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Conceptualising the sexually explicit as free expression: The distinct legal and political challenges presented to a liberal feminist critique in a South African constitutional context

Summary

This article explores critically whether the liberal feminist understanding of women's situation under conditions of patriarchy (in its critique of liberal philosophy) has the potential to uncover the complex nature of the (legal) harm inherent to gender-specific sexually explicit material. By virtue of the fact that liberal feminism has emerged from classical liberal theory, this school of feminism appears to struggle in balancing the interests of a free, equal and democratic society with the pressing interests of women to live in a society which is free from both direct and indirect gender-specific violence. Liberal feminism's often uncritical acceptance of classical liberal principles would appear to render it virtually incapable of appreciating (female) sexuality as a social construct. And as a consequence, sexually explicit speech is not *per se* deemed sexist or harmful to women, because mere images are not understood to have the capacity to cause harm. Accordingly, to justify legal intervention, harm must either be imminent and directed against women specifically, or must constitute the advocacy of hatred that constitutes incitement to cause harm. Seen in this context, this article seeks to determine whether liberal feminism could conceptualise sexually explicit material as a violent mode of expression within a South African constitutional context.

Konseptualisering van die seksueel eksplisiete as vrye uitdrukking: Die bepaalde regs- en politiese uitdagings wat aan 'n liberaal feministiese kritiek gestel word binne 'n Suid-Afrikaanse grondwetlike konteks

Hierdie artikel ondersoek krities of die liberale feministiese begrip van vroue se situasie onder die patriargie (as kritiek op die liberale filosofie) oor die potensiaal beskik om die komplekse aard van die (regs)skade wat inherent tot geslagspesifieke seksueel eksplisiete materiaal is, bloot te lê. Weens die feit dat die liberale feminisme uit die klassieke liberale teorie ontstaan het, vind hierdie skool van die feminisme dit skynbaar moeilik om die belange van 'n vrye, gelyke en demokratiese samelewing te balanseer met die dringende belang van vroue om in 'n gemeenskap te leef sonder sowel direkte as indirekte geslagspesifieke geweld. Die liberale feminisme se dikwels onkritiese aanvaarding van klassieke liberale beginsels veroorsaak dat die paradigma skynbaar feitlik nie oor die vermoë beskik om die (vroulike) seksualiteit as 'n sosiale konstruksie te waardeer nie. En gevolglik word seksueel eksplisiete spraak

nie *per se* as seksisties of skadelik teenoor vroue beskou nie, want blote afbeelde beskik nie oor die vermoë om skade te berokken nie. Dus om regsintervensie te regverdig, moet skade of dreigend en direk op vroue gerig wees of dit moet die verkondiging van haat wat aanhitsing om leed te veroorsaak, uitmaak. In hierdie konteks beskou, word daarom gepoog om vas te stel of die liberale feminisme seksueel eksplisiete materiaal binne 'n Suid-Afrikaanse konstitusionele konteks as 'n gewelddadige vorm van uitdrukking sou kon konseptualiseer.

Liberal feminism is rooted in the belief that women, as well as men, are rights-bearing autonomous human beings. Rationality, individual choice, equal rights and equal opportunity are central concepts for liberal political theory. Liberal feminism, building on these concepts, argues that women are just as rational as men and that women should have equal opportunity with men to exercise their rights to make rational, self-interested choices.¹

A distinctively feminist theory conceptualizes social reality, including sexual reality, on its own terms ... [t]his requires capturing it in the world, in its situated social meanings, as it is being constructed in life on a daily basis. It must be studied in its experienced empirical existence, not just in the texts of history (as Foucault does), in the social psyche (as Lacan does), or in language (as Derrida) does. Sexual meaning is not made only, or even primarily, by words and in texts. *It is made in social relations of power in the world, through which process gender is also produced.*²

1. Introduction

The conceptualisation and possible regulation of adult³ gender-specific⁴ sexually explicit⁵ material is arguably one of the oldest and most vexing of controversies. This has been, in part, due to a failure to agree on an acceptable (and workable) legal framework⁶ within which to situate the debate, coupled with a lack of consensus on an appropriate paradigm and suitable (legal) definition. And while most legal jurisdictions would cautiously

1 Freeman 2001:1106.

2 MacKinnon 1989:129. Emphasis added.

3 'Adult' implies that the material in question consists of sexually explicit images, irrespective of how created, of women who are above eighteen years of age.

4 'Gender-specific' denotes that the material in question, through the medium of pictures (including films, photographs, sketches or prints) or sexually explicit words and prose, contains images of adult (heterosexual) women.

5 Gender-specific sexually explicit material thus consists of sexually explicit images, irrespective of how created, of adult women specifically produced for, and consumed by, the adult male heterosexual market, to be set apart, therefore, from so-called "child", "gay" and "lesbian sexually" explicit material. Van der Poll (2010:387) terms this genre "adult heterosexual pornography".

6 It will be argued that a rights-based (*i.e.* constitutional) framework is best suited to address the various legal implications of gender-specific sexually explicit material.

agree on the use of the term “pornography”⁷ (or even “obscenity”),⁸ few have ventured forth to approach the subject from a distinctly feminist (or “woman-centred”)⁹ perspective.

Yet within a legal and constitutional context, there exist compelling reasons to assume a critical feminist stance on material deemed sexually explicit, as only a feminist analysis has the potential to draw into the debate the importance of fundamental human rights, the superficiality of equality rhetoric (and its hidden consequences),¹⁰ the construction of sexuality (and gender),¹¹ the significance of (social) representation, the legitimacy of state power in relation to questions of regulation, and so on. Since no philosophical tradition other than feminism analyses the patriarchal nature of institutions, only feminist jurisprudence has the potential to facilitate a critical analysis of the law as a patriarchal construct.¹² The feminist movements in Northern America, Europe and Australasia have, for example, provided valuable (legal) insights into the situation of women by conceptualising patriarchal power and sexually explicit material as threats to gender equality.¹³ However, due to the diverse nature of feminist thought, and the multiplicity of feminist accounts of women’s oppression,¹⁴ a broad and general feminist analysis will arguably be hard-pressed to make critical sense of, for example, the human rights implications of sexually explicit material deemed harmful to women.

The socio-political reality of women in South Africa accentuates that the context within which the debate must be situated is not exclusively

7 Although no legal definition exists, the terms “pornography” or “pornographic material” are widely encountered in Anglo-American jurisprudence and denote material of a graphic, sexually explicit nature.

8 The terms “obscenity” and “obscene material” are especially employed in the jurisprudence of the Supreme Court of the United States. See *Ex parte Jackson* 96 US 727 (1877) 736-737; *United States v Chase* 135 US 255 (1890) 261; *Robertson v Baldwin* 165 US 275 (1897) 281; *Public Clearing House v Coyne* 194 US 497 (1904) 508; *Hoke v United States* 22 US 308 (1913) 322; *Near v The State of Minnesota* 28 US 697 (1931) 716; *Chaplinsky v New Hampshire* 315 US 568 (1942) 571-572; *Hannegan v Esquire Inc* 327 US 145 (1946) 158; *Winters v The State of New York* 333 US 507 (1948) 510; *Beauharnais v The State of Illinois* 343 US 250 (1952) 266; *Samuel Roth v United States* 354 US 476 (1957) 484; *Marvin Miller v State of California* 413 US 15 (1973) 24, and *American Booksellers Inc v Hudnut* 771 F2d 323 (7th Cir) (1985) 328.

9 The term “woman-centred” denotes a perspective that emanates from, and thus seeks to highlight, the unique experiences and perspective of women under a pervasive system of oppression and domination.

10 Albertyn & Kentridge 1994:152-153; Williams 1991:15.

11 In this article, a “gender(ed)” perspective proceeds from the politically and culturally constructed perspective of what it means to be “female”. See also Van der Poll 2007:8 footnote 43.

12 I employ the term “patriarchy” to refer to the pervasive dominance in (and of) society, law and politics by the male hierarchy. See also Jaggar 1988:102-103.

13 Hansson & Russell 1994:431-436.

14 Van Marle & Bonthuys 2007:15.

that of a history of repressive moralism and conservatism. South Africa's history of racial and/or gender oppressive inequality also created a climate in which social evils, notably violence against women, could flourish.¹⁵ Consequently, a suitable theoretical framework should not only formally embrace unconditionally the strong non-sexist and non-racist spirit of the South African legal and constitutional order, but should also be capable of recognising and addressing the plight of women under conditions of violence and subordination.

A suitable framework must accordingly rise to the challenge of establishing a critical legal discourse that could be utilised both as analytical and equality framework. Since liberal thought constitutes the preferred conceptual framework for addressing the legal and/or constitutional ramifications of sexually explicit material in most (Western) legal systems, the debate is unavoidably cast within the context of the right to freedom of speech and expression. Under the powerful influence of United States First Amendment jurisprudence, sexually explicit material enjoys considerable constitutional protection. It has become exceptionally difficult to move United States obscenity jurisprudence away from its historical (and decidedly moralistic) concern with prurience and offensiveness. Since sexual explicitness *per se* is the focal point, it becomes near impossible to re-conceptualise the issue in terms of the pressing concerns of sexual objectification and sexualised gender-specific violence. And thus, in almost every instance (and this sentiment is also echoed by the South African Constitutional Court),¹⁶ freedom of expression would triumph over the (competing) constitutional concerns for human dignity, personal security and equality.

This article seeks to establish whether it will be at all possible to mount a successful constitutional challenge within the rubric of freedom of expression against gender-specific sexually explicit material employing the (rather unavoidable) framework of liberal thought. And thus the question will be posed as to whether liberal feminist thinking, as critique of liberal philosophy, has the capacity to meet the challenges presented by a legal context in which women's pressing constitutional interests in equality, human dignity and personal security are accentuated. To this end, the distinct conception of women's oppression yielded by liberal feminism will be critically evaluated against the backdrop of a rather unique feature of the South African constitutional democracy,¹⁷ notably the prohibition

15 Fedler (1996:50) rightly argues that a response to sexually explicit material must extend beyond individual responses, and only context can facilitate constraints in subjective meaning.

16 In *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 CC; *South African National Defence Force Union v Minister of Defence* 1999 4 SA 469 CC; *Kauesa v Minister of Home Affairs* 1995 11 BCLR 1540 NmS, and *Banana v Attorney-General* 1999 1 BCLR 27 ZS.

17 The South African constitutional democracy is characterised by the supremacy of the *Constitution* and the incorporation of a justiciable charter of fundamental rights and freedoms.

of so-called hate speech, as a means to promote the fundamental (and potentially competing) constitutional values of liberty, equality and human dignity.¹⁸

Consequently, the themes that will be addressed in this article centre upon liberal feminist conceptions of the situation of women as these relate to sexually explicit material as a possible threat to gender equality. In what follows, a *brief* account of feminist theory in modern jurisprudential thought will be provided for two reasons. First, to set out the broad (historical and theoretical) ambit within which the legal discourse on the oppression of women is conducted and, secondly, to serve as platform for a critical assessment of the type of feminist framework that may be best suited to facilitate a women-centred analysis of the impact of sexually explicit material on the inalienable rights and freedoms of women.

2. Feminist theorising¹⁹

In spite of the diversity within and interdisciplinary nature of current feminist discourse, common touchstones within its structure can be identified. One of the primary tasks of feminism is to create awareness of the ways in which patriarchy has distorted issues of gender, law and politics. The various foundations for the (legal) subordination of women that have been highlighted in feminist discourse thus all serve to facilitate a degree of substantive change. The exposure of myths about patriarchy²⁰ and legal objectivity,²¹ the identification of discriminatory practices, the undermining of traditional boundaries between the “personal” and the “political” and its commitments to substantive and social change, are all common benchmarks within the structure of feminist theory. The political nature of feminist discourse is particularly evident in its conceptualisation of women’s oppression. Most feminist theories view the oppression

18 Human dignity, equality and freedom are recognised as fundamental constitutional values in sections 1(a), 7(1), 9, 10, 36(1) and 39(1)(a) of the *Constitution of the Republic of South Africa*, 1996. These values “must suffuse the whole process” of constitutional adjudication and “are derived from the concept of an open and democratic society based on freedom and equality”. See Sachs J in *Coetsee v Government of the Republic of South Africa* 1995 10 BCLR 1382 CC:paragraph 46.

19 Bender (1988:5-6) and Jaggar (1988:5) date the term “feminism” to the early twentieth century and employ it to signify the advocacy of revolutionary changes to the status and advancement of women.

20 Scales (1986:1379) regards the myth that men have a natural right to dominate women as one of the most pervasive, and thus powerful, myths propagated by patriarchy.

21 Bender (1988:13) and Dalton (1988:1) argue that the law and legal system have, almost without exception, confined the roles of women to those of wife, mother and domestic, with the most powerful public roles reserved for and by men. The male character of law is, for example, illustrated by the positivistic doctrine that all law is “man-made”.

of women as the consequence of human agency,²² which manifests as the imposition of unjust restrictions²³ on women's freedom and equality, suggesting that the problem is caused by one group actively subordinating another group to further its own interests. Liberation then becomes the (political) correlate of oppression, resulting in release from oppressive constraints. Therefore, a feminist world view includes two groups with conflicting interests and thus presupposes a dynamic view of society that is, in some instances, strongly influenced by the Marxist idea of the (economic) class struggle.

The diversity and complexity of current feminist thought largely emanate from the women's liberation movement and consciousness-raising groups of the 1960s. Historically, two waves of feminism can be identified in the United States. Whereas the first wave spans almost one hundred years from 1830 to 1920 (giving rise to the notion of formal or "strict" equality), the second wave, resulting in calls for substantive equality based on the actual social, economic and political disparities between individuals and groups,²⁴ dates from 1960 to the present,²⁵ and includes postmodern, ethical and postcolonial feminism.²⁶ Since feminist legal theory in modern jurisprudential thought developed in three distinct phases,²⁷ a brief exposition of these will follow.

2.1 Conceptual development: The phases of feminism

Whereas first-phase feminism²⁸ is characterised by its classical liberal (or egalitarian) perspective and its focus on campaigns directed at the extension of civil rights and liberties to women resulting in calls for the fair, rational and impartial treatment of women,²⁹ second-phase feminism³⁰ produced sophisticated theoretical accounts of the differences between

22 Compare the radical feminist view of women's oppression which proceeds from the argument that male oppression in fact *denies* women agency to take decisions about their own bodies and/or lives.

23 Jaggar (1988:6) employs a useful example: the democratic decision to divide the limited food supply on a desert island into equal parts between the survivors of a shipwreck would impose a restriction on the freedom of each survivor to eat his/her fill. However, in this instance, the restriction on freedom would not be oppressive, because the distribution is just.

24 De Vos 2001:59 footnote 27.

25 Kemp & Squires 1997:3.

26 Van Marle & Bonthuys 2007:37-40.

27 For a useful account of the different phases in feminist thought, see Van Blerk 1996:174-183.

28 Although first-phase feminism is a product of the nineteenth century, Bender (1988:12 footnote 25) traces the earliest stirrings of feminism as far back as 1792 when Mary Wollstonecraft published *A vindication of the rights of women*.

29 It is from this civil and political context that liberal feminism emerged.

30 The women's liberation movement of the 1960s surpassed all earlier waves of feminism in the ambit of its concerns and depth of its critiques, reflecting significant development in the political perspective of contemporary feminism.

men and women.³¹ The widespread growth in educational opportunities for women, coupled with their eventual entry into previously all-male professions and the recognition of reproductive rights, paved the way for the women's liberation movement of the 1960s.³² The various conceptualisations of women's difference produced a rich political and philosophical context from which radical feminism³³ and relational feminism,³⁴ respectively, emerged. Third-phase (or postmodern) feminism introduced a scepticism of a single solution to the oppression of women and thus assumes an anti-essentialist stance on equality and difference.³⁵ This has entailed a critique of modern foundationalist theories based on the conviction that a single theory could in itself explain the many facets of the oppression of women.³⁶

Both first- and second-phase feminism have impacted significantly on feminist conceptions of sexually explicit material. This influence is significant for, under the pervasive influence of United States First Amendment jurisprudence, sexually explicit material is conceptualised (and safeguarded in the "marketplace of ideas")³⁷ as a particular mode of speech and expression. This particular conception thus allows space for sexually explicit material as part of the foundation of an open, free and democratic society.³⁸ Free expression is typically viewed as fundamental to a constitutional democracy and directly supports those values which

31 West (1991:201; 213-214) points out that, initially, difference was conceived as biological and women's role as child bearers the root cause of oppression.

32 Kemp & Squires 1997:3.

33 Smith (1993:9) points out that radical feminism views the difference between men and women as one of power and advocates the idea of "sexism as gender, the idea that gender is socially constructed within a hierarchy that embodies male domination and female subordination. Everything else flows from that. One may agree or disagree with this idea, *but it cannot be reduced to another theory*". Emphasis added.

34 Smith (1993:9) employs the term "relational feminism" as opposed to "maternal feminism". Gilligan (1977:481-517; 1979:431-446) distinguishes a distinctly male ("ethic of justice") versus distinctly female moral development ("ethic of care").

35 Postmodern feminists perceive the idea of Woman (like the idea of Self) as socially constructed, an idea built on the claim of De Beauvoir (1949: page nos?) that one is "not born, but rather become[s] a woman".

36 Van Marle & Bonthuys 2007:37-38.

37 This paradigm has, to a large extent, emanated from John Stuart Mill's *On liberty*, and forms the basis of United States First Amendment jurisprudence. The relevant section of the First Amendment reads: "Congress shall make no law ... abridging the freedom of speech, or of the press". The appropriate remedy for the harms produced by speech, according to Brandeis J in *Whitney v The State of California* 274 US 357 (1927) 377, is thus "more speech, not enforced silence".

38 In the words of Nicholas Wolfson (1997:129), "[t]he rationale of the First Amendment is that the benefit of free speech is well worth the risk".

advance political debate and further individual self-fulfilment and autonomy.³⁹

Within this doctrinal context, liberal feminism has been instrumental in advancing constitutional arguments for the reasonable and justifiable restriction of sexually explicit material. Yet such an approach has hardly been without distinct challenges. Since sexually explicit material is scrutinised under the rubric of freedom of speech and of the press, courts have endeavoured to distinguish constitutionally protected modes of expression from so-called “obscenity”⁴⁰ intended to appeal to the “prurient interest”,⁴¹ the applicable standard or test is inherently, and thus unavoidably, subjective.⁴² And yet the courts appear unaware of the fact that such a libertarian and moralistic conception is premised on false assumptions about the applicable social and political context within which a dialogue of this nature unfolds, and the degree of autonomy enjoyed by men and women in a social design characterised by systemic gender inequality. It appears to be near impossible to re-conceptualise (and thus re-position) the Supreme Court’s obscenity jurisprudence and moralistic obsession with prurience, offensiveness and sexual explicitness *per se*. To re-conceptualise the matter in terms of sexual objectification and sexualised gender-specific violence often presents itself as all but an

39 Mill 1859:77; Dworkin 1981:178-179; 194-199. See also *Abrams v United States* 250 US 616 (1919); *Whitney v The State of California* 274 US 357 (1927) 377; *Chaplinsky v New Hampshire* 315 US 568 (1942) 571-572, and *Samuel Roth v United States* 354 US 476 (1957) 484.

40 One of the oldest definitions of obscenity is found in the *Obscene Publications Act* of 1857, revisited in in *The Queen on the Prosecution of Henry Scott, Applicant v Benjamin Hicklin and Another, Justices of Wolverhampton, Respondents* (1868) LR 3 QB 360. This judgment was followed in all Anglo-American jurisdictions: see *United States v Kennerly* (DC NY) 209 F (1913) 119; *MacFadden v United States* (CA3dNJ) 165 F (1909) 51; *United States v Bennett* (CC NY) 16 Blatchf (1879) 338; *United States v Clarke* (DC Mo) 38 F (1889) 500, and *Commonwealth v Buckley* 200 Mass 346 86 NE (1909) 910.

41 Prurient interest could be said to be the lowest common denominator, the assumption being that the material is bound to be sexually arousing to at least someone. Yet there exists a range of depictions (from advertisements for designer underwear to images contained in medical or gynaecological reference works) which are bound to stir *some* prurient interest. And so a subjective moralistic criterion is effectively elevated to a constitutional standard. The danger is obvious: when one moralises about (sexual) behaviour, one is certain to moralise about its consequences, as aptly illustrated by Easterbrook J in *American Booksellers Inc v Hudnut* 771 F2d 323 (7th Cir) (1985) 328 when he declared: “no one [will] believe that the actress suffered pain or died” or “that there was a *real* sexual submission”. Emphasis added.

42 The constitutional standard was formulated in *Marvin Miller v State of California* 413 US 15 (1973) 24 and requires an enquiry in three parts: “(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious artistic, political, or scientific value”.

insurmountable challenge. This dilemma was fittingly encapsulated by Stewart J when he lamented:

I shall not today attempt to define the kinds of material I understand to be [pornography]; and perhaps I could never succeed intelligibly doing so. But I know it when I see it.⁴³

And Sachs J's (somewhat rueful) response:

[m]r Justice Potter Stewart might have known obscenity when he saw it, but with respect, I do not, nor would in any way claim to any intuitive and immediate recognition of what is indecent.⁴⁴

United States jurisprudence is thus presented with a distinct moralistic challenge when sexually explicit material is judged under the rubric of the First Amendment. And not surprisingly, freedom of expression is found to triumph over the (competing) constitutional concerns for human dignity, equality and security of the person. Andrea Dworkin rightly sounds a stern warning:

[i]f equality interests can never matter against first amendment challenges, then speech becomes a weapon used by the haves against the have-nots; and the First Amendment, not balances against equality rights of the have-nots, becomes an intolerable instrument of dispossession, not a safeguard of human liberty.⁴⁵

Yet no constitutional democracy places an *absolute* value on personal liberty and in a pluralistic society (such as South Africa) characterised by entrenched socio-political divisions, the prioritisation of individual freedom would almost certainly prove to be problematic. So the question arises: Can liberal feminist thought potentially facilitate a comprehensive, yet nuanced, human rights argument for the restriction of sexually explicit material within the (rather unavoidable) context of the doctrine of freedom of expression? In order to answer this question, a critical appraisal of the respective theoretical tenets of liberal feminism will follow.

3. The philosophy of liberal feminist thought

Liberal feminism is an extension of traditional liberalism which emerged with the growth of capitalism in the seventeenth century. Liberalism, which dominates Anglo-American legal and political thinking, raised demands for democracy and political liberties. These demands were based on the Enlightenment assumption that there is a "universal, stable and pre-political identity which is owed fundamental rights due to one's human status rather than social, political, or historical conditions".⁴⁶ The core elements

43 Stewart J in *Jacobellis v The State of Ohio* 378 US 184 (1964) 197.

44 Sachs J in *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 CC:paragraph 108.

45 MacKinnon & Dworkin 1997:319.

46 Fields 1996:86.

of liberalism, namely abstract individualism, neutrality, rationality, pre-political private rights and the distinction between the private and public sphere, have all been incorporated into liberal feminist theory.

Since individual autonomy is the cornerstone of liberal thought, liberalism conceptualises humans as independent, rational beings. The human capacity for reason is assumed to be a mental capacity that is possessed in equal measure by all human beings.⁴⁷ Consequently, physical capacities (or incapacities) are conceived as irrelevant to liberal political theory, for liberalism does not place any philosophical importance on the (accidental) differences between individuals in status, class, race or sex.⁴⁸ The liberal conception of rationality is thus based on the assumption that the individual is ontologically prior to society.⁴⁹ Since individuals are the basic constituents of social groups, liberalism perceives the self as an autonomous, rational being who joins social life only to further self-centred interests⁵⁰ and values.⁵¹ The liberal account of human motivation and rationality indicates a belief that human nature remains constant, with the result that individual autonomy is viewed as both universal and not socially or culturally constituted.⁵²

Liberalism professes to protect the individual's freedom and autonomy by the endorsement of private rights on the basis of the human capacity for moral deliberation. Individual wants and desires are treated as pre-political constants, developed prior to, and in isolation from, the collective and political sphere.⁵³ To this end, a neutral attitude to the private (moral) life of the individual (and the plural and competing conceptions which constitute it) is adopted. Only minimal interference by the state and/or law is tolerated.⁵⁴ Liberalism's belief in the ultimate worth of the individual is expressed in political egalitarianism: if all individuals have intrinsic and ultimate value, then their dignity must be reflected in political and legal institutions that do not subordinate any individual to the will or judgment of another.⁵⁵ The good society, based on basic liberal values, must therefore

47 Whereas Rousseau and Kant conceived the essence of the human capacity for reason as the ability to grasp the rational principles of morality, Hobbes and Bentham understood rationality as the capacity to calculate the best means to an end that an individual wishes to achieve. In turn, Locke, Rawls and Nozick attempt to maintain a balance between the moral and instrumental aspects of rationality.

48 Melden 1977.

49 Fallon 1989:1695; Gardbaum 1992:685.

50 On the question of individual interests, liberal theorists tend toward general agreement that each individual has desires and interests that, in principle, can be fulfilled separately from the desires and interests of others, coupled with the assumption that human beings always inhabit an environment of relative scarcity and the resources necessary to sustain life are always limited.

51 Sandel 1984:6.

52 Buchanan 1988-1989:852.

53 Fallon 1989:1700.

54 Buchanan 1988-1989:852.

55 Dworkin 1977:172.

protect the dignity of each individual⁵⁶ and promote individual autonomy and self-fulfilment. The state is the politically neutral institution that liberals charge with protecting persons and property and, simultaneously, guaranteeing the maximum opportunity for autonomy and self-fulfilment. In an attempt to delineate legitimate state intervention in the life of the individual, liberal theory distinguishes between so-called “public” and “private” realms. Whereas the public realm includes those aspects of life that may legitimately be regulated by the state, the state is thought to have no legitimate authority to intervene in the private realm.⁵⁷ Conservative classical liberal theorists, for example, view the primary task of the liberal state to secure external defence, internal order and uphold the sanctity of contracts. The state charged with the preservation of individual freedom must merely fulfil the role of “night watchman”.⁵⁸ Contemporary liberals, however, assign much further-reaching functions to the state, as it is expected to mitigate the worst effects of a modern market economy by providing a guarantee of a minimum standard of living and education.⁵⁹

Since liberal feminism is both an extension and a critique of traditional liberal thinking, a critical assessment of the various theoretical premises of liberal feminist thought follows.

4. A critical assessment of the theoretical tenets of liberal feminism

The core belief of liberal feminism is expressed in the argument that women, as individual rational beings, are entitled to the equal enjoyment of basic liberties and rights. It follows that women should be free to pursue their interests and “explore their full potential in equal competition with men”.⁶⁰ Since liberal feminism is grounded in the traditional liberal view of human beings as autonomous rational agents, it presupposes that physical characteristics such as race and sex are irrelevant to political theory. Male and female natures are thus deemed identical, for rationality (and not physicality) is emphasised. Liberal feminism thus accepts the liberal idea of creating a society which maximises individual autonomy, formal equality and equal opportunity for individual self-fulfilment.

In what follows, it will be argued that at least five theoretical premises of liberal feminism are problematic when situated within the context

56 Gewirth (1992:10) argues that the dignity of the individual is thought to form the basis of the liberal conception of (individual) human rights. For an assessment of human dignity as both a right and value in South African constitutional jurisprudence, see Currie & De Waal 2005:272-279.

57 For a critique of these two categories of distinction, see Milo 2008:140-143.

58 Scheffler (1976:59) points out that Nozick, although a contemporary liberal, still subscribes to this theory of the state.

59 This understanding of the role of the modern liberal state led Rawls to formulate the theory of the welfare state as his conception of social justice.

60 Bryson 1992:159.

of (female) sexuality and gender-specific sexual explicitness. These problems result, to a large extent, from liberal feminism's often uncritical endorsement (and at times even misunderstanding) of fundamental liberal principles. By accepting the basic assumptions of liberal feminism, the latter shies away from confronting the relationship between state power and the status of women within a male-dominated society.

Unmodified liberal principles applied uncritically to the situation of women will, therefore, be hard-pressed to provide an understanding of the nature and causes of women's oppression and are thus unlikely to provide a comprehensive strategy for ending it. Moreover, it will be argued that social and legal reform is only likely to succeed if it is based on an understanding of society's complex power structures and the interrelationship between "public" and "private" life. Consequently, a liberal feminist analysis will in all likelihood produce only a rather limited constitutional argument against sexually explicit material. Each of the five theoretical premises of liberal feminism that raise particular problems when applied to the situation of women will now be discussed.

4.1 The liberal feminist position on the role of the law and the state

The demands that liberal feminism makes on the law and the state would seem to involve the use of these two institutional powers far beyond that envisaged in classical liberal theory.⁶¹ The liberal feminist demand for, *inter alia*, maternity benefits or child care facilities in the workplace opens the door to (and are indeed premised upon the idea of) state intervention in the private realm of the individual. Not only could these demands be considered to increase women's dependence on the state,⁶² but also to obscure the distinction between the private and public domain. It could, therefore, be argued that the liberal feminist call for increased state power stands in direct contradiction to the liberal ideals of individual autonomy and self-determination.

Yet liberal feminism does not seem to conceive of extensive state intervention in the private life of individuals as a threat to individual freedom and autonomy. It could, therefore, be argued that the liberal feminist view of state intervention as a means to individual freedom and self-determination rests on a misunderstanding of the role of the liberal state for two reasons. First, liberal feminism's conception of the role of the state involves an uncritical acceptance of the assumption that all competing groups have potentially equal access to state power. Secondly, it assumes that state power will be used impartially to facilitate equal treatment and

61 Bryson (1992:165) points out that, although liberal thought has moved away from its classic *laissez-faire* position towards a greater degree of state responsibility for economic and general social welfare, this trend has encountered opposition from American neo-liberals of the New Right.

62 Borchorst & Siim 1987; Hernes 1988; Siim 1991 and Smart 1989.

thus promote justice and the general social good. This misunderstanding of the role of the state and the nature of state power means that liberal feminism can neither anticipate nor explain the failure of (or opposition to proposals for) legislative reforms.

The reason for this can be attributed to the fact that, although the liberal feminist call for state intervention extends beyond conventional liberal thinking, liberal feminism still has no theoretical conception of the structural inequalities and vested interests that block women's progress in the (patriarchal) state. The mere pointing out of (social) injustices will not guarantee that the (economically and/or politically) powerful groups in society will make the necessary sacrifices and adjustments or surrender their public power and economic superiority in order to, for example, participate more fully in family life. In its fundamental misunderstanding of the role of the liberal state and the nature of state power lies the first theoretical flaw of liberal feminism.

4.2 The liberal conception of human nature

The liberal conception of the characteristics of human nature exposes a deep-rooted problem of liberal feminism, particularly in how it conceives of human self-sufficiency, individualism and rationality.⁶³

It was pointed out earlier that the liberal conception of human nature rests on the assumption that each human individual is essentially rational, independent, competitive and autonomous.⁶⁴ As the starting point of liberal political theory, this assumption seeks to determine what the circumstances might be in which essentially solitary individuals will agree to come together to constitute a civil authority, what might justify them in doing so, how conflict might be prevented and what these individuals might assent to as the basic principles governing their agreement.

These questions have typically been answered with the help of various versions of the social contract theory which specify the interests that individuals have in civil society, namely the protection of life, civil liberties and property, and limit the powers of association to fulfil these interests. Much of the credibility and endurance of the social contract theory derives from the assumption that individuals are essentially self-sufficient agents who only join civil authority to further their own interests.

Yet the idea of individual self-sufficiency is, at best, an unrealistic assumption about human nature. It ignores the co-operation, nurturing and mutual support that constitute an essential basis for human society and that have, at least historically, been central to women's lives. Therefore, the liberal assumption of individual self-sufficiency is plausible only if

63 Putman 1995:298-331 and Hubbard 1993:147.

64 Jaggar (1983:40) describes the liberal idea of human nature "political solipsism" with the intent to show that the liberal view of individuals as independent, rational beings ignores human co-operation and mutual support.

one ignores human (reproductive) interdependence.⁶⁵ This unrealistic assumption about human independence could, in turn, question the justification for establishing political or civil institutions designed to promote human well-being and fulfilment when juxtaposed with the liberal call for maximum freedom for individuals to define or interpret their own needs. Consequently, liberal theorists require that political institutions must be as neutral as possible about any particular conception of the good life or of what gives value to life.⁶⁶

Yet this very requirement can be considered to constitute a withdrawal from the most fundamental problems that confront political philosophy, namely the basic needs of human beings as a biological species. By ignoring the common biological constitution of human beings, an important avenue for determining objective criteria of human need remains unexplored by liberal political theory. Contrary to the impression created by liberal thinking, these concerns are far from irrelevant and should, in fact, serve as the starting point of any political philosophy.⁶⁷

To its credit, liberal feminism does at least provide an *implicit* challenge to the liberal assumption that the essential human characteristics are properties of individuals and are formed independently of any particular social context. Liberal feminism does challenge this assumption by highlighting the role social context plays in the cognitive and emotional differences between the sexes.⁶⁸ It follows, therefore, that liberal feminism does not conceive of human nature as a pre-political given. The challenge developed by liberal feminists seems rightly to suggest that the conception of individuals outside of a social context is logically as well as empirically impossible.

The liberal feminist challenge to abstract individualism has profound consequences for liberal political theory. By undercutting the liberal conceptions of freedom (as non-interference), equality and the presumption that individuals have certain fixed interests (thereby invalidating the liberal justification of the state), liberal feminism rightly concludes that political philosophy must rely on a much closer examination of actual social conditions.⁶⁹ Liberal feminism, therefore, seems willing to challenge the inherent male bias of the liberal conception of human nature. The excessive

65 Pateman 1986. See also Wolgast 1980.

66 Dworkin (1978:127) argues that, since the citizens of a society differ in their conceptions, the state does not treat them as equals if it prefers one conception to another.

67 The significance of these concerns are well established in the leading equality jurisprudence of the South African Constitutional Court. See *Brink v Kitshoff* 1996 6 BCLR 752 CC; *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 CC; *Harksen v Lane NO* 1997 11 BCLR 1489 CC, and *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 CC.

68 These cognitive and emotional differences are based on the argument that men and women differ in their emotional reasoning due to a distinctly different moral development. See footnote 34.

69 Bix 2003:116.

value which the liberal paradigm places on rationality at the expense of physicality also poses direct problems for women, since, in traditional Western philosophy, women have consistently been viewed in terms of their reproductive capacities and sexuality.⁷⁰ The association of women with the physical and men with the rational has obvious implications for women's demand for basic human rights.⁷¹ Moreover, the liberal idea of abstract individualism could also be said to generate inadequate conceptions of freedom and equality. The liberal conception of equality awards equal rights to every rational individual regardless of race, sex or even class. Although this understanding of equal rights appears to be progressive, it actually gives rise to serious drawbacks.⁷² These drawbacks are twofold. First, a theory of women's oppression needs to realise that human beings are not abstract individuals, but experience actual differences in power, sex, race and class. Secondly, the liberal insistence on formal equality (which will be addressed later) invokes a male standard which, to a large extent, ignores the actual (and unique) social, legal and political (or material) conditions and realities of women as an oppressed group or class.

The third related theoretical aspect in which the liberal idea of human nature is problematic, namely its conception of rationality, will be explored in the next paragraph.

4.3 The liberal conception of (human) reason

There are a number of interrelated aspects of the liberal conception of reason that are problematic. The liberal conception of reason could well be conceived as inherently male-biased and prejudicial to women, thus falling short of facilitating a basis for substantive legal and political change.

Liberal feminists have been forced to frame their arguments for the equal treatment of women in terms of women's full capacity for reason by virtue of the fact that liberalism awards basic civil and political rights to individuals on the basis of their rational capacity. This strategy is problematic for various reasons. Historically, the liberal concept of reason is based on the experiences and perceptions of men.⁷³ For centuries, "reason" has been equated with the male in Western legal and political thought and, consequently, the terms of political debate have been laid down by male theorists.⁷⁴ Since "reason" as a concept cannot be "disembodied", it is not a gender-neutral concept in Western philosophical thought as is commonly supposed by liberal feminism.⁷⁵ The liberal claim that reason is both objective and universal must, therefore, be questioned,

70 Van Marle & Bonthuys 2007:32.

71 Putman 1995:298-331 and Markus 1992:386

72 Van Marle & Bonthuys 2007:32.

73 Braidotti 1986:48.

74 Smart 1989:86.

75 Pateman 1986:505-509. This critique of human rationality was first articulated by Lloyd in her ground breaking work of 1984.

particularly since Western philosophy has defined reason in terms of overcoming 'nature' and 'emotion' which have traditionally been construed as essentially female. Consequently, the feminine has become associated with that which rational knowledge and understanding transcends. Liberal feminism's attempts to show that women are fully rational agents, therefore, essentially means that only by denying the peculiarity of their sexual or gender identity women are allowed participation in the male (rational) world of politics, philosophy and science.⁷⁶

Liberal feminism's eagerness to satisfy inherently biased criteria has effectively erased the centrality of gender, sex and sexuality in their account of women's legal and political oppression. This failure can actually serve to perpetuate injustice to women under the pretext that equality is merely a matter of satisfying a demand for equal treatment of the sexes. Moreover, liberal feminism also ignores the relationship between gender identity and patriarchal power. Since liberal feminism directs its focus only at reason as a prerequisite to basic rights and liberties, male domination and power as a barrier to (substantive) equality is completely overlooked.

By stressing the dichotomy between reason and intuition, liberal feminism could actually pave the way for the suggestion that reason and logic are (inherently) strange to feminist epistemology. Instead of highlighting the female modes of knowledge and underlining their importance, as envisaged by the liberal feminist conception of a distinctly female point of view, the suggestion that reason and logic are unfamiliar to feminist method and knowledge could actually perpetuate the discrimination and domination to which women have been subjected.⁷⁷ This could very well undermine the transformative potential of feminism, because such a view still confines women to womanhood.⁷⁸ It is also questionable whether the affirmation of differences in knowing and method could be politically useful to the feminist cause. It could open the door to the kind of moral reasoning which allows women to claim as their own the very qualities (and consequences) that male supremacy, to its own advantage, has projected upon them.⁷⁹ To the extent that women are different, liberal feminism must guard against constructing their difference in a way that could be detrimental to the advancement of women and a feminist epistemology.

4.4 The liberal conception of (gender) equality

The liberal conception of equality appears to run into immediate difficulties when it is made to apply to women. Since this conception is based on the

76 MacKinnon (1991:1287) argues that, since men have defined women as different to the extent that they are female, it would appear that women can be entitled to equal treatment only to the extent that they are not women.

77 Bartlett 1991:370.

78 Scales 1986:1380.

79 Rhode 1991:333.

Aristotelian idea of equality,⁸⁰ the liberal understanding of equality accepts the proposition that

those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness. Equality and justice are synonymous: to be just is to be equal, to be unjust is to be unequal.⁸¹

Aristotle's concept of equality provides various obstacles when applied to instances of discrimination based on gender and sex. The difficulty with the proposition that those who are alike should be treated alike is that it provides no guidance in respect of the determination of which things are alike and, therefore, equal for purposes of determining discrimination. The claim that equals shall be treated equally does not define who equals are. Therefore, the Aristotelian conception of equality turns on a prior question, namely a pre-understood establishment of which persons are, in fact, equal for the purposes of the enquiry.⁸² This has led the Supreme Court of the United States to adopt the so-called "similarly situated" test.⁸³ When a female complainant alleges discrimination, she does not only have to accept the assumption that men and women are similarly situated, but also has to show that there is a male who has received more favourable treatment. But given the vertical and horizontal gender divisions that exist in, for example, the labour market, a female employee will often not be able to point to any existing male comparator to prove discrimination.⁸⁴ Adherence to the liberal conception of equality, therefore, means that only those few women who are in the unusual position of being similarly situated to men can benefit from measures designed to eradicate discrimination. As Catharine MacKinnon states:

[t]he more unequal a society gets, the fewer such women are permitted to exist. Therefore, the more unequal society gets, the less likely the difference doctrine (for example, anti-discrimination legislation) is likely to be able to do anything about it.⁸⁵

The problems experienced by liberal feminism with regard to equality theory would seem to be the inevitable consequences of a value system which ignores the (unequal) power relations between the sexes.⁸⁶ It makes no sense for equality doctrine to require women to be the "same" as socially and politically advantaged men in order to qualify for equal treatment. Apart from the fact that the liberal idea of equality ignores the social reality of women which consists of systematic deprivation of

80 Westen 1982:543.

81 Davis 1996:197, quoting from Aristotle's *Ethica Nichomacea* Book V 3 1131a-1131b.

82 Westen 1982:543.

83 *Rostker v Goldberg* 453 US 57 (1981).

84 O'Regan 1994:69.

85 MacKinnon 1987:37-38. Emphasis in the original.

86 MacKinnon 1987:37-38.

power and resources, the failure of this idea to take account of sexual difference is highly problematic in a legal context. Liberal feminism's aspirations to compete on strictly equal terms with men has caused it to view any recognition of (sexual) difference as an admission of inferiority or as a reduction of womanhood to biological functions. This theoretical position does not allow for the ways in which the law has maintained and constructed the disadvantage of women to be questioned. It also does not allow for an examination of the extent to which the law is male-defined and built on male conceptions and interests. When women are compared to men, their opportunity to be treated as equals is, therefore, unavoidably limited to the extent of their likeness to men. The way in which similarity is measured is problematic.

This defect in the liberal model becomes particularly acute in instances where an infringement of equality arises from female-specific circumstances. It consequently becomes difficult to treat sexual assault, sexual harassment in the workplace, rape and pornography as issues of sex equality, because men (as a group) experience no comparable disadvantage or need. And, if the similarly situated test cannot be met, there exists theoretically no legal basis for complaint. Moreover, when equality is understood according to the liberal model, the assumption is that equality is the norm and that, from time to time, autonomous individuals are discriminated against. This means that systemic, persistent (group) disadvantage is not contemplated. The Aristotelian model is incapable of identifying systematic discrimination, because it assumes a universalistic, gender-neutral approach that fails to recognise that institutional structures may impact differently on women as opposed to men.

When viewed within the framework of the principles and values of the South African legal and constitutional order, a purely formal understanding of equality will indeed be hard-pressed to realise fully the ideals expressed in sections 9(2) and 9(3) of the *Constitution* which seek to respectively achieve "restitutionary"⁸⁷ and substantive equality as a means to realise the "project of transformative constitutionalism".⁸⁸ And even though South Africa's legal and political reality demands that society should "afford each human being equal treatment on the basis of equal worth",⁸⁹ formal equality is simply incapable of realising the fundamental values and object of the South African legal⁹⁰ and constitutional order. The liberal feminist

87 *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 CC:paragraph 61. See also *Bato Star Fishing v Minister of Environmental Affairs and Tourism* 2004 4 SA 490 CC:paragraph 73, and *Minister of Finance v Van Heerden* 2004 6 SA 121 CC:paragraph 26.

88 De Vos 2001:58. See also Klare 1998:155.

89 *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 CC:paragraph 41.

90 As expressed in the preamble to the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

model of equality is thus more likely to perpetuate rather than eradicate inequality.⁹¹

There seems to be little room for optimism that the liberal idea of equality can overcome its limitations and reconcile the reality of different needs with the ideal of free and open competition. Liberal feminism seems to be unable to redress the shortcomings inherent in a liberal conception of equality, because it accepts the necessity of an individualistic, hierarchal competitive society.

4.5 The liberal distinction between the private and the public sphere

The distinction between the private and the public realm in liberal legal and political theory raises its own particular problems for women. Since liberal theorists define the areas of sexuality, childbearing and rearing as belonging to the private sphere (because these activities have been conceived as natural or biologically determined), the failure to consider the possibility that the private and public worlds may, in some way, be connected or that the private realm may, in fact, be the site of sexual politics or oppression,⁹² constitutes one of liberal feminism's biggest drawbacks. As a result, liberal feminism has, to a large extent, failed to come to terms with the ways in which the domestic division of labour spills over into public life and the vested interests men may have in maintaining this division. As a political theory, liberal feminism seems to lack the ability to conceptualise the possibility that family life may be an institution that oppresses and exploits women physically, emotionally and sexually.

This theoretical difficulty is also experienced by the South African Constitutional Court.⁹³ By subscribing to the liberal political assumption that the demarcation between the public and the private sphere is sound in an assessment of the possible constitutional implications of sexually explicit material, the Constitutional Court appears unaware of the possibility that the private sphere, in which the individual is free to exercise all moral choices, could be construed as a seat of oppression and exploitation, manifesting in the physical, emotional and sexual abuse of women.⁹⁴

91 Alberyntyn & Kentridge 1994:152-153; De Vos 2001:59. Canadian jurisprudence favours a more context-based approach which is sensitive to the actual social circumstances of individuals or groups. For a feminist critique of Canadian equality jurisprudence, see Mahoney 1994:437; 1992:759. See also *Mahe v The Queen* (1988) 42 DLR (4th) 514 and *Andrews v Law Society of British Columbia* (1989) 56 DLR (4th) 1. For the application of Canadian equality jurisprudence by the South African Constitutional Court, see *President of the Republic of South Africa v Hugo* 1997 6 708 CC and *Harksen v Lane NO* 1997 11 BCLR 1489 CC; paragraph 50-53.

92 Pateman 1987:118; Morris 1994:352.

93 *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 CC.

94 Pateman 1987:118; Morris 1994:352. See also Van Marle & Bonthuys 2007:31-32.

Consequently, women's experiences of sexual violence occurring in the private domain are overshadowed, even silenced, and so the real harm is overlooked and/or misconstrued. Within the context of sexually explicit material, the actual harm is not, therefore, to be found in the curtailment of the individual's right to privacy and free moral choice, but in the fact that both the existence and the (violent) impact of patriarchal power and entrenched male privilege are rendered invisible in the private sphere.

Liberal feminism seems to be incapable, however, of conceptualising the ways in which sexuality and sexual experiences are related to the dominant structures of patriarchal power. As a result, domestic violence is rendered invisible, rape becomes an unfortunate (and random) personal experience,⁹⁵ and sexual activity, including family planning, reproduction and the use of sexually explicit material are simply matters of individual, private choice. Gender-specific sexual violence is thus all too readily reduced to an arbitrary and indiscriminate *individual* incident,⁹⁶ all as a direct consequence of the fact that female sexuality, both expressed and conceptualised in the creation, use and dissemination of sexually explicit material, is understood as a matter exclusive to the private sphere where the individual is to remain undisturbed so as to freely exercise all moral choices.⁹⁷ The remarks by the South African Constitutional Court that "[i]t seems strange that what one can do in the privacy of one's bedroom one cannot look at in one's bedroom"⁹⁸ and "[w]hat erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody's business but mine ... [i]t is certainly not the business of society or the State"⁹⁹ appears completely unaware of the fact that the private sphere is a seat of male privilege, manifesting in gender-specific oppression, subjugation and harm.¹⁰⁰

The liberal concept of a private area of life free from power struggle and political interference, therefore, poses obvious problems for a theory of women's liberation. The liberal understanding of a private realm is thus far removed from, for example, the (radical) feminist argument that all existing social institutions and relationships, whether private or public, are part of a patriarchal power struggle.¹⁰¹

95 Bronstein 1994:202-227.

96 Bronstein 1994:202-227.

97 Van Marle & Bonthuys 2007:34-35.

98 Sachs J in *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 CC:paragraph 112.

99 Didcott J in *Case; Curtis v Minister of Safety and Security* 1996 5 BCLR 609 CC:paragraph 91.

100 Clark 1983:50.

101 Eisenstein (1984:215) points out that the radical feminist attack on the private/public distinction is not an attack on privacy as an ideal, nor does it advocate political involvement in personal and family life. Radical feminists simply seem to claim that the relations of family are political and should not be. But compare Wolin 1988:113-115.

The question as to whether liberal feminism, as legal and political framework, is well suited to a critical analysis of the distinct harm produced by gender-specific sexually explicit material will be considered next.

5. The suitability of liberal feminism as both a theoretical and constitutional framework

Although no political theory which seeks to address the situation of women under conditions of patriarchy can be satisfactory in all aspects, the liberal conception of women's oppression would seem to produce quite a number of interrelated problems. It was argued in the previous paragraphs that the liberal paradigm is based on an incomplete (and biased) view of human nature, with the result that it cannot provide an adequate understanding of human motivation and behaviour. The liberal paradigm thus seems unable to predict political and/or legal outcomes or to provide a workable strategy for women's liberation. In employing male experiences as the (legal) norm, liberal feminism imposes particular goals and standards upon women under a universal guise. It requires women to conform to the male standard rather than to highlight the unique predicament faced by women as a group.¹⁰² Even if the values and priorities of liberal feminism are accepted, its failure to address society's power relations in both the private and the public realm can have serious legal and political consequences. It need not be argued that society's power relations and reproductive and domestic needs will not simply vanish once it is recognised that women have a right to fulfil themselves in other roles. Therefore, the liberation of women from domesticity, a cause for which liberal feminism fought long and hard, still leaves the question of child care and domestic responsibilities unanswered. The liberal feminist proposals of flexible work arrangements or even greater male involvement in the rearing of children and/or domestic tasks create problems in themselves, for it remains difficult to see why a free-market system should accommodate these changes or why a majority of men should willingly embrace activities which feminists have considered to be inherently unfulfilling.

The possibility also exists that the individualistic assumptions of liberal feminism may pose difficulties for a feminist political theory based on the recognition of shared gender interests. The liberal belief that it is up to each person to make the best of his/her own life stands in direct opposition to feminism's awareness of group disadvantage and the need for collective action.¹⁰³ This dichotomy lies at the heart of liberal feminism.

102 MacKinnon (1993:611) attributes this to "male supremacist jurisprudence" which establishes qualities valued by men to serve as standards for, among others, judicial review, norms of judicial restraint, reliance on precedent, separation of powers and the division between public and private law.

103 Burchell (1998:41) argues that this dichotomy also fails to understand the potential harm caused to groups, calling into question whether it is possible to clearly identify a person or persons whose dignity may be impaired by the publication of sexually explicit material.

The major theoretical problems inherent to the liberal feminist conception of women's subordination thus seem to be closely related to the liberal understanding of human nature and rationality which, as was argued, are male-biased. Liberal feminism, therefore, appears ill-suited to constitute the philosophical foundation for a *comprehensive* theory of women's liberation. A theory which centralises gender, sex and sexuality (instead of underplaying them) within a social context of male domination, would not only appear to be better suited to facilitate legal and doctrinal reform, but also be capable to facilitate a comprehensive rights-based critique of gender-specific sexually explicit material.

One unique feature of the South African *Constitution* does, however, open up the possibility of framing a critique of sexually explicit material within the larger liberal paradigm. Section 16 entrenches the right to freedom of expression, including "freedom of the press and other media"¹⁰⁴ and "freedom of artistic creativity".¹⁰⁵ Section 16(2), however, delineates the right to freedom of expression by stipulating that the right in subsection 16(1) does not extend to "propaganda for war",¹⁰⁶ "incitement to imminent violence",¹⁰⁷ or the "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm".¹⁰⁸ While the wording of section 16(2)(a) is drawn from the International Covenant on Civil and Political Rights,¹⁰⁹ section 16(2)(b) emanates from long-established United States First Amendment jurisprudence.¹¹⁰ Legal restrictions on the right to freedom of expression through the prevention of the advocacy of racial hatred is well established and, in fact, recognised

104 Section 16(1)(a) of the *Constitution of the Republic of South Africa*, 1996.

105 Section 16(1)(c) of the *Constitution of the Republic of South Africa*, 1996.

106 Section 16(2)(a) of the *Constitution of the Republic of South Africa*, 1996.

107 Section 16(2)(b) of the *Constitution of the Republic of South Africa*, 1996.

108 Section 16(2)(c) of the *Constitution of the Republic of South Africa*, 1996.

109 Article 20(1) of the *International Covenant on Civil and Political Rights* of 1966 provides that "[a]ny propaganda for war shall be prohibited by law". By contrast, section 16(2) of the *Constitution* merely excludes such expression from the scope of the right to freedom of expression.

110 Whereas early judgments, such as *Abrams v United States* 250 US 616 (1919), *Whitney v The State of California* 274 US 357 (1927), and *Dennis v United States* 341 US 494 (1952), laid down a "clear and present danger" test to determine restrictions on free speech as threats to state security, the Supreme Court held in *Brandenburg v The State of Ohio* 395 US 444 (1969) 448 that state laws may not criminalise the advocacy of the use of force or civil disobedience, except where it "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action". See also *Collin v Smith* 439 US 916 (1978) and *The State of Texas v Johnson* 491 US 397 (1989).

in a number of international human rights instruments¹¹¹ as well as leading national constitutions.¹¹²

Since section 16(2)(c) contains both abstract and concrete requirements,¹¹³ the mode of expression in question should not only convey a message of hatred (requiring a value judgment of whether the complainant has suffered humiliation and degradation), but must also constitute incitement to cause *harm*. The latter requirement will require a court to determine the harm that is likely to result from a particular mode of expression such as, for example, sexually explicit material, thus conceptualised as hate speech.

Yet section 16(2) does not itself prohibit hate speech nor does it provide remedies to aggrieved parties. To this end, section 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*¹¹⁴ (the *Act*) contains a *general* statutory prohibition on hate speech. Read with section 12 of the *Act*, the two sections considerably broaden the scope of section 16(2)(c).¹¹⁵ And since the prohibited grounds listed in section 1 the *Act* are not restricted to the three grounds espoused in section 16(2)(c), but instead include all the grounds of non-discrimination contained in section 9(3) of the *Constitution* (thus including gender and sex¹¹⁶ as well as “any other ground”¹¹⁷ which “causes or perpetuates systemic disadvantage”,¹¹⁸ “undermines human dignity”,¹¹⁹ or “adversely affects the equal enjoyment

111 Article 20(2) of the *International Covenant on Civil and Political Rights* of 1966, for example, states that “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law”. See also Article 4 of the *International Covenant on the Elimination of All Forms of Racial Discrimination* of 1966.

112 Section 319 of the Canadian *Criminal Code* of 1985 (as amended), for example, provides that any person “who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group is guilty of an indictable offence”. See also article 5(2) of the *Basic Law For The Federal Republic of Germany* of 1949 (as amended) which provides that the right to freedom of expression is “subject to limitations embodied in the provisions of general legislation, statutory provisions for the protection of young persons and the citizen’s right to personal respect”.

113 Currie & De Waal 2005:372.

114 *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

115 Whereas the constitutional provision simply refers to “advocacy of hatred”, section 10(1) of the *Act* stipulates that “no person may publish, propagate, advocate or communicate”. Similarly, whereas section 16(2)(c) prefers “incitement to cause harm”, section 10(1) of the *Act* refers to “reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate”.

116 Section 1(a) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

117 Section 1(b) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

118 Section 1(b)(i) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

119 Section 1(b)(ii) of the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4/2000.

of a person's rights and freedoms in a serious manner"),¹²⁰ hate speech appears to be equated with *discriminatory* speech.¹²¹ Moreover, the harm principle contained in section 16(2)(c) is extended by section 10(1)(a) to include the term "hurtful", thereby further broadening the scope of the constitutional conception of hate speech. Thus, in the words of Lamont J:

in balancing the rights and obligations contained in the Constitution in regard to hate speech the Court is obliged to seek the solution which is just not that which is fair.¹²²

By its very nature, hate speech is more than a remark that coincidentally offends the targeted person or group(s). As a mode of expression, hate speech is prohibited for reasons that impact on both a social and a personal level. While in the case of social harm, hate speech is prohibited, *inter alia*, to prevent disruption to the public order and to prevent psychological harm to the targeted group(s),¹²³ at a personal level hate speech is prohibited as a "direct invasion and infringement on the rights of association of an individual".¹²⁴ And since section 10 of the *Act* defines the target group widely, this would include groups and categories of people such as women.

Hate speech thus consists of words and images that are calculated to dehumanise, degrade and subjugate.¹²⁵ It chooses its target carefully and carries a distinctive message of inferiority, subordination and degradation. It attacks that which human beings value most – our identity, self-worth and inherent dignity. It often targets that which is immutable, such as race,¹²⁶ gender, or sexual orientation. The effect of hate speech is that it perpetuates negative stereotypes and promotes discrimination against a historically disadvantaged group,¹²⁷ thereby maintaining the inferior status of the targeted group and hampering their participation in society.¹²⁸ By bearing distinct psychological and social consequences,¹²⁹ hate speech could furthermore carry the threat of physical violence or manifest as

120 Section 1(b)(iii) of the *Promotion of Equality and Prevention of Unfair Discrimination Act 4/2000*.

121 Currie & De Waal 2005:379.

122 *Afri-Forum v Malema* Case No 20968/2010:paragraph 25.

123 *Afri-Forum v Malema* Case No 20968/2010:paragraph 29.

124 *Afri-Forum v Malema* Case No 20968/2010:paragraph 30.

125 Lederer & Delgado 1995:6.

126 For a discussion of race as the basis of hate crimes, see Nel & Judge 2008:20-22; Sadurski 1996:717.

127 Greenawalt 1989:153.

128 Lederer & Delgado 1995:5. For a discussion of the distinction between the injury experienced from racial insult and that of one based on other distinctive features or attributes, see Neisser 1994:336-356; Delgado & Stefanic 1996:93-111.

129 *Regina v Keegstra* [1990] 3 SCR 697. For a comprehensive discussion of the constitutional ramifications of hate speech in Canadian law, see Mahoney 2009:321-351; Mullender 2007:241-255.

physical abuse in the form of assault, lynching, or rape.¹³⁰ In conveying a persecutory, hateful and degrading message of inferiority,¹³¹ hate speech effectively silences its victim(s). As Lamont J argues:

Hate speech has no respect for ... rights. It lacks full value as political speech. Hate speech does not address the community in general but merely a portion of it; those who are the target group. Hate speech should not be protected merely because it contributes to the pursuit of the truth, if it denies recognition of the free and reasonable rights of others it makes no direct contribution to the process.

The constitutional prohibition contained in the *Act*, emanating from section 16(2)(c) of the *Constitution*, could *prima facie* facilitate a rights-based argument against a relatively small category of sexually explicit material. As an extension of the liberal tradition, liberal feminist thought would naturally seek to prioritise basic *individual* liberties, especially the right to freedom of expression which is typically considered to underpin a democratic social, political and legal order based on individual autonomy and fundamental human rights. In their widely published *amici curiae* brief,¹³² Nan Hunter and Sylvia Law indeed argued forcefully in favour of the protection of what they referred to as “sexual expression” or “sexually explicit speech”.¹³³ They contended that any curtailment of these modes of speech and expression would be detrimental to women, *inter alia*, infringing upon women’s capacity to voluntarily agree to participate in the creation of sexually explicit images.¹³⁴ And while not considering the actual material conditions of women’s lives (and thereby not calling into question conditions that may impact directly upon women’s agency), they confirmed the position of the Supreme Court’s First Amendment jurisprudence, concluding that so-called “pornography” constitutes constitutionally protected speech, thereby prioritising individual autonomy and freedom.

From this it follows that a rights-based argument against gender-specific sexually explicit material within a liberal feminist framework would unavoidably have to proceed from an understanding that sexually explicit expression would not *per se* be deemed sexist or harmful to women, because mere images are not understood to have the capacity to cause harm. Accordingly, to justify legal intervention, harm must either be directed against women specifically or constitute the advocacy of hatred

130 Strossen 1996:449.

131 Matsuda 1993:47-71.

132 This *amici curiae* brief resulted from an appeal against the decision of the Circuit Court (Seventh Division) which declared the feminist anti-pornography ordinance enacted by the city council of Indianapolis unconstitutional as a violation of the First Amendment of the United States Constitution. See *American Bookseller’s Association v Hudnut* 771 F2d 323 (1985).

133 Hunter & Law 1987-1988:69-136.

134 Hunter & Law 1987-1988:69-136; 1993:472.

that is based on sex and gender and that constitutes incitement to cause harm. Viewed in this context, liberal feminism could at best accommodate an argument against sexually explicit material which conceptualises it as a violent, and thus harmful, mode of expression. It thus becomes possible to formulate an argument against a limited category of gender-specific sexually explicit material only. Material depicting women as beaten, bruised and wounded would, for example, fall into this narrow category, including so-called “torture pornography” containing images that propagate hateful messages about women, their sexuality and sexual identity.¹³⁵ In the words of Sopinka J:

[t]he message of [sexually explicit material] which degrades and dehumanizes is analogous to that of hate propaganda ... [it] wields the power to wreak social damage in that a significant portion of the population is humiliated by its gross misrepresentation.¹³⁶

Yet it remains doubtful, however, whether liberal feminist thought has the capacity to conceive of gender-specific sexually explicit material and (female) sexuality in such a way as to show how sexuality, and more specifically female identity, is constructed through a gender hierarchy in which women are subordinated and subjected. By not recognising the constitutive role of sexuality in the creation and perpetuation of male dominance, liberal feminism struggles to provide the conceptual foundation for bringing sexuality into the domain of politics. Female sexuality, in what it represents and how it is portrayed, is inextricably linked to gender- and sex-specific inequality. This particular understanding of (female) sexuality under conditions of patriarchy is, in fact, echoed by the minority of the

135 “Torture” pornography entails the actual killing of women in the manufacture of sexually explicit material. A “new” genre of sexually explicit torture, mutilation and murder flooded the pornography market after 1979 with the release of the notorious *Snuff* movie which depicted a man ripping out a woman’s uterus in the final scene, holding it up in the air while he ejaculated. Subsequent examples of sexual femicide followed in mainstream sexually explicit publications, particularly in *Hustler* magazine. Yet the practice of “torture” pornography is centuries old, with a set of Japanese prints taken from *A garden of pain* depicting, in graphic detail, the disembowelment of women in a sexual context. In the first print, a woman is disembowelled with a large, sharp knife while a man watches and masturbates. The second print depicted the mutilated corpses of two women in the background hanging by their feet, and the corpse of a woman which is in the process of being mutilated by a man. The latter is tied up with her arms behind her back and her legs spread wide open. Long needles protrude from her neck, some kind of torture device has been stuck up her anus and her shins have been cut open. With his right hand, the man is tearing off her nipples, while he plunges a sword into her vagina with his left hand so far that it exists through her stomach. These two prints date to the late fourteenth century.

136 *Regina v Butler* [1992] 1 SCR 452:501. For a basic critique of this judgment of the Supreme Court of Canada, see Clayton & Tomlinson 2001:225-226; Barendt 2005:363-364; 380-381.

South African Constitutional Court.¹³⁷ In assessing (adult) prostitution “with its strongly gendered context”,¹³⁸ the minority observed that:

it seems to us that patterns of gender inequality and illegitimate double standards relating to male and female sexuality will be reinforced. In our constitutional democracy which is committed to gender equality, a criminal prohibition which has the effect of furthering patterns of gender inequality will need powerful justification to meet the test of [the limitation clause].¹³⁹

Yet it becomes virtually impossible within the realm of liberal feminist thought to consider the social and political significance of the differences between the sexes, thereby failing to enlarge the domain of politics so as to make visible previously concealed forms of gender-specific oppression. As Beth Gaze so eloquently states:

[t]his argument against [sexually explicit material] lies outside of the liberal framework. It is precisely the ideological effect of [sexually explicit material], its role as propaganda in the oppression and devaluation of women, which is problematic. Feminists object to [such material] because of its message. Censoring speech because of its content is unacceptable discrimination within a liberal framework (except for obscenity); proof of [direct or imminent] harm is usually required.¹⁴⁰

6. Concluding observations

This article explored the suitability of liberal feminism, in its critique of liberal thought, as legal paradigm to examine gender-specific sexually explicit material within the (unavoidable) context of freedom of expression. It was revealed that, due to liberal feminism’s often uncritical endorsement of classical liberal principles, this school of feminism will be hard-pressed to make adequate critical sense of how sexually explicit material impacts on women’s sexuality, and thus identity. Gender and sexuality as social constructs must unavoidably impact on the identity of women under a pervasive system of male domination. A feminist paradigm which acknowledges and critically explores the possible meaning and impact of sexuality on women’s lives, instead of underplaying the importance thereof, will thus arguably be better suited to conduct a nuanced rights-based

137 Sachs J and O’Regan J in *Jordan v S* 2002 11 BCLR 1117 CC:paragraph 34-129.

138 *Jordan v S* 2002 11 BCLR 1117 CC:paragraph 96. It is noteworthy that, although the minority of the Constitutional Court indicated an awareness of the more gender-neutral term “sex work”, they chose to employ the term “prostitution” throughout the judgment, thus not shying away from the stigma and sexual objectification that similarly stand central to the patriarchal practice of prostitution.

139 *Jordan v S* 2002 11 BCLR 1117 CC:paragraph 97.

140 Gaze 1994:139-140.

analysis of material deemed sexually explicit. Only once the constitutive role of sexuality in the creation and perpetuation of male domination and gender inequality is understood, can, for example, rape, battering, sexual abuse, sex work and, especially, gender-specific sexually explicit material be viewed as, *inter alia*, barriers to the achievement of substantive equality for women. Such a theoretical stance duly recognises that the law has the ideological capacity to reinforce the devaluation of women and that the law should, therefore, carry the burden of mediating substantive change. Only a framework which conceptualises gender-specific sexually explicit material as a constitutional (*i.e. legal*) problem that affects the fundamental rights and freedoms of women, can transcend the problems inherent in a moralistic understanding of the issue(s) and has the potential to facilitate meaningful doctrinal change.

However, any attempt to conceptualise the sexually explicit (and thus make critical sense of female sexuality under patriarchy) within the context of legal and constitutional discourse must unavoidably be conscious of the particular restraints imposed by the law. Whereas both first- and second-wave feminism must certainly guard against a crude reductionism and cultural imperialism whereby the experience and concerns of a certain class (or race) is elevated to present the experiences of all women, the law, by its very nature, demands an answer, an outcome. Any critical feminist paradigm would be foolhardy to ignore or underplay this reality.

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