

# **GENDER MAINSTREAMING – AN ETHICAL FEMINIST CONSIDERATION\***

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## **SUMMARY**

In this article I tentatively consider the notion of gender mainstreaming from an ethical feminist perspective. Underlying this is a tension, or paradox, between law's limits and law's potential, law's poetry, poetry's law. A few theoretical arguments come into play. Firstly, the multiple meanings of sex and gender are reconsidered. Thereafter feminist critiques against the notion of one feminist method as well as a feminist jurisprudence are combined with a critical perspective on the institutionalisation of human rights and the politics of law. I recall these arguments to inform my investigation into gender mainstreaming. Two aspects are considered: firstly, in light of the critical perspectives, the preference for gender mainstreaming instead of challenging from the margins; and secondly, how mainstreaming actually takes place. Relying on the notion of ethical feminism and concepts of "asymmetrical reciprocity", "city life", the "imaginary domain" and the "community of the ought to be", I ponder ways of making gender issues noticed beyond and within attempts at mainstreaming.

*"No such thing  
as innocent  
bystanding"*

– Seamus Heaney

## **1 INTRODUCTION**

In this article I critically reflect on the notion of gender mainstreaming that has become an important concern and aim for many women, gender and feminist theorists and activists. My reflection considers the argument that in order to force government and other institutions to address the subordinate position of women sufficiently, issues that affect women and their position directly and indirectly should be made central – should be mainstreamed.

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Simultaneously women should be mainstreamed, by appointing them in public and institutional positions. Many questions arise. For example, how does one identify these issues, decide which to pursue and which not, and how does one go about mainstreaming them? And how does one mainstream women without expecting them to assimilate, and without co-opting them within the system? An underlying aspect of these questions is that in order to make certain issues and women's presence central we need some notion of commonality, generality, unity and solidarity amongst women. By doing this, many voices could be excluded, with the effect that only the concerns of a few women are addressed. Practical attempts to mainstream gender, to make women, and women's and gender concerns, central to institutional processes and structures should bear in mind the violence of including – of mainstreaming – the concerns of only a few, by excluding many.

My consideration in this article will reflect on two related aspects. Firstly, whether gender mainstreaming as such is a viable option, or, as mentioned in the preface, whether gender and feminist insights shouldn't be employed as forms of radical activism, critique and challenge rather than being mainstreamed. Secondly, when we mainstream, how do we do it, whose concerns do we take into account, which values are taken as possible models? From the second aspect it should be clear that I am not taking a hard line position against mainstreaming. Like law and legal reform, the notion of gender mainstreaming is also paradoxical, it has limits but also potential. My suggestion is that our attempts to mainstream gender should pay more heed to contingency and the paradoxes inherent in these ideas and processes.

I start with a brief reiteration of the fact that, through the application of various strategies, women's and gender concerns have been negated, ignored and excluded not only in institutionalised social and legal politics but also in research. Women in fact have been made "invisible" by a society where the male standard is not only accepted as the norm, but is also falsely disguised as neutral, objective and scientific. Feminists have responded in various ways. Notable here are arguments for the acceptance of subjective truth as a legal yardstick and within sociology for "standpoint theory" that could take the concrete experience of women into account.<sup>1</sup> However, significant for my argument is the cautionary approach that some theorists follow towards any notion of "feminist method".<sup>2</sup> Related to this cautionary approach to "feminist method" is the critical response of feminists to the "quest for a feminist jurisprudence" and the warning against entering "a game whose rules are predetermined by masculine requirements and a positivistic tradition".<sup>3</sup> For critical legal feminists the work of feminism is to deconstruct and challenge the power of law, as it is constituted – the quest

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<sup>1</sup> See, eg, Conaghan "Reassessing the Feminist Theoretical Project in Law" 2000 *Journal of Law & Society* 351; Scales "The Emergence of a Feminist Jurisprudence: An Essay" 1986 *Yale Law Journal* 1373; Hartsock "The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism" in Harding (ed) *Feminism and Methodology* (1987) 157; and Collins *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment* (1990) 234.

<sup>2</sup> Harding "Introduction: Is There a Feminist Method?" in Harding (ed) *Feminism and methodology* (1987) 1.

<sup>3</sup> Smart *Feminism and the Power of Law* (1989) 67.

for a feminist jurisprudence could fall into the trap of replacing one hierarchy of truth with another.<sup>4</sup> I connect the critical approaches toward the notion of a “feminist method” and “feminist jurisprudence” with Costas Douzinas’ critical investigation of human rights and his argument about the end of the utopian ideal in human rights resulting from its incorporation into national constitutions and international conventions.<sup>5</sup> I regard these arguments as significant critiques against the limits and maybe even dangers of mainstreaming.

Before I turn to Drucilla Cornell’s notion of ethical feminism and her argument that no institution or system can ever fully cater for women’s equality and dignity, I recall an argument for activism as put forward by Young.<sup>6</sup> Young exposes the limits of deliberative democracy and supports activism. She stands critical towards both a liberal and communitarian or civic republican approach to politics. In her most recent book, Cornell calls for dignity in intergenerational relationships, in our intimate relationships, but also for dignity in our attempts at multicultural, intracultural, and transnational dialogues between women.<sup>7</sup> My aim is to situate the notion of gender mainstreaming and its implications within the context of Cornell’s thoughts on dignity and respect. To conclude I recall the myths of Antigone and Medusa – two women who refused incorporationism and co-option and who symbolise transgression. However, before all these perspectives and theories can be considered, in order to contemplate the notion of gender mainstreaming we need to turn to *sex* and *gender* and their multiple meanings.

Two final aspects need mentioning because they capture something that might be called the “spirit” of this article: Firstly, I start and end this article with a quotation from the poet Seamus Heaney that pertains to each and every one’s complicity. The notion and practical aspects of gender mainstreaming, gender equality, equal opportunities and other related aspects should be an ongoing concern and opportunity for critical reflection for everyone. Secondly, I refer in the article to Julia Kristeva’s call for revolt and contestation. Where gender mainstreaming is an institutional process with the inherent limits that accompany such a process, events of revolt and contestation encompass the freedom to “call things into question”.<sup>8</sup>

## 2 SEX AND GENDER

Judith Butler recalls De Beauvoir’s famous formulation of “One is not born, but rather becomes a woman” in an article in which she reflects on the “variations” of sex and gender.<sup>9</sup> I shall not go into the depth of Butler’s argument here but only briefly focus on it in so far as it pertains to my consideration of the notion of gender mainstreaming. The distinction between sex as something “natural” and gender as something “culturally

<sup>4</sup> *Ibid.*

<sup>5</sup> See generally Douzinas *The End of Human Rights* (2000).

<sup>6</sup> Young “Activist Challenges to Deliberative Democracy” 2001 1 Vol 29 5 *Political Theory* 670.

<sup>7</sup> Cornell *Between Women and Generations. Legacies of Dignity* (2002).

<sup>8</sup> Kristeva *Revolt She Said* (2002) 12.

<sup>9</sup> Butler “Variations on Sex and Gender. De Beauvoir, Wittig and Foucault” in Benhabib and Cornell (eds) *Feminism as Critique* (1987) 128.

constructed” has been with us at least since De Beauvoir’s famous statement. Butler, however, focuses on the verb “become”, and asks:

“If genders are in some sense chosen then what happens to the definition of gender as a cultural interpretation of sex, that is, what happens to the ways in which we are, as it were, already culturally constructed? How can gender be both a matter of choice and cultural construction?”<sup>10</sup>

Drawing on the work of Monique Wittig, Butler contends that this “choice” comes to mean a process of interpretation through the body within the contexts (“networks”) of already inscribed cultural norms. A question that could be asked then is what aspects of the body (of sex) are “natural” and not already culturally imprinted. Butler explains that it is important not to understand “becoming” as a move from outside or beyond the body, rather it is a “move from the natural to the acculturated body”.<sup>11</sup> This means that there is no point of “disembodied freedom ... Indeed, one is one’s body from the start, and only, thereafter becomes one’s gender”.<sup>12</sup> It is important that this becoming is not a linear process of progress with a definite point of origin or an end point – gender is an ongoing process. As Butler puts it:

“Gender is a contemporary way of organizing past and future cultural norms, a way of situating oneself in and through those norms, an active style of living one’s body in the world.”<sup>13</sup>

Butler explains the aspect of choice as an act of interpretation and reconstruction of already established corporeal styles. She notes the emancipatory potential in this notion where oppression is not a “self-contained system”.<sup>14</sup> However, the constraining gender norms of the society we live in cannot be negated. As Butler puts it:

“If human existence is always gendered existence, then to stray outside of established gender is in some sense to put one’s very existence into question.”<sup>15</sup>

De Beauvoir continues the notion of male disembodiment and transcendence and female embodiment and immanence. Butler notes that De Beauvoir does not subscribe to either view in her support of “embodied identity that incorporates transcendence”.<sup>16</sup> Of importance here is how men come to regard women as Other because of their own (male) disembodied feature and woman’s embodied and accordingly limited feature. For Butler disembodiment is nothing but a denial. A better alternative to both disembodiment and feminine bodily enslavement was suggested by De Beauvoir, namely the body as a situation. Butler explains that this has two meanings: the body is an already located and defined material reality and the body is a space for interpretive possibilities.<sup>17</sup> This understanding of the

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<sup>10</sup> Butler 128.

<sup>11</sup> Butler 130.

<sup>12</sup> Butler 131.

<sup>13</sup> *Ibid.*

<sup>14</sup> Butler 132.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

<sup>17</sup> Butler 133.

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body as “a cultural situation” makes the distinction between sex and gender suspect – both sex and gender seem to be cultural.<sup>18</sup>

Through De Beauvoir, Wittig and Foucault, Butler formulates a position that is against a “dyadic” gender system that continues seemingly “natural” sexual distinctions and irreducible sexual difference. She argues for the notion of a “proliferation” of genders, which would not entail a rejection of either bodily materiality or cultural forms. It would entail a context where multiple differences could exist not to be forced within a binary system. This view of sex and gender has important implications for sex and gender, not only on a theoretical level, but also for the notion of gender mainstreaming.<sup>19</sup> The meanings of sex and gender, and in particular the problematic and stereotypical aspects of these meanings, must be kept in mind when programmes for legal reform, equal opportunities and equality are formulated because the underlying understanding of sex and gender will no doubt influence the content of the programme.

It might be useful here briefly to recall the distinction between humanist and gynocentric feminism. Young describes the former as feminist thinking from a Beauvorian position that sees women’s oppression as the inhibition and distortion of women by a society that allows the self-development of men only.<sup>20</sup> Humanist feminists generally experience patriarchy as a system that forced upon women a distinct feminine nature, which justified their exclusion from many aspects of the public realm – science, politics, invention, industry, commerce and the arts. The constructs of “femininity”, masculinity, feminine and masculine sexual difference are perceived as the main reasons for women’s suppression.<sup>21</sup> They argue that only men are allowed transcendence and women are fixed in a state of immanence. Gynocentric feminists, on the other hand, value feminine sexual difference and regard the devaluation of women’s experience by a masculinist culture as the main reason for women’s oppression.<sup>22</sup> These are only two of many approaches to feminism and they themselves include a multiplicity of positions and theories. They are significant if we consider the ways in which gender concerns could be mainstreamed. To what extent will drafters of these kind of programmes and legislation be willing to enter into a critical enquiry of the notion of sex and gender as well as the causes of the exclusion of and discrimination against women?

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<sup>18</sup> Butler 134.

<sup>19</sup> See in this regard also Butler’s reference to possible objections from Marxist as well as psycho-analytical theory to the notion of proliferation (139-142).

<sup>20</sup> Young *Throwing Like a Girl and Other Essays in Feminist Philosophy and Social Theory* (1990) 73.

<sup>21</sup> Young 73-75.

<sup>22</sup> Young 73-79.

### **3 WOMEN'S "INVISIBILITY", FEMINIST METHOD, FEMINIST JURISPRUDENCE AND THE LIMITS OF THE LAW**

#### **3.1 Women's invisibility**

Feminist theorists and researchers have exposed women's "invisibility" within most research as a result of the male claims to objectivity and neutrality.<sup>23</sup> Three forms of invisibility identified are exclusion (male dominated theories ignore or neglect women); pseudo-inclusion (theory appears to take women into account but in fact marginalises them); and alienation (theories include women but distort women's experiences).<sup>24</sup> Techniques used by theorists to make women invisible include decontextualisation (maleness becomes the norm for the universal and the abstract); universalism (this disguises the fact that men and women are treated differently and unequally); dualisms (the male side of an opposition is valued, the female side devalued); naturalism (if something is described as natural it requires no explanation and is taken for granted, for example women's reproductive labour) and appropriation and reversal (images and symbols of women-centered processes are used by men in a way that distorts and trivialises women's activities).<sup>25</sup> Feminists respond by challenging the claim to neutrality and objectivity thereby exposing the male bias and calling for subjective knowledge and women's experience to be taken into account in research.<sup>26</sup>

#### **3.2 Feminist method**

Although some theorists have referred to a specific feminist research method, Harding argues against the idea.<sup>27</sup> According to her the question is not about method but about "what have been the most interesting aspects of feminist research processes".<sup>28</sup> She warns against merely "adding" women to existing social analyses and argues that feminist investigation should go further and deeper. Three distinctive features of feminist analyses that for her go beyond mere adding are the focus on women's experiences; doing research with women and their needs as aim; and researching new subject matter.<sup>29</sup> Her argument is that these distinctive features have produced new and interesting feminist research and not a "feminist method". Feminist standpoint theory, for example has been identified within sociology as a way to think about knowledge through the notion of a feminist standpoint.<sup>30</sup> The call for subjective knowledge and women's experience to be taken into

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<sup>23</sup> Kritzinger "The Status of Feminism" 2003 *UP Institute for Women's and Gender Studies Occasional Paper* 30. See also Thiele "Vanishing Act in Social and Political Thought: Tricks of the Trade" in Pateman and Gross (eds) *Feminist Challenges* (1986).

<sup>24</sup> Kritzinger 30.

<sup>25</sup> Kritzinger 31-32.

<sup>26</sup> Scales 1986 *Yale Law Journal* 1373.

<sup>27</sup> Harding 1.

<sup>28</sup> *Ibid.*

<sup>29</sup> Harding 6-10.

<sup>30</sup> Hartssock 157.

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account is not an attempt at formulating a specific feminist method that could repeat the same mistake of exclusion and the assumptions of neutral and objective truth, but rather ways of widening traditional research.<sup>31</sup> In the rally for gender mainstreaming these approaches should be taken into account. Subjective knowledge and experience could easily be overtaken again, even (or maybe especially) by the gender mainstreaming lobby.

### 3 3 Feminist jurisprudence

Carol Smart argues against the notion of a “feminist jurisprudence” because it promises a comprehensive theoretical framework and political practice that is not only impossible to attain but also politically suspect.<sup>32</sup> Further the quest for a “feminist jurisprudence” runs the risk of accepting a male standard because the law itself is founded upon male requirements and a positivistic tradition. This search also places too much emphasis on the law, thereby giving too much recognition to the position of a misogynist system that is based on a male standard in the hierarchy of knowledge. For Smart the search for a feminist jurisprudence will ultimately be another project of “grand theorising” following universalist strategies.<sup>33</sup> The aim of feminist theory should rather be to focus on the “reality” of the lives of women. The quest for a feminist jurisprudence situates the feminist debate within law and removes it from the community. Attempts to create a comprehensive feminist jurisprudence run the risk of identifying one correct version of feminism that could create a new hierarchy of truth and knowledge instead of a continual questioning of the truth.<sup>34</sup>

To place the law central to feminist debate has implications for the language in which the feminist struggle is fought. Smart describes the law as a phallogocentric discourse: phallogocentric refers to the heterosexual, male standard in law and logocentric refers to the fact that knowledge is never neutral but is created under patriarchal circumstances.<sup>35</sup> The quest for a feminist jurisprudence, although its aim might be to challenge male values, will at the end only affirm law’s hierarchy. Smart suggests that feminists should rather deconstruct the assumptions that law is based on by focusing on context.<sup>36</sup>

Similar to the argument against the notion of a feminist method, the critical response to a feminist jurisprudence is of importance to the project of gender mainstreaming. By mainstreaming gender, the gender focus could lose its critical edge, its concern with difference, its ability to expose the limits and flaws of present systems, its promise of a better time to come. “Drawing strength from the margins” should be considered as possibly a better way to disrupt and to contestate continuously.

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<sup>31</sup> See in this regard also Cornell’s critique on MacKinnon’s claim to “feminism unmodified” in “The Doubly-prized World: Myth, Allegory and the Feminine” 1990 *Cornell Law Review* 644; and see also MacKinnon *Feminism Unmodified* (1987).

<sup>32</sup> Smart 66-89.

<sup>33</sup> Smart 68.

<sup>34</sup> *Ibid*; see also Cornell *Beyond Accommodation* (1991); *The Imaginary domain* (1995); and *At the Heart of Freedom* (1998).

<sup>35</sup> Smart 86.

<sup>36</sup> Smart 88.

#### 4 THE LIMITS OF THE LAW

Costas Douzinas notes that human rights have become part of the dominant discourse of governments and international organisations.<sup>37</sup> With the fall of communism and apartheid, human rights have won the “ideological battle of modernity”. However, for Douzinas the “triumph” of human rights is “something of a paradox”.<sup>38</sup> The many examples of human rights abuses, massacres, genocide, ethnic cleansing and the discrepancies between the poor and the rich illustrate the gap between the theory and practice of human rights. Douzinas asks whether this should make us doubt the principle of human rights and the promise of emancipation through reason and law and mentions that critiques of human rights quite often amount to an ironical distance towards those who still take human rights seriously and accept the contingency and uncertainty of “civil life” and “civilisation”.<sup>39</sup>

Douzinas combines the utopian theory of Ernst Bloch with the psychoanalytical concept of the imaginary domain in order to explore the questions of ethics, pluralism and transcendence in the face of this distance.<sup>40</sup> He notes that Bloch retained the main elements of Marx’s critique on rights but discovered in the natural law tradition the human trait to resist domination and oppression. Bloch supported Jean Jacques Rousseau’s theory that established a relationship between the citizens and the general will and the accompanying shift from natural law as a philosophical or religious construct into a historical institution.<sup>41</sup> Politics and rights were connected and natural law became the outcome of the concrete reason of people. Right or *ius* became synonymous with the rights of the people, the idea of equality for all was accepted and the slogans of liberty, equality and fraternity acquired normative weight. However, because property was regarded as one of the inalienable rights, equality was restricted and the potential of rights could not materialise. By following and expanding Marx’s distinction between man and citizen, Bloch captured a *utopian* moment because the citizen was for him a “prefiguration of the future socialised freedom”.<sup>42</sup> Douzinas explains that “the foreshadowing of a future not yet and not ever present helps the self-purification of moral ideas and public, as freedom of choice and of action is the ability to act *contra fatum*, thus in a perspective of a still open world, one not yet determined all the way to the end”.<sup>43</sup> He recalls Benjamin’s warning that one should avoid the conformism

<sup>37</sup> Douzinas “Human Rights and Postmodern Utopia” 2000 11 2 *Law and Critique* 219.

<sup>38</sup> Douzinas 2000 11 2 *Law and Critique* *Ibid* 200; and see also Fitzpatrick “Globalisation and the Humanity of Rights” *Law, Social Justice & Global Development* <http://elj.warwick.ac.uk/global/issue/2000-1/Fitzpatrick.htm>.

<sup>39</sup> Douzinas 2000 11 2 *Law and Critique* 221.

<sup>40</sup> Douzinas 2000 11 2 *Law and Critique* 222-227.

<sup>41</sup> Douzinas 2000 11 2 *Law and Critique* 223.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* Oppression and domination are obvious violations of freedom because their effect is to make political power and economic conditions inescapable. Douzinas explains that because freedom operates as an open concept its openness has allowed it to be co-opted by ideologies and movements that are inherently opposed to the essence of freedom, for example deregulated market capitalism or neo-liberal law and economics. Douzinas argues that even though equality can be restricted to equality before the law, its obvious and gross violations cannot be concealed. He also highlights the interrelation between equality and freedom. “While their action differs, the aim of equality and freedom coincide: they are both



that so often comes with tradition and notes that it is precisely this conformism that threatens human rights when they become a tool of states, governments and international organisations.<sup>44</sup>

Douzinas' call for a utopian vision of human rights to challenge the conformism of its mainstreaming supplements the reflections on a feminist method and a feminist jurisprudence. When gender issues are mainstreamed without taking the dangers of exclusion, false assumptions of truth, and conformity into account, they could lose any power to challenge the status quo. Anne Scales warns against what she calls incorporationism, the process by which women are made to believe that their interests and needs have been served by the law.<sup>45</sup>

Central to a critical enquiry in law is the paradox or tension between law's potential and law's limits. A similar paradox will of course be found in the notion of gender mainstreaming. As critical scholars have argued, law's institutional structure will always prevent its potential for critical self-revision.<sup>46</sup> Law can be seen to function on the basis of exclusionary reasoning, in other words law will always be law's fall-back position.<sup>47</sup> Law's politics or legal politics cannot be reflexive in the sense that politics can. Where politics asserts contingency, the law will normalise differences and assert certainty. The "law is politics" contention of US Critical Legal Studies is challenged by critical scholars because of their failure to distinguish between social struggle and politics.<sup>48</sup> Van der Walt argues that this failure could have the effect that the "law is politics" contention can be understood to mean that law is an expression of dominant economic interests in society – such a contention will be supported by an economic analysis of law, but not a critical legal one.<sup>49</sup> For Van der Walt the politics of law should not be associated with a specific "political project" – this would undermine law's

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inclined towards 'the human identity that has yet to arrive.' Douzinas notes that all realism has utopianism at its core because reality is always incomplete and there are many future possibilities. "Utopia is the name for the great power of imagination which finds the future latent in every cultural product and preserves the kernel of radical enthusiasm in every ideology it criticizes." Bloch places natural law in such a utopian paradigm. Douzinas notes certain important differences between natural law and utopia: While the natural lawyers derived their schemes of rights from axiomatic principles about human nature in a way that resembled mathematical deductions and scientific proofs, the utopian imagination used narratives, images and allegories to project the future society. Another difference is that natural law is inspired by the past and utopias are "imaginary projections of the future". And while natural law strives to abolish degradation and uphold human dignity, social utopias strive to reduce suffering and promote human happiness. The utopianist does not follow a linear concept of time. The past is put in service of an undetermined future and can be defined as the "remembrance of the future".

<sup>44</sup> Douzinas 2000 11 2 *Law and Critique* 226; and Benjamin "Theses on the Philosophy of History" in Benjamin (edited by Arendt) *Illuminations* (1969) 255.

<sup>45</sup> Scales 1986 *Yale Law Journal* 1373.

<sup>46</sup> See, eg, Christodoulidis "The Suspect Intimacy Between Law and Political Community" 1994 *Archiv für Rechts- und Sozialphilosophie* 1-18; and "Self-defeating Civic Republicanism" 1993 *Ratio Juris* 64-85.

<sup>47</sup> See Christodoulidis *Law and Reflexive Politics* (1998) 227; and "The Irrationality of Merciful Legal Judgement: Exclusionary Reasoning and the Question of the Particular" 1999 *Law and Philosophy* 215-241.

<sup>48</sup> Van der Walt "The (Im)possibility of Two Together When it Matters" 2002 *Journal of South African Law* 462-477.

<sup>49</sup> Van der Walt 2002 *Journal of South African Law* 463-464.

political potential. He turns to Hannah Arendt's understanding of politics as something "fundamentally plural". Law, or the politics of law in this view, should be concerned with the conditions for plurality. To connect this with the contemplation of gender mainstreaming, my argument is that a certain approach to gender mainstreaming would also (wrongly) negate the notion of plural politics in favour of a political project with economic outcomes.

## 5 A CALL FOR ACTIVISM AND ETHICAL FEMINISM

### 5.1 Activism

Young exposes the limits of deliberative democracy in her argument for activism. For her, activism entails a critical oppositional activity rather than an attempt to come to agreement with those who support or benefit from existing power structures.<sup>50</sup> She notes points of critique that supporters of deliberative democracy will have against activists: that they have a lack of commitment to general principles that all can accept because of their emphasis on interest group politics and that they are unreasonable.<sup>51</sup> However, activists on the other hand will challenge deliberative democrats on the following grounds: that they are exclusive; that formal inclusion (a dialogue/commission of enquiry/structure) is not enough; that the outcome of deliberative democracy can be merely constrained alternatives and that its discourse is hegemonic.<sup>52</sup>

Her argument for activism connects with her critique on both a liberal and a communitarian or civic republican approach to politics. Her concern is the reduction inherent in both approaches and that the denial of difference in both contributes to oppression. She supports a politics that recognises rather than represses difference.

For Young, the civic republican approach to politics, in its adoption of the notion of "enlarged thought", seems to mean that a person can know what the position of the other means. This understanding of "enlarged thought" underlies most legal attempts to deal with difference and otherness. Young, in her approach to "enlarged thought", coincides with Cornell's (discussed below) view of "solidarity" and feminist "community". Young argues that a consequence of claiming that one can truly know the other will be a collapse of difference between individuals. This collapse is what we see in most examples of law and attempts at legal reform and my fear is that attempts at gender mainstreaming will continue this collapse. The interpretation of "enlarged thought" that Young suggests could be something to be followed in the attempt at gender mainstreaming namely, "not only taking account of one another's interests and perspectives, but also ... considering the collective social processes and relationships that lie *between us* and which we have come to know together by discussing the world".<sup>53</sup>

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<sup>50</sup> Young 2001 1 Vol 29 5 *Political Theory* 671.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> Young "Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought 1997 4 *Constellations* 360.

Her support of the view of the continuous becoming of the self and the subject as a “heterogeneous process” also relates to Cornell’s notion of the person as a project of becoming. Subjects are never fully present, they must be free to revise themselves – they can never make themselves transparent and wholly present to one another. We therefore need a politics that can ensure such continuous becoming of the self and self-revision. Again we can ask if legal reform as well as attempts at gender mainstreaming could achieve this.

Young’s arguments for “city life” as model for community and “asymmetrical reciprocity” should be considered briefly. She criticises the notion of moral respect as a relation of symmetry between self and other and accordingly criticises a communicative theory of moral respect that subscribes to the idea of “imaginatively” taking the position of the other.<sup>54</sup> By acknowledging the asymmetrical reciprocity between subjects, we accept that, while there may be many similarities and points of contact between subjects, each position and perspective transcends the others and goes beyond their possibility to share or imagine. She suggests the ideal of city life as a vision of social relations that can affirm difference without exclusion. For Young, city life reflects the paradox of being together and being separate, being bound and unbound simultaneously, of being one but not the same. “Their being together entails some common problems and common interests, but they do not create a community of shared final ends, of mutual identification and reciprocity.”<sup>55</sup>

I contend that such an open politics would be easier to assert from a marginal position, however, if gender mainstreaming is something that must be pursued, the mindsets of asymmetrical reciprocity and city life should be pursued.

Julia Kristeva’s call for revolt and contestation is of importance here. She explains revolt as “not simply about rejection and destruction; it’s also about starting over”.<sup>56</sup> She calls for values to be put into question and defines contestation as the “violent desire to rake over the norms that govern the private as well as the public, the intimate as well as the social, a desire to come up with new, perpetually contestable configurations”.<sup>57</sup>

## 5 2 Ethical feminism

Cornell articulates an understanding of a justice that could protect all women through the notion of the imaginary domain, a notion she develops through psychoanalytical theory. Her description of what she calls “ethical feminism”, which opened feminist discourse to other ways of reflecting on sex, gender, difference, equality and many other “feminist” concerns, is marked by a non-essentialist starting point and the search for new ways of articulating “the

<sup>54</sup> Young 1997 4 *Constellations* 340. Symmetrical reciprocity, which entails that each of us should take the perspective of all others in making moral judgements, has at least three flaws: It obscures difference; it is based on the supposed possibility of reversing positions; and it is politically suspect (Young 1997 4 *Constellations* 346-350).

<sup>55</sup> Young “City Life and Difference” in Kasinitz (ed) *Metropolis. Centre and Symbol of Our Times* (1995) 265.

<sup>56</sup> Kristeva 123.

<sup>57</sup> Kristeva 12.

feminine within sexual difference”.<sup>58</sup> Her “imaginary domain” denotes the psychic and moral space in which women as “sexed creatures who care deeply about matters of the heart” evaluate and represent who they are.<sup>59</sup> Integral to the concept of imaginary domain is the notion that the person can never be assumed as a given, but is always part of a project of becoming. A person is thus understood as a possibility, an aspiration, and through the development of a psychoanalytical framework, Cornell argues that the freedom to become a person is dependent on minimum conditions of individuation that serve as a prior set of conditions. In other words, the freedom that a person must have to become a person demands the appropriate space for renewing the imagination and for re-imagining “who one is and who one seeks to become”.<sup>60</sup> Although formal equality is seen as having achieved some gains in this respect, most societies are identified as continuing to impose and reinforce rigid gender identities upon their citizens. So whilst the imaginary domain demands of a theory of justice that women must be imagined and evaluated as free persons, it also represents the political and ethical basis of the right to self-representation of one’s sexuate being.<sup>61</sup> As such, it does not only address questions of freedom and equality, but also the question of dignity.

This turn to psychoanalysis helps with the protection of dignity because psychoanalytic insight regards dignity as the capability to articulate desire and to make moral evaluations.<sup>62</sup> Cornell wants us to see that:

“[P]sychoanalysis can help us understand why *the feminine within the imaginary domain* can be infinitely represented, and represented so as to explore the culturally and legally imposed norms of femininity. As I have defined it within the legal sphere, the imaginary domain is the moral and psychic right to represent and articulate the meaning of our desire and our sexuality within the ethical framework of respect for the dignity of all others.”<sup>63</sup>

Cornell illustrates the possibility of being prevented from having a free imaginary domain by what she calls “internal tyrants”<sup>64</sup> and describes the imaginary domain as protecting that moral and psychic space needed to escape them. Focusing on “the feminine within the imaginary domain”<sup>65</sup> she highlights the subjective aspect of the assumption of sexual identity. Here however, the feminine does not refer to femininity, but to the way in which we might re-imagine and redefine women. It affirms the difference of women and how they are represented by the imagination and in language.<sup>66</sup> Cornell

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<sup>58</sup> Cornell *The Imaginary Domain* (1995).

<sup>59</sup> Cornell *At the Heart of Freedom* (1998) x.

<sup>60</sup> Cornell *The Imaginary Domain* (1995) 5.

<sup>61</sup> Cornell *At the Heart of Freedom* (1998) 159. The philosophical basis that Cornell uses for the imaginary domain is Rawls’ conception of our equal moral worth and Kant’s idea of our freedom as moral persons.

<sup>62</sup> Cornell *Legacies of Dignity* (2002) 29.

<sup>63</sup> *Ibid.*

<sup>64</sup> Cornell *Legacies of Dignity* (2002) 30.

<sup>65</sup> Cornell *Legacies of Dignity* (2002) 31.

<sup>66</sup> “Since we not only assume identities but also live them, this process of acting-out is inevitable. We are the ones who externalise the meaning of gender. How we assume these identities is never something ‘out there’ that effectively determines what and who we can be as men and women – gay, lesbian, transsexual, straight, or otherwise.” Cornell *Legacies of Dignity* (2002) 31.

argues that feminism is, by definition, multicultural and committed to trans-national literacy, and that the demand that everyone's rights to the imaginary domain must be protected, does not repeat the essentialist claim of likeness. She thus makes a feminist intervention in the search for a legitimate decision-making procedure that requires an initial universalisation. This feminist intervention poses the question of how to deal with the fact that human beings are sexed and therefore "ontologically dissimilar".<sup>67</sup>

In addressing this question, Cornell demands recognition of the moral space necessary for equivalent evaluation of our sexual difference as free and equal persons.<sup>68</sup> This demand for the imaginary domain must be met prior to the formulation of a broader egalitarian or social justice theory.<sup>69</sup> Cornell notes that some feminists have tried to find a place in reality where women were fully equal with men, but to no avail. She also notes that the imaginary domain reflects a utopian moment in its demand for focus on what ought to be, and that liberalism, by focussing only on what is and by rejecting the utopian moment, negates the imaginary domain.<sup>70</sup> A strong feature of her anti-essentialist approach is the belief that any theoretical appeal to likenesses denies the full significance of differences:

"The feminism I advocate, necessarily demands equality for women as free persons, but does not seek to make law the main vehicle for restructuring the current meaning of our sexual difference. Indeed, such a law would fall foul of the equal protection of the imaginary domain, since it would make the state and not the individual the source of the representation of her sexuate being."<sup>71</sup>

At an international level the imaginary domain has important implications for women in the context of globalisation or the "new imperialism".<sup>72</sup> By accepting women's right to dignity and the demand for the imaginary domain, women's "intrinsic worth" can be recognised instead of just subscribing to the typical Western imperialist notion of value or reform that embraces the idea of progress. In "The art of witnessing and the community of the ought to be",<sup>73</sup> Cornell turns to Spivak's chapter on history in *A Critique of Postcolonial Reason*<sup>74</sup> where Spivak argues that the subaltern in history has either been absent/silent or misrepresented. The subaltern is not a figure in the traditional sense because she is a "trace", and her story exists only as a "subliminal and discontinuous emergence".<sup>75</sup> Spivak seeks to stand witness to the stories of two women, the one, the Rani of Sirmur,<sup>76</sup> the

<sup>67</sup> Cornell *At the Heart of Freedom* (1998) 14.

<sup>68</sup> Cornell *At the Heart of Freedom* (1998) 11-14.

<sup>69</sup> According to Cornell the failure to recognise the prior moral space in describing a legitimate procedure to determine issues of distributive justice prevented Kantian political philosophy from taking account of sexual difference.

<sup>70</sup> Cornell *At the Heart of Freedom* (1998) 15.

<sup>71</sup> Cornell *At the Heart of Freedom* (1998) 14.

<sup>72</sup> Spivak *Critique of Postcolonial Reason* (1999).

<sup>73</sup> Cornell *Legacies of Dignity* (2002) 71-94.

<sup>74</sup> Spivak (1999).

<sup>75</sup> *Ibid.*

<sup>76</sup> Spivak wanted to investigate *Sati* and women who practised *Sati* as ritual mourning. Her aim was to retell the stories of these women who were pitied and sentimentalised by history. In her investigation, she found a Rani who threatened to commit *Sati* whose name was never recorded by the British and remains only as the Rani of Sirmur. Spivak challenges the "ideological battlegrounds" to change the perception of women who committed *Sati* as

other, a distant family member,<sup>77</sup> and retells them with the ethical purpose of preserving their pathos and dignity, and exposing how female subjectivity is affected when enacted in a manner traditionally seen as pitiful. Cornell describes Spivak as “restaging ideological battlegrounds so that the might have been of woman’s agency can be returned to the picture”,<sup>78</sup> and interprets Spivak’s “feminist inspired historical project” through a reading of Kant’s notion of aesthetic judgement.<sup>79</sup> According to Cornell, Spivak seeks a particular kind of community best understood as Kant’s *sensus communis aestheticus*, wherein community is understood by way of aesthetic judgment that we are before a sublime or beautiful object or person. Spivak is calling on us to judge loss and fundamental misinterpretation as sublime.<sup>80</sup>

However, according to Cornell, two mistakes are commonly made about the quality of aesthetic judgment. One is to limit Kant’s analysis of aesthetic judgment to any particular field. The other is to reduce our emotive response to the sublime as something so purely subjective that it belies judgment.<sup>81</sup> Cornell defines aesthetic judgment as “a specific form of judgment provoked by feeling but that is not simply overwhelmed by it”.<sup>82</sup> She is critical of interpreters of Kant who reject the subjectivism and reduce the *sensus communis aestheticus* to conventions of an existing community. She explains that a communication of aesthetic judgement is possible in Kant, not because someone shares the existing aesthetic standards of a particular community, but because we can imagine that others would join in if we all adopted an “enlarged mentality”. The *sensus communis aestheticus* in Kant thus points toward an “ought to be” of a shared community, and the enlarged mentality to which Kant refers does not refer to a given community but to the idea of humanity. So, when we judge an object as sublime we include the “should” of the universal, which is inseparable from an idealised humanity. The *sensus communis* thus demands a particular kind of public sense. Yet it is not that which we normally think of as a community. It is an imagined community where all the possible viewpoints of others are imagined.<sup>83</sup>

Ethical feminism exposes the limits of institutional attempts to fully address women’s equality and dignity. The anti-essentialist stance emphasises the dangers of exclusion of which many Western attempts to address the position of women have been guilty. The concern with dignity and the protection of our dignity by way of the right to the imaginary domain should be kept in mind in any attempt to address issues of gender equality and discrimination against women.

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victims and return their pathos. These women should also be seen as signifiers and not only as the signified.

<sup>77</sup> A distant relative committed suicide as a way of giving notice of a political and ethical dilemma that she was facing. She was a national liberation fighter who was asked to commit a political murder that she could not do. The reason for her suicide was seen by her family as that she had an illicit love affair. Spivak uncovers the actual motivation for her suicide.

<sup>78</sup> Cornell *Legacies of Dignity* (2002) 79.

<sup>79</sup> Cornell *Legacies of Dignity* (2002) 81.

<sup>80</sup> Cornell *Legacies of Dignity* (2002) 81-82.

<sup>81</sup> Cornell *Legacies of Dignity* (2002) 82.

<sup>82</sup> Cornell *Legacies of Dignity* (2002) 83.

<sup>83</sup> Cornell *Legacies of Dignity* (2002) 85.

## 6 REMEMBERING ANTIGONE AND MEDUSA

I have already referred to the danger of incorporationism above. Scales describes it as a process through which marginal voices are made to believe that they have a place in the existing system.<sup>84</sup> However, she warns that “official acceptance is the one unmistakable symptom that salvation is beaten again, and is the surest sign of fatal misunderstanding, and is the kiss of Judas”.<sup>85</sup> Incorporationism presumes that white male supremacy is simply a random collection of irrationalities – that discrimination, for example, is simply a legal mistake. By doing this it negates the pervasive power of male supremacy.<sup>86</sup> In a similar vein we can remember the myth of Antigone, which has been told in many ways by many scholars for many purposes.<sup>87</sup> In legal theory Antigone is usually remembered as someone who followed natural law (her own spiritual beliefs and traditions) instead of the positivist law of the state by insisting on a burial for her brother, thereby opposing the decree issued by Kreon that the bodies of deserters should be thrown to wild animals outside the city walls. In this context she could be celebrated as a woman who refused to be incorporated by supreme male power unlike her sister Isemene who refused to go against the decree of Kreon. Scales recalls the myth of Perseus who was able to slay the female monster Medusa only with the help of Athena. Medusa is the archetype of a free woman, in contrast to Athena who is the patriarchal stereotype of woman.<sup>88</sup> My call is for all women to be free as Antigone and Medusa from the restrictions and pervasive power of the mainstream even if those powers can superficially address individual selfish concerns. Challenge from the margin and refuse to be incorporated.

To conclude, my ethical feminist consideration of gender mainstreaming is informed by theoretical perspectives such as the critical inquiry into sex and gender; perspectives against the notion of a feminist method; a feminist jurisprudence as well as a critical approach towards the institutionalisation of human rights and the politics of law. I am further concerned with the dangers of exclusion and incorporationism. I find in the notion of ethical feminism a way of thinking about women’s equality or equivalent rights, dignity and community that disrupts present systems and goes beyond mainstream approaches.

Of course we are faced with a paradox, we know that there is no easy way out, that there is no simple way to fix this, that there is an inseparable link between restriction and salvation, the system/mainstream and the margin, the law and the critique of law, innocence and complicity.

*“No such thing  
as innocent  
bystanding.”*

<sup>84</sup> Scales 1986 *Yale Law Journal* 1382.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Ibid.*

<sup>87</sup> Sophocles *The Theban Plays* (1947). See, eg, Elshtain “Antigone’s Daughters” in Daly (ed) *Communitarianism. A New Public Ethics* (1994) 335-344.

<sup>88</sup> Scales 1986 *Yale Law Journal* 1379.