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Feminism, Governmentality and the Politics of Legal Reform

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Griffith Law Review

17 (1) 2008

Not Published Version

I. Feminism, Law and Critique:

“Think we must. Let us think in offices; in omnibuses; while we are standing in the crowds watching Coronations and Lord Mayor’s Shows; let us think as we pass the Cenotaph; and in the Whitehall; in the gallery of the House of Commons; in the Law Courts; let us think in baptisms; and marriages and funerals. Let us never cease from thinking – what is this “civilization” in which we find ourselves? What are these ceremonies and why should we take part in them? What are these professions and why should we make money out of them? Where in short is it leading us, this procession of the sons of educated men?”

Virginia Woolf (1938/1963, p 60)

Modern feminist thought, fuelled by a yearning for change, commends itself as bearer of novel theoretical and political creativity. Possessed of a mind that persistently negates fundamental presuppositions, assumptions and axioms of traditional method and theory, and a voice, which challenges patriarchal structures of social and cultural institutions, feminism has long considered itself almost by definition critical.¹ Its broad thrust, consistently directed at identifying the phallogocentric nature of the political, ontological and epistemological commitments of modern knowledge, strives to reveal the exclusion, erasure or marginalisation of women and the feminine from social discourse and practice. Its gaze constantly scrutinizes culture to unravel pretensions of truth, objectivity and universality, and expose the contradictions, inadequacies, and injustices it sustains. As such, it functions akin to a whistle-blower. Yet in pointing to what is missing, what is erroneous, unfair or untrue, feminist critique necessarily registers a lack, both in the domain in relation to which it is articulated, and in its own being. It not only appears as oppositional and reactive - as a negative rather than positive practice - but also as begging for something else; not merely content to inculcate, it seeks to right whatever it identifies as wrong. So even if purely negative engagement offers a level of theoretical insight, it will be seen to fail at the level of *praxis* if it does not address feminists’ desire to bring real practical benefits to women.² To be true to itself, to its original purpose, aspirations and hopes, the initial fault-finding stage of feminist critique must therefore be followed by propositions for change. Usually taking the form of calls for the abandonment of specific cultural models in favour of other, more feminine-centred alternatives or for the reform of existing ones, these propositions transform dissentience into reconstructive practice. Indeed, if not forthcoming feminist critique could be regarded as dangerous because by

¹ For a discussion of this critical nature see Braidotti (1991) pp 147-173. Also see Gross (1986), pp 190-204 and Gnew (1990), pp 23-25.

² This emphasis on change was pervasive in the feminism of the 1960’s and 1970’s but remains equally strong today. For example see Conaghan and Bottomley in critical legal studies collection, see Beasley (1999) pp 25-35. See also the Gnew collection.

failing to offer clear alternatives, or at least avenues for change, it can be accused of affirming its object as the only available option and thereby encourage political inactivity.³

Feminist legal scholarship exhibits a strong and decisive commitment to critique as both negative and reconstructive practice; a commitment evidenced in its employing the politics of legal reform as its fundamental means of engaging with law. For we feminist lawyers this quest furnishes a constant reminder that as well as being theoretical and abstract our critique is also bound to a transformative project formed of conscious political interventions aimed at effecting significant social change. Nearly two hundred years have seen women's thinking and writing about law and the possibilities for its reform mould their political visions, demands and hopes, whilst the campaigning for this reform has dominated feminist *praxis*. Of course much has changed with time, and although we can look back to the thoughts, sayings and deeds of our foremothers with considerable affection and admiration, we no longer agree unequivocally with their positions and expectations. The principle of equality does not hold the promise it once did, the notion of rights has become the object of sustained feminist critique, and our gaining the vote has, contrary to expectations, cured none of the ills of womanhood. What has remained constant however has been our commitment to a politics of legal change. Now as then we are primarily concerned with the effect law has upon the lives of women, and modern feminist legal scholarship, faithful to its past, continues to 'police' the domain of law and detect the multiple ways in which the legal norm oppresses, discriminates against or disempowers women.⁴ And now as then mere identification of normative contradictions between law as it is and as feminists desire it to be, is not enough. Reconstructive propositions as to how the legal 'is' will become the feminist 'ought' are not simply demanded, they comprise the cornerstone of our critical project in law and sustain its ethical and political legitimacy.

Although the fecundity of the relationship between feminism and the politics of legal change has been routinely celebrated, over the last couple of decades its credibility has been repeatedly called into question. Feminists have, at the very least, become sceptical about the quality and value of the fruits of legal reform; many expressing considerable ambivalence born out of a sense of betrayal of their aspirations for law's 'promised land', and a recognition of law's inability, despite reform after reform, to deliver its long-cherished undertaking to fundamentally improve women's lives. Some even conclude attempts to achieve social change through law are delusory, deceptive, if not futile.⁵ A discursive space has thereby opened up wherein the limitations or merits of a feminist politics of legal reform are reflected upon, particular defences and critiques debated, problems and their causes identified, and remedies and solutions proffered. One trend blames law's resistance to change on the very nature of the legal structure itself or, more usually, on the particular social, political or cultural contingencies surrounding the specific reform. Grounded in a political pragmatism its adherents offer explanations articulated as realistic estimations as to what could have been achieved, concluding that the results, if not ideal, probably represent the optimum outcome given the specific circumstances.⁶ However, the view that generates greatest mistrust in the value of legal reform concerns the nature of the legal norms being proposed, namely the generalisations within which they are framed. In boasting to benefit all women these norms evoke a universality of women's experience

³ See for example Gross 1986 pp 195-6. For a discussion of this point see Brown and Halley (2002), p 25. See also the discussion in Gnew of feminism as critique and as construct and Stimpson's classification of feminist critique as deconstructive, reconstructive and constructive). For a discussion of the characterization of negative critique as an abandonment of politics see Conaghan.

⁴ Smart has located the origins of feminist jurisprudence in critiques of law to be found in the writings of 19th century women (Smart 1989).

⁵ This observation is also valid for the big political questions on reform that were debated during the 1970s: Is reform revolutionary or not? Can we achieve liberation through legal reform? etc. See Hardring (19??); Thornton (1986); Stubbs (1986); Smart (1989, 1992); Frohmann and Mertz (1994); Drakopoulou (2000); Hunter (2002).

⁶ For example the debate over the lack of women judges etc or the patriarchal nature of law.

that largely obliterates the diversity of their social realities; an analysis that reflects what I term ‘the crisis of subjectivity’, our awareness that use of an all-encompassing ‘we’ is premised upon an essentialist conceptualisation of Woman; She in whose name the specific reform is demanded, yet She who can no longer be irrefutably accepted to exist because She is so readily withered by difference, whether that of class, race, religion, sexual orientation or ethnicity.⁷ Whatever the approach an individual interlocutor might favour, whether choosing to defend or mistrust reform, celebrate its positive results, or caution as to its problems, judgement is always reached through evaluation of end results – the reform’s ability to improve or alter women’s reality, even if only marginally increasing social benefits or preventing erosion of gains already won. It is here, at the receiving end of reform, at the intersection of social and legal realities, that measurement and comparison of ‘desirable’ and ‘real’ effects is made, where the normative efficacy of proposed or achieved reforms are evidenced and their success in embracing and accommodating difference whilst alleviating women’s legal and social disadvantage, ascertained.

An appreciation of reform that depends on outcomes reveals a consensus as to what is meant and understood by a feminist politics of legal change. Evaluating impacts privileges an apprehension of reform as mere legal technique, suggesting an unquestionable transparency bearing no marks of history, politics or theory. Whilst law itself changes, the existence of the practice of reform, inexorably interwoven within the very nature of law itself, somehow natural to it, remains immune, both to the passage of time and to changes in the nature of thought. Performed by King, parliament or legislator, whether benevolent or not, by the collective, whether righteous or not, or by the class, whether revolutionary or not, its purpose is to alter, abolish, or introduce legal norms in the service of a specific social purpose. So whether in ancient Greece and Rome, medieval and early modern Europe, or in the present day, whatever the historical, political, social or cultural contingencies, reform is seen as a neutral ‘tool’, one ever ready to be put to work in the interests of whosoever decides to wield it. Any politics of legal change is capable of victory or defeat, and feminists, representing one social group amongst many, appropriate this technique to benefit women. What therefore matters in feminist analysis is not the actual phenomenon of a politics of legal change; neither its history and nature, nor the function of and necessary conditions for its existence. Apportioning praise or blame, or proposing cures for the ‘pathology’ of the process shifts the emphasis to external factors; those factors which create the conditions in which such politics can triumph. When problems with a particular reform are rationalised by pragmatic appraisal of its context what provides the gravity tipping the balance towards success is the strategic strength of the particular campaign, whether cunning employment of appropriate tactical moves or wise exercise of compromises that accommodate or avoid social, political and legal obstacles. Similarly, when a proposed legal norm is unable to withstand accusations of non-inclusiveness, the arguments engage not with the nature of the practice itself, but with the configuration of the female subject seeking the particular reform. It is She who colours the seemingly neutral technology to propose a legal norm which attempts to embrace the multiplicity of female experience and She who, in so doing, either transcends the limitations of the non-inclusive ‘we’ to skilfully manipulate legal change down the road to ‘success’, or, in continuing to insensitively press Her essentialist claims, causes it to fail.

It is my contention that a critical exploration of the feminist politics of legal change need not follow this seemingly inevitable path. Its engagement does not have to be grounded in their transformative capacity and their success measured through ‘calculating’ gains made by women at the receiving end. Nor should it become embroiled in rebuttals or defences of these politics, to be left wrestling with their failings or offering cures. By targeting the very presence of the phenomenon of a feminist politics of legal change, it can explore its rise,

⁷ Drakopoulou (2000).

nature and the configuration of its being. In so doing however, the intention is not to devalue the feminist debate on legal reform, rather to cloud the transparency surrounding its apprehension by suggesting its practise is not as neutral as it has hitherto been accepted to be. To this end I have divided the text into three parts. The first, in locating the historical emergence of the feminist politics of legal change in Victorian times, asks why these politics dominated in the nineteenth century and not previously. Here I examine the conditions which made possible the emergence of Woman as the feminist subject whose knowledge claims formed and informed each specific attempt to change law. Like many modern feminist legal scholars, I address questions of female subjectivity; unlike them I avoid contextual and experiential explanations.⁸ Instead, acknowledging the epistemological positing of the Woman as the *sine qua non* condition for the existence of a feminist politics of legal change, I investigate the wider epistemological context and argue that it was this which not only made Victorian feminist calls for the reform of law possible and fashioned the specific form they took, but also indelibly marked its future. The second section takes a closer look at Victorian women's campaigns for civil rights and the vote, though resisting the temptation to recount and evaluate these in terms of the legal norms proposed, the strategies and tactics employed, alliances formed, the embrative nature of the 'we' they articulated, or their success or failure.⁹ Focussing on the inner logic and organisation of the discourse these campaigns initiated, I pay attention not to who or what is excluded, but rather who or what is included. More specifically I ask what sort of knowledge claims concerning the relationship of women and law they articulated, what sort of representations of female subjectivity they construed and promoted, and how both of these were rationalised and substantiated. Finally, by way of a conclusion, the last section considers any ramifications this historical analysis may hold for the current discourse on a feminist politics of legal change.

II. Mapping the Victorian Feminist Discourse or Woman and her doubles¹⁰

What is the reason for all this?

Do women ever ponder on this question? Why is it that hardly any of them can get on in life, notwithstanding their utmost zeal, their utmost economy, although the world around them grows wealthier day by day?

Mrs Wibaut (1890, p 4)

...the lady sold in marriage, the working woman and the prostitute. The bondage of these three types is different in kind, but the manner of entering bondage is the same in all three cases. All these women enter bondage by selling their bodies; selling them for man's pleasure or selling them for the profit of an employer, but always by selling that sacred thing, a woman's body.

Lily Gair Wilkinson (1914, p 11)

For the English the nineteenth century was an age of transition during which old opinions, feelings, customs and institutions crumbled away and new discoveries, inventions, advances in production, and specific technologies, such as the railway and steamboat, heralded an era that carried civilization triumphantly forward.¹¹ Women responded to this climate of quest and change with considerable zeal, allowing few issues concerning their

⁸ See for example Mitchell and liberal individualism, Reason disciples, et al. where context is the historical explanation

⁹ Some references of all and also speak of the class character of the demands

¹⁰ Foucault

¹¹ Bulwer-Lytton (1833/2004) p 281. For similar views on the transitory nature of the age see also Carlyle (1829/1967) and Mill (1831/1986). For a discussion of the character of the age, especially the issue of transition and breaking with the past see Houghton (1957) pp 1-4.

lives, proper roles, and their social status to remain unexplored. The nature and conditions of their work; their access to the professions; sexuality and the body; their role in the family and the public sphere; law and its reform; female prisoners and delinquents; women's place in trade unions and guilds; all were subjected to their intense scrutiny.¹² Yet the sheer range of issues addressed was but one facet by which this feminist critique differed from that of previous centuries. Contrasting even more starkly with the past were its very nature and direction. Simple resistance to misogynistic discourses or the identification and protest of the ills of womanhood would suffice no more; for the feminist agenda acquired a novel dimension. At its heart now lay a call for action, a call for social and legal reforms to cause "a readjustment of man's and woman's fields of work...of their manner of life ...in order to restore the equilibrium of society".¹³

This decisive development was made possible by a radical shift in the apprehension of the parameters of knowledge which occurred at the close of the eighteenth century and which was marked by a fundamental change in the relationship between the inquiring subject and its object of inquiry. Thought ceased to be identical to the mind's reception of ideas, the representations of the external world, and understanding reality ceased to be the outcome of their ordering, whether as task of reason or of the imagination's power to associate them according to degree of similarity, contiguity in space or time, or relationships of cause and effect.¹⁴ With the function of the senses remaining merely receptive, all varieties of perception and all unconnected data of experience came to acquire the structure of definite object purely as a consequence of original and 'spontaneous' acts of thinking, 'natural' acts of judgement determining whether something could be subsumed under the mind's categories of understanding. Ideas still remained the ultimate source of knowledge, but could now only make sense if the mind imposed its own inherent order upon them through the employment of its *a priori* categories of understanding alongside sensibility's *a priori* forms of intuition.¹⁵ But if that which ultimately made knowledge possible was an accord between empirical reality and the cognitive structure of the self, it was the operation of reason that permitted knowledge claims to be articulated.¹⁶ So henceforth it would be the exercise of reason that would allow judgements to be related to one another to produce coherent conceptual knowledge, and this in turn would enable inferences to be made and conclusions to be drawn that formed and informed the universal conditions of knowledge and human action; those precious principles, concepts and ideas reason claimed as its own irrefutable possessions.¹⁷

The order that reason imposed upon this synthesis of experience did not however necessarily always hold true.¹⁸ By refusing to allow itself to be limited by the senses and with its autonomy permitting no extraneous influence to determine the manner by which its knowledge claims were deduced, reason might inadvertently engender principles tainted with contradictions, antinomies, fallacies or illusions.¹⁹ Thereby shrouded in mist and

¹² For the array of issues which concerned women in the 19th century see the anthologies by Holis (1987), Murray (1984) and Bauer and Ritt (1979).

¹³ Butler (1869) p xv.

¹⁴ For a detailed discussion of the epistemological context of the 17th and 18th centuries see Yolton (1975, 1984). For its discussion in relation to feminism see Drakopoulou (2000, 2007).

¹⁵ Although here, in order to exemplify this epistemological shift, I use Kantian philosophy as the example *par excellence* of this radical epistemological shift, British philosophers of common sense such as T Reid, J Beattie and D Stewart moved in the same epistemic plane as Kant. For a detailed analysis of these see Grave (1960). In Kant the form of intuition was time and space and the categories were quantity, quality, relation, and modality (Kant, A 21-3/B 36-8 and A 80/B 106). For the impact of Kantian thought on nineteenth century British philosophy see den Otter (1996) pp 19-36 and Copleston (1977) pp 146-164.

¹⁶ Kant CPR A 68/B 93; A 132/B 170-1.

¹⁷ Kant CPR A 302/B 359.

¹⁸ The function of reason is not constitutive of knowledge because reason is entirely separate from experience, but it is regulative, see Kant CPR A 306/B 362-3; A 509/B 537. This is actually one of the major points of contention and distinction between Kant and British 'common sense' philosophy.

¹⁹ The freedom of reason is also evident in Kant 1784/1991 and 1786/1991 – autonomy in A548/B576.

tinged with peril its path would not invariably lead to enlightenment. But if so, how could these dangers be avoided? The answer could neither be sought in an unequivocal vindication of reason nor its abandonment through reference to some external authority securing alternative foundations for truth, since both these solutions undermined reason's authority. What was instead required was a level of scrutiny akin to that endured by an offender before a court of law wherein reason was at one and the same time both the accused and appointed judge. In short, a duty of self-critique was imposed, one manifested in a system of checks and balances, a set of negative rules and a canon of positive principles, which together served to discipline and determine reason's correct application and thereby allay any suspicions that reason's practise might be marked by extravagances or deceptions.²⁰ This strategy of thought, a method which, whether exercised in the mind's individual tribunal or in public and free, democratic debate, arose out of reason's critical and reflective strength, established the necessary conditions for rational thought and action by separating reliable from unreliable modes of reasoning.²¹

Positing the mind's judgement as the *locus* for the unity of representations, and endowing reason with self-reflexive capacities, not only stripped thought of its representational nature, it also moved both source and possibility of knowledge from object world to inquiring subject.²² A novel form of subjectivity was thereby born wherein the self was both subject and object of inquiry; a sense of self that allowed the subject to be conscious of her ability to be and to think, whilst simultaneously being conscious of this consciousness. From now on subjectivity could no longer be apprehended as simply empirical, although true, in possessing consciousness of her being in space and time, and as bearer of specific perceptions and thoughts, of a personal identity, history and individuality distinguishing her from others, her self was indeed empirically given. Yet in claiming the power of reflection empirical subjectivity relied upon the presence of the transcendental because all experience stood in a relationship with both the experiencing self and her capacity for self-consciousness - the empirical subject was always accompanied by the 'I think', the immediate awareness of the self as a thinking being.²³ Indeed, absence of this 'I think' would mean something could be perceived which could not be thought; at least by the particular self who experienced this perception. So the subject of self-consciousness, the 'I think', necessarily accompanied all discourse of the empirical 'I am' and, in connecting her perceptions to thought, secured their unity and let her claim with certainty that: "These perceptions and this thought I have and this judgement I make all belong to me."²⁴ In addition, because the 'I think' was not attached to specific experiences it was apprehended as prior to all experience, thereby exceeded the limits of the concrete self, and, as such, remained the unchanging subject of all self-consciousness - the single and irreducible *a priori* condition founding the unity of the empiric subjectivity's being and thought.

This apprehension of subjectivity as both transcendental and empirical initiated a novel form of feminist inquiry, one which brought feminist thought to the threshold of modernity. No longer a mere observer who, in exercising reason, could draw inferences and arrive at

²⁰ See Kant B xiii and A708/B736-A712/B740; A795/B823-A797/B825. Also, for an excellent discussion of Kant's tribunal for reason see Rose (1984) pp 11-24.

²¹ Kant CPR A 739/B 767 and What is Enlightenment

²² This is Kant's Copernican Revolution, that which he terms the subjective unity of consciousness (B 136-9)

²³ My reference here to 'transcendental' is Kantian. It indicates a form of knowledge not of objects themselves but of the ways in which we are able to know them, in short, the conditions of possible experience. Thus uses the term 'transcendental' for all knowledge that is occupied, not so much with objects, as with the mode of our knowledge of objects in so far as this mode is possible to be *a priori* (CPR A 12). He also distinguished the transcendental from the empirical and it is aligned with the *a priori* in so far as the *a priori* involves a reference to the mode of knowledge See CPR A 56/B 86.

²⁴ CPR B 131-2. This is what Kant calls 'transcendental unity of apperception' where 'apperception', borrowed from Leibniz, refers to any experience of which the subject can say "it is mine". In Kant the concept is used to mean self-conscious experience.

conclusions about the causes and effects of women's reality, she could now abandon her sovereign position as enunciating I and posit her herself as the object of her thoughts.²⁵ The transcendental 'I think', in being conflated with the historical 'I' of the subject of discourse, allowed the subject to fold in upon itself and be reconfigured as the object of this discourse. In other words, the female and feminist subject could now articulate knowledge claims not only as an 'I' but as an 'I' who was self-conscious of her sex and of what it means to live in the world as a woman. As such she could legitimately raise questions and pose answers as to the what, how and why, both of a personal and female consciousness and self-consciousness, and of that which they shared.

The conflation of the transcendental with the empirical, in allowing repetition of the subject in the object, was responsible for the emergence of a novel configuration of female subjectivity; one which was clearly sexually demarcated. The Victorian subject of feminist discourse could therefore not only speak as an 'I' but also as a sexually demarcated 'I'; as an 'I' as a woman and hence as an 'I' who could lose herself in the female 'we'. So sex ceased to be a purely biological characteristic of the subject of knowledge and became for the first time constitutive of the knowledge claims she articulated. A discursive space was thereby opened within which answers were sought to that which the Victorian's called 'The Woman Question' and from within which authoritative statements about the truth of women's reality were proffered by women as women. Here, next to religious, 'scientific', moral and legal constructions of womanhood, a feminist one had seized its place.²⁶ Demanding participation in any dispute over the truth of women's social state of being, about her nature, form, and peculiar characteristics or the inferences made about the causal affiliations that governed it, this feminist discourse offered its own hierarchy of issues to be resolved and means of doing so, proclaiming an equal right to the truth about women and asserting its prerogative to critique any position it deemed 'hostile' to its own.²⁷

In ascertaining that her discourse faithfully represented both her own reality and that of women generally, the Victorian feminist need not recourse to external axiomatic principles of truth nor assert all traces of 'personal colouring' had been effaced from her account. Since experiences were known through objective forms inherent in the human constitution and occasioned by types of sensibility and the categories of the understanding, her accounts were already endowed with objective validity. By locating the necessary principles of experiential synthesis in her discourse the thought of the times located the evidence of its objective nature in this self-same discourse. All that was required to validate knowledge was proof that feminist expositions fell within the sphere of possible female experience, both personal and collective. To do so however, the subject must evidence the manner in which she exercised her freedom of reason and in such a way as to repudiate any doubts as to whether her judgements resulted from its misuse. Her discourse had to therefore conform to preceding 'rules of truth', a system of ideas and principles, which, though designated independently of the specific object of investigation, would lead reason securely along its path of inquiry. And although the recognition of this need might in itself elude the subject's consciousness, the very configuration of her discourse would bare visible marks of its presence; for whether justifying the inclusion or exclusion of certain facts or beliefs, demonstrating the manner in which judgements were established and interrelated, or drawing conclusions and exploring their ramifications, the feminist discourse was permeated and structured by an obedience to the discipline and canon self-reflective reasoning demanded of itself. Consequently, the feminist author's representations rested not merely upon inferences derived from observations of women's materiality; they were also interwoven with expositions of her mode of ratiocination,

²⁵ On this point see Drakopoulou (2007).

²⁶ For a discussion of this Victorian discourses see Bland (1995) pp 48-90. The sciences of woman were already in place from the 19th century see Riley and Drakopoulou (2000).

²⁷ See for example Cobbe (1869).

demonstrations of the clarity and coherence of her conceptual understanding manifesting the rationale which led her to proclaim female experience as other than that portrayed. As such, these feminist representations were no more merely juxtapositional reactions to those propounded by men. They had become distinct analytical frameworks, each predicated upon definitive premises, each leading to particular ways of identification and examination of particular aspects of women's reality, and each framing specific solutions designed to alleviate the problems they identified. And despite their considerable variation, whether resting upon historical or economic analysis, empirical examinations of facts, universal principles of equality and rights, utilitarian arguments, or simple evocations of commonsense, these feminist modes of analysis all shared a unity anchored in the deeper space of knowledge, that level at which the positivities determining the inner law of discourse manifested themselves, namely that level which relied upon transcendental subjectivity.²⁸

The Victorian feminist discourse thus emerges as irrevocably pervaded by reflections of subjectivity; for it must always account for the transcendental subject which, though not visible at the surface of the discourse, remains the single, fundamental condition for its possibility. As such it cannot submit itself solely to the canon of reason prescribed by the particular theoretical perspective it adopts, as other discourses were able to do. It had to engage with questions of female subjectivity, and its efforts to persuade as to the correct use of reason, necessarily be imbued with evidence of how the feminist author in her particularity could legitimately speak as both female 'I' and 'we'. In order to do so she had therefore to raise questions as to: what it meant to be a woman, both for the individual and society; how different forms of female experience could be identified; what sort of 'truths' had been ascribed to this biological division of humanity under specific historical and social conditions; and, what sort of authorities had been involved in these processes. Moreover, in so doing she had also to reflect upon her own personal experience so that those threads linking her to those women she posited as the objects of her discourse, the very possibility of an all embracing 'we', could be carefully unravelled. In accounting for her own 'acts of thinking' her interrogation of her sense of self and of that of other women set in motion an interplay of sameness and difference which embraced and configured the modes in which the knowing subject and the object of her discourse were related. This is not to suggest that an appreciation of similarities and differences between women had only appeared with nineteenth-century feminism.²⁹ Rather, that this appreciation was no longer predicated upon an understanding of sameness or difference resulting from a divinely ordained order, the 'facts' of nature, or accidents of birth. It was now derived from an analytic of sameness according to which difference was not excluded for falling outside the thought of the same, but in being re-inscribed as constitutive of identity, functioned to sustain it.³⁰

An analytic of sameness and difference, one rooted in the duplication of the historical self as both subject and object of knowledge, therefore marked a sharp transformation of the feminist critical engagement. It not only precipitated the appearance of Woman as the generic embodiment of womanhood, as the She who claims the power to speak both as 'I' and 'we', and as the She modern feminists would acknowledge as the 'Woman of

²⁸ This level is that which Foucault (1991, p xi) calls 'the archaeological level'. See also Foucault (1991) p 318-22. The emergence of distinct theories of knowledge and of epistemology precisely reflects this shift in the positivities of knowledge witnessed by 19th century. My use of the term 'epistemological' is an anachronism in so far as Kant himself never used it, see Cargill (????).

²⁹ Already from the Middle Ages in feminist/women's writings there was reference to the differences between women, whether nobility, nuns, town women etc. (see Christine de Pizan, 1405/1982). Similarly in the 17th century feminist discourse there was a strong sense of the division between married and unmarried women (see Drakopoulou 2000), though perhaps most intense were the similarities or difference between men and women but I am not interested in this here.

³⁰ See Foucault (1991) pp 312-18.

Feminism', it also made possible a feminist politics of legal change. Her authoritative pronouncements about the plights and misfortunes, virtues and faults of women who constituted the objects of feminist discourse, pronouncements predicated upon a bond of sameness between Her and the empirical women whose truth She represented, sought to reveal what was erroneous, false or deceptive in alternative depictions of womanhood. In so doing they founded Her legitimacy to pass judgement over the authenticity of these depictions,³¹ because the differences she distinguished between Her own identity and those women described by alien or hostile discourses, founded a conspicuous dissonance which provided a measure of what was real and what was fictitious. Areas in need of reform and criteria according to which specific problems could be resolved could then be simultaneously designated and projects for reform, including that of law, thereby made both thinkable and credible. Hereafter critique could no longer remain merely negative, it would be ever ready to offer blueprints as to how anything it acknowledged to be wrong, false or untrue could best be put to right; it would, in future, be essentially reconstructive.

'Technologies' of the Female Self and the Victorian Feminist Politics of Legal Change

Desdemona: Am I that name Iago?
Iago: What name, fair lady?
Desdemona: Such as she says my lord did say I was

William Shakespeare (1622)³²

The emancipation of the woman...is now demanded. By the prophets of the future and the advanced minds of the present is the demand made.

Catherine Barmby (1843, p 1)

Interlaced with considerations of what a woman and her experience truly were, and pervaded by reflections about the mode by which these truths were produced, the Victorian feminist discourse was much more than a place inhabited by claims to valid knowledge about women, and where blueprints for reform were conceived. In grappling with the connections between authentic womanhood and the ways in which Her truths were rendered, it also formed the arena in which female subjectivity was constituted. This is not to suggest that it propagated specific theories of female subjectivity; theories seeking to account for the female self as a condition, source and object of feminist knowledge. Although this discourse might well have been the germinator of these theories, they would only become fully fledged within the future context of postmodernity. What could however be discerned in the surface layers of the discourse, amidst that imparted by the specific analytic frameworks it employed, were signs of concern as to the need to offer explanations as to how the female and feminist subject might render the knowledge she produced, thinkable. So that which the feminist discourse presented in the form of correlations between the truths it posited about women and the epistemological explanations it offered for these truths, opened discursive fields wherein prescriptions of women's singular and collective being could be developed. Here, in these conceptual spaces, knowledge about women and by women foretold, described, judged and shaped the female sense of self, whether as individuals or whether as citizens, workers, professionals, criminals, delinquents, wives, widows or unmarried daughters; and it was

³¹ Previously men's depictions were accepted – the difference was at the level of the implications of a particular state of things or at the level of cause. In the middle ages the depiction was not accepted but that was usually an ontological depiction – empirical was accepted

³² *Othello* Act IV Scene II

here that processes of female subjectification took place.³³ The power that was thereby released was perhaps most evident in its manifestation as a politics of legal reform; for by interrogating the way in which womanhood was represented in existing legal norms and exposing their faults, the specific qualities, merits and characteristic features of the female self were analytically identified. And in offering propositions about how these norms ought to be changed visions of this self were prescribed which promised a more fulfilling and valuable life if the reforms demanded of law were implemented. The discourse thereby not only clearly set out the contours of a new female existence, but it also indicated the means by which this transformation was to be achieved.

Despite these important developments, within these nineteenth century feminist politics of change neither the principle of equality nor evocations of natural law rights loomed large, with the Victorian feminist discourse exhibiting nothing of similar standing to Olympe de Gouges's *Declaration of the Rights of Woman* (1791), the *Declaration of Sentiments and Resolutions* (1848) or Elizabeth Cady Stanton's *The Solitude of Self* (1892).³⁴ This is not to say that its arguments bore no reference to women's equality with men or to women's rights. However, such references, few in number, acknowledged neither an axiomatic value of equality, nor that inalienable human rights should be secured by the universal rational order of natural law. Indeed, rather than positing equality and rights as cornerstones of its reasoning and demands, this feminist discourse employed these concepts as evidential or polemic means in its efforts to counter opposing arguments.³⁵ In engaging with law feminist rationales instead appeared to follow two major strategies of analysis, two canons of reason determining how they would think of and voice their 'truths'; the one which can be termed historical, the other, positivistic.

In the first of these two modes of analysis the present of women's social being was painted in somewhat gloomy tones. She whom the feminist discourse scrutinized was deprived of civil and legal rights, and lived a life, whether at home, at work, or in the public arena, that was burdened by a double system of oppression, one exercised by society and by men. As such, Her existence was almost invariably described as suffering under the yoke of tyranny, slavery, or bondage.³⁶ And although descriptions of Her condition were thoroughly empirical, embedded as they were in female experience, whether it be of household, work-place, prison, brothel or slum, the analysis of Her predicament of degradation and misery was never delimited within boundaries of immediate materiality. Never thought of beyond or without a history of Her own, and despite always being contextualised within the present time and its social, political, legal and cultural contingencies, the true reasons for Her state of being were identified as neither the evils of contemporary society nor rooted in the nature of Her relationship with men *per se*. Instead, the explanation was projected within a historical narrative, one which, as it unfolded, revealed the interconnections between Her own history and that of society's historical evolution. In so doing, the causes underlying the current state of things were seen to have been revealed, such that it was the historical truths describing the development of social structures, those facts of economy, politics, and family, which formed and informed the

³³ For a discussion of the processes of subjectivation see Rose (1996).

³⁴ The Declaration of Sentiments was made at Seneca Falls, USA, during the First Woman's Rights Convention, while Stanton's work is a classic exposition of the equality of the sexes. For discussion of the absence or limited reference to equality and rights in relation to demands for the reform of women's property rights Auchmuty (2006). For an opposite view about the significance of equality see Mitchell and Shanley (????).

³⁵ See for example Power Cobbe (1874/1987) pp 182-3 where in presenting the reasons why women should be enfranchised no reference is made to the natural equality of men and women. Similarly see Helen Taylor (1867/1987) pp 33-4 who, in describing women's lack of civil rights, clearly states the irrelevance of theories about the natural equality of the sexes. For the polemical use of the concept of equality see Becker (1874/1987).

³⁶ See Marx and Aveling (1836/1955) pp 6-7; Barmby (1843/1995) pp 2-3, 8; Gair Wilkinson (1914/1973) pp.15-9.

empirical truths of Victorian womanhood, not only of its present but those of its future as well.³⁷

With the evolution of society being seen at each juncture as responsible for the birth of the stage to follow, the certainty of change from the present was considered inevitable and beyond question. And whether named as progress, civilization, philosophical history or historical materialism, this evolution, which the course of history elucidated and promised, and which would result from revolutionary action targeting complete structural change, the triumph of reason or from peaceful and incremental demands for the reform of law, could not leave the female condition untouched. So the evidence of the truth of Woman Herself, as indeed the knowledge claims articulating this truth, were both grounded upon the nexus of economic, social and political conditions, together with the telling of their history; a history which rested both upon memory of the past and the power to foretell the future. As a result, the true knowledge that the feminist discourse boasted was already anticipated in its use of the analytic framework it employed; for it was this very same framework's claim to truth that provided testimony as to the accuracy of the feminist discourse's representations of female experience.

This location of the truth of the object of the feminist discourse within the truth of the historical analysis shifted the focus away from the subject position of the discourse and privileged the empirical qualities of its object. By doing so it failed to address the nature of the subject of knowledge, namely the relationship of the transcendental to the empirical, and consequently it failed to provide an explanation founded upon the possibility of knowledge. Accordingly the subject position construed by the historical mode of analysis was left devoid of any of the qualities or individual characteristics of its occupier who could therefore equally well have been either male or female. However, although this mode of feminist analysis offered no prescriptions for the female and feminist subject, it did provide for the identity of its object. The Woman spotlighted by historical analysis could only be apprehended within the thought of the same, a sameness grounded upon women's shared fate materialised in common bonds of oppression and subordination that originated in the distant past, extended into the present, and whose removal was a promise of the future. As such She could not be attached to any specific name or face; indeed She could not be subjected to *any* individualising process. In encompassing all empirical forms ascribed to female experience She and the real women whose sameness She represented were posited as interchangeable objects of knowledge of the feminist discourse, so that in feeding each other's truth they were constituted with interminable cross-reference to one another.

The second mode of analysis, though sharing with the first a similar description of the contemporary station of womanhood, posited the truth of the knowledge claims it articulated, not in historical analysis but in the very object it scrutinised, namely the empirical parameters of female existence. This positivistic analytic framework privileged the facts of experience, yet nevertheless refrained from assuming any higher laws or axiomatic principles, with all its inquiry and search for truth being at the level of empirical reality where. It was therefore the principle of utility or happiness, defined not in respect to the individual but to society as a whole, which comprised the realistic and rational criterion for the value of things and human action.

In employing such an analytical framework, the Victorian feminist discourse explored all aspects of the every day lives of women, claiming that the truth it sought was to be found no where else save in this very object of its scrutiny. In restricting the veracity of the discourse to its object, this discourse not only submitted itself to the facts of the female

³⁷ Ford (1907/1995) pp 8, 23-4; Gair Wilkinson (1914/1973) pp 18, 23-28; Marx and Aveling (1836/1955) pp 3-6.

condition, but, most importantly, hardly differentiated between them. So despite acknowledging the commonalities binding womanhood together, it allowed no space for those differences arising out of the disparate circumstances of life. Moreover, in grounding its knowledge claims and the inferences it drew from them upon factual observations which it evaluated according to their measure of utility, it necessarily implicated the subject position of the discourse in each of its accounts. This was not because it explicitly addressed the sex of the knowing subject, but rather, because this sex would inevitably leave its imprint upon the discovery, description and analysis of facts and their utilitarian value.

In the event the historical analysis was of relatively little significance in informing the Victorian feminist politics of legal change. The historical perspective was used to substantiate claims of reform, but the universalising and unifying claims it raised, coupled with its lack of attention to the specificity of the present, weakened its effectiveness when wielded in the context of feminist legal campaigns.³⁸ It was the positivistic one that was triumphant, with the feminist arguments developed within its framework, the result of, on the one hand an examination of existing legal norms and identification of those identified as bearing erroneous representations of womanhood, and on the other hand, propositions, based on their own truthful representations, as to how such faults in law might be remedied. And it was in their attempts to persuade as to the truth of their negative critique and the value of their reconstructive propositions that they came to set out clearly their thoughts about what they thought a woman, and hence themselves as women, was and ought to be. More specifically the Woman represented in their writings, was a responsible, rational individual, one able to govern both herself and her property together with her other personal affairs, and who, although perhaps not equal to men, was certainly to be thought of as being of equivalent value. It was She who demanded Her civil and legal rights, not only as a matter of fairness and justice by virtue of the qualities She shared with men, but also, and perhaps most importantly, as a matter of expedience because recognition of Her ability of self-governance was matched by the corollary that an ability to govern others could greatly benefit men and society in general.³⁹

Such arguments of expediency were, in essence, arguments about the utility of women, a utility no longer limited within the boundaries of the household but now unfolding to embrace the whole of society, if not the whole of the British Empire. In thus articulating these arguments and describing the benefits women's involvement in the governance of others undertaken side by side with their male counterparts might bring, women invariably referred to facts derived from the distinct empirical reality of women, a reality different from that of the speaking subject; for these women suffered because of their poverty, moral depravity or their colour in belonging to those parts of 'lesser civilisation' across the Empire.⁴⁰ Yet here the difference of these 'other' women posited as governable did not function to exclude them from the homogeneity upon which the representation of women as capable of being self-governed rested. Instead, it was re-inscribed as a difference of identity between distinct groups of women and used to emphasize rather than oppose or contradict the very sameness each of them shared.

The two analytic frameworks which the Victorian feminists most adopted, though in varying degrees, both shaped the Victorian politics of legal change and served to configure its future. For in their very process of reasoning, that which sustained what I have termed 'historical analysis' one can identify the modern debates which would come to flourish

³⁸ It was primarily socialist women who used this framework. For a discussion of their involvement in legal reform campaigns see Hannam and Hunt (2002) pp 57-74 and 105-128.

³⁹ See for example the Editorial of the *English Woman's Journal*, 1st of July (1864); Taylor (1867/1987); Fawcett (1871/1987).

⁴⁰ See for example Becker (1872/1987); Cobbe (1874/1987); Bodichon (1869/1987); Fawcett (1884/1987).

during the feminist movement of the 1970's, debates about the revolutionary nature and character of a politics of legal reform, and whose echoes still resound within contemporary academic debates about the structural difficulties faced by the feminist politics of legal reform.⁴¹ Similarly, the positivistic analysis rooted in this period still forms and informs the transformative politics of feminist legal scholarship, by providing the belief in the truth held by the facts of women's empirical reality. As we have seen, it was the conditions of the possibility of knowledge, defining the constraints of the Victorian feminist discourse, that bore so heavily upon this inheritance.

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⁴¹ See Harding (1976) and Hunter (2005).

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