> an Observance to those whom Nature, Gratitude, or other Respects may have made it due.[82]

But these inequalities in no way affect an individual's basic freedom or political capacity, for Locke continued in the same passage:

> … yet all this consists with the Equality which all Men are in, in respect of Jurisdiction or Dominion one over another, which was the Equality I there spoke of, as proper to the Business in hand, being that equal Right every Man hath, to his Natural Freedom, without being subjected to the Will or Authority of any other Man ...[83]

If 'Man' is used as a generic term, then woman's natural freedom and equality could not be alienated without her consent. Perhaps a marriage contract might be taken for consent, but this is a dubious proposition. Locke had indicated that a marriage contract in no way altered the political capacity of a queen regnant. While the decision-making power over the common interests of a conjugal unit belonged to the husband, Locke admitted that the wife might have interests apart from their shared interests. Women could own separate property not subject to her husbands' control. If a husband forfeited his life or property as a result of conquest, his conquerors acquired no title to his wife's life or property.

Did these capacities entitle women to a political role? Locke never directly confronted the question; nevertheless, it is possible to compare Locke's qualifications for political life with his views of women. Locke used the Genesis account to show that women possessed the name natural freedom and equality as men. Whatever limitations had been placed on women after the Fall could conceivable be overcome through individual effort or scientific advance. Furthermore, women were capable of earning through their own labour, of owning property and of making contracts.

Locke and the Rational Women

The one remaining qualification for political life is rationality. For Locke's views on the rationality of women it will be necessary to turn to his other writings, notably his *Thoughts on Education*.

In the published version of his advice on education, Locke mentioned that the work had been originally intended for the education of boys; but he added that it could be used as a guide for raising children of either sex. He noted that 'where difference of sex requires different Treatment, 'twill be no hard Matter to distinguish'.

Locke felt that his advice concerning a gentleman's education would have to be changed only slightly to fit the needs of girls. However, in a letter to a friend, Mrs Edward Clarke, Locke tried to show that his prescriptions were appropriate for her daughter and not unnecessarily harsh. On the whole, Locke believed that except for 'making a little allowance for beauty and some few other considerations of the s[ex], the manner of breeding of boys and girls, especially in the younger years, I imagine should be the same'...[84]

The differences which Locke thought should obtain in the education of men and women amounted to slight differences in physical training. While Locke thought that 'meat, drink and lodging and clothing should be ordered after the same

82 *Two Treatises*, II, 54.

83 *Ibid*.

84 Locke to Mrs Clarke, 1 January 1685, in *Correspondence*, Rand (ed).

manner for the girls as for the boys', he did introduce a few caveats aimed at protection the girls' complexions.

Locke introduced far fewer restriction in his plan for a young lady's mental development. In a letter to Mrs Clarke he wrote: 'Since therefore I acknowledge no difference of sex in your mind relating … to truth, virtue and obedience, I think well to have no thing altered in it from what is [right for the son]'. Far from advocating a special, separate and distinct form of education for girls, Locke proposed that the gentleman's education should more closely resemble that of young ladies. For example, he favoured the education of children at home by tutors. Modern languages learned through conversation should replace rote memorisation of classical grammars. In addition, Locke suggested that young gentlemen as well as young ladies might profit from a dancing master's instruction.

Taken as a whole, Locke's thought on education clearly suggest a belief that men and women could be schooled in the use of reason. The minds of both men and women were blank slates to be written on by experience. Women had intellectual potential which could be developed to a high level.

Locke's educational process was designed to equip young men for lives as gentlemen. Since the gentleman's life certainly included political activity, a young man's education had to prepare him for political life. If a young lady were to receive the same education, it should be expected that she, too, would be capable of political activity.

Finally, 300 years ago, Locke offered a 'liberated' solution to a controversy which still rages in religious circles – the question of the fitness of women to act as ministers. In 1696 Locke, together with King William, attended a service led by a Quaker preacher, Rebecca Collier. He praised her work and encouraged her to continue it, writing: 'Women, indeed, had the honour first to publish the resurrection of the Lord of Love; why not again the resurrection of the Spirit of Love?' It is interesting to compare Locke's attitude here with the famous remark made by Samuel Johnson on the same subject in the next century: 'Sir, a woman's preaching is like a dog walking on his hindlegs. It is done well; but you are surprised to find it done at all.'[85]

Perhaps a similar conclusion might be reached about the roots of feminism in Lockean liberalism. In a world where political anti-patriarchalism was still somewhat revolutionary, explicit statements of more far-reaching forms of anti-patriarchalism were almost unthinkable. Indeed, they would have been considered absurdities. Thus, while Filmer had presented a comprehensive and consistent patriarchal theory, many of his liberal opponents rejected political patriarchalism by insisting on the need for individual consent in political affairs but shied away from tampering with patriarchal attitudes where women were concerned. John Locke was something of an exception to this rule. Though his feminist sympathies certainly did not approach the feminism of Mill writing nearly two centuries later, in view of the intense patriarchalism of 17th century England, it should be surprising to find such views expressed at all.[86]

85 EL McAdam and G Milne (eds), *A Johnson Reader* (New York: Pantheon Books, 1964), p 464.

86 *On Locke*, p 88.

John Rawls's *Theory of Justice*[87]

In 1972 John Rawls's *Theory of Justice* was published to much critical acclaim. Hailed as the most comprehensive contemporary exposition of the social contract, Rawls elaborates on the ideas of earlier writers such as Locke, Paine and Rousseau. The result is a painstakingly worked and reworked calculation of the criteria for a 'nearly just society'. The formula to which Rawls works is to hypothesise about placing representative people from differing walks of life in a society behind a 'veil of ignorance'. This veil prevents individuals from knowing their personal characteristics, including, inter alia, their intelligence, wealth, class or position in society. Only by stripping people of their individuality does Rawls consider that the principles on which society – and hence laws – should be based can be reached. Rawls does not envisage that everyone in a society at any point in time will go behind this 'veil of ignorance'. Rather the original position (under the veil of ignorance) is a mental construct to be used for the determination of rational principles for the ordering of society. Rawls writes:

> … the original position is not to be thought of as a general assembly which includes at one moment everyone who will live at some time; or, much less, as an assembly of everyone who could live at some time. It is not a gathering of all actual or possible persons. To conceive of the original position in either of these ways is to stretch fantasy too far; the conception would cease to be a natural guide to intuition …[88]
>
> Rather than an assembly of all persons, those in the original position are viewed as being 'representatives' of a class of persons.

Knowledge and ignorance behind the 'veil of ignorance'

In order to maximise the rationality and disinterest in decision-making about society and laws, Rawls denies the respresentatives in the veil of ignorance certain knowledge. Such persons do not know:

> … his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again does anyone know his conception of the good, the particulars of his rational plan of life, or even the special feature of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. They do not know its economic or political situation, or the level of civilisation and culture it has been able to achieve.

On the other hand, representatives do know 'general facts' about human society. For example:

> They understand political affairs and the principles of economic theory: they know the basis of social organisation and the laws of human psychology. Indeed the parties are presumed to know whatever general facts affect the choice of the principles of justice.[89]

87 Oxford University Press, 1973.

88 *A Theory of Justice*, p 139.

89 *Ibid*, p 137.

By denying parties any particular knowledge of their personal situation, Rawls considers that the parties will be unable to bargain to reach decisions about justice from a self-interested position. Rather, parties – who will have a general desire to achieve their 'life plan' and to participate as fully as possible in the good of society – will adopt an attitude to decision-making which, should they end up as less advantages than others, will protect their position as far as possible. The parties behind the veil of ignorance are vaguely pessimistic about their own end-position, and as a result, will always gear their decisions towards the 'worst off' position in society.

The principles of justice

The principles which would be chosen by this representative congress of people are explained to be as follows. First: each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others. Second: social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all.

The principles are ordered lexically – that is to say the first principle is 'prior to the second',[90] and accordingly no departure from the first principle is justified by any greater social or economic advantages which might flow from such a departure. Rawls reworks this explanation to provide a more comprehensive account of the two principles of justice.

First principle: each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all. Second principle: social and economic inequalities are to be arranged so that they are both: (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

First priority rule (the priority of liberty)

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases: (a) a less extensive liberty must strengthen the total system of liberty shared by all; (b) a less than equal liberty must be acceptable to those with the lesser liberty.

Second priority rule (the priority of justice over efficiency and welfare)

The second principle of justice is lexically prior to the principle of efficiency and to that of maximising the sum of advantages; fair opportunity is prior to the difference principle. There are two cases:

(a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;

(b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship.

As a general conception, Rawls provides that:

90 *A Theory of Justice*, p 61.

> All social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured.[91]

From a feminist perspective a number of large questions loom out of Rawls's conception of the criteria for selecting principles of justice in society, and *A Theory of Justice* has been submitted to feminist scrutiny.[92] Amongst other matters, the question of the gender of Rawls's 'representative persons' arises. Also central to the analysis is Rawls's attitude to the reality of equality in a just society. Extracts from the writings of Mari Matsuda and Carole Pateman are presented here to elucidate the perceived strengths and weaknesses of Rawls's theory.

Rawls's methodology is subject to scrutiny by Mari J Matsuda who argues, inter alia, that Rawls's abstractions are unhelpful.

LIBERAL JURISPRUDENCE AND ABSTRACTED VISIONS OF HUMAN NATURE: A FEMINIST CRITIQUE OF RAWLS'S THEORY OF JUSTICE[93]

Mari J Matsuda[94]

> To argue at the level of abstraction proves nothing and clouds our vision. What we really need to do is to move forward through Rawls's veil of ignorance, losing knowledge of existing abstractions. We need to return to concrete realities, to look at our world, rethink possibilities, and fight it out on this side of the veil, however indelicate that may be. By ignoring alternative visions of human nature, and by limiting the sphere of the possible, Rawls creates a gridlock in which escape from liberalism is impossible, and dreams of the seashore futile.[95]

Having considered the 'facts' which persons in the original position do and do not know, Mari Matsuda writes:

> Feminist theory suggests alternative conceptions that, while like Rawls's are not provable, show how Rawls made some determinative choices in describing the original position.
>
> Feminist theory suggests that we can achieve identity of interest on the real-life side of the veil. In that world, people would not be moved solely by self-interest, but also by feelings of love, intimacy, and care for others. They would be in a perpetual state of mutual concern. Rawls begins to consider this possibility when he discusses families and social unions, but his dominant idea is that it is personally advantageous for individuals to join social unions. Feminist experience suggests there is something beyond personal advantage – a collectivist way of thinking that presume it natural, joyful, and easy to care for

91 *Ibid*, pp 302–03.

92 M Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls's Theory of Justice' (1986) 16 *New Mexico Law Review* at 613; SM Okin, *Women in Western Political Thought* (Virago, 1980); 'Justice and Gender' (1987) 16 *Philosophy and Public Affairs* 42; D Kearns, 'A Theory of Justice – and Love: Rawls on the Family' in M Simms (ed), *Australian Women and the Political System* (Melbourne: Longman, 1984).

93 (1986) 16 *New Mexico Law Review* 613.

94 At the time of writing, Assistant Professor of Law, University of Hawaii.

95 *Ibid*, p 624.

others. There is an element of self-interest in this proposition, but it is not a dismal struggle for individual advantage within the merely convenient context of social union that Rawls proposes.

Another counter-assumption is that this may not be a world of an endless mad grab for limited goods. First, it may be possible for all of us to achieve happiness by deciding we don't want the goods anymore. The desire for wealth and property may be the product of false consciousness and consumerist, patriarchal traditions. The desire for power and achievement may be a product of never learning to rejoice at the excellence of others, of never learning to play for the sake of playing rather than winning. Second, the scarcity of goods may be an illusion. Science and technology, good fortune and good weather, cooperation and creativity, may change the availability of most of the goods we covet. This leaves the problem of distribution of such Rawlsian goods as self-respect and excellences, or natural talents and assets. The whole concept of self-respect presumes that others will try to interfere with our plans. Self-respect is defined by Rawls as being left alone to pursue one's own ends. Again, this is a nonsensical concept unless one presumes that individualism is the only possible creed of human conduct. Similarly, excellences are the subject of envy only if it is presumed that we can't rejoice at the gifts of others, and that they won't rejoice in the use of their gifts to help us without some *quid pro quo*.

This leads to another counter-assumption, one that challenges Rawls's stern view of what feels good. Achievement, carrying out a plan, excellence feel good to him. Feminist thought, derived through consciousness raising, considers the possibility that humour, modesty, conversation, spontaneity, laziness, and enjoying the talents and differences of others also feel good. Because Rawls imposes a limited view of what feels good upon the deliberators in the original position, they adopt a limited formula for redistribution. This ignores the possibility that we can take collective pleasure in knowing that there is some rare and fine advantage that only a few can have, and that we can all celebrate when those few are chosen. Sports fans might understand this.

It seems that what really hurts, and this Rawls seeks to avoid, is when those rare and fine advantages are distributed not by grace, but by arbitrary privilege. If this is the real problem, then perhaps justice requires elimination of class differences. My purpose here is not to construct or prove true other theories of justice, but only to point out that Rawls's theory arises from Rawls's unproven premises, and that different premises suggest different results.

Conclusion

There are many hopeful counter-premises that Rawls ignores, and the method of abstraction allows him to do this. Rawls might characterise the counter-assumptions suggested here as alternative conceptions of the good that will be considered in the abstract in the original position. That response is not good enough. It doesn't explain why the presumptions of self-interest and mutual disinterest are not abstracted out, but taken as given, while the possibility of collectivisim is just another possibility that saints may choose on the real-life side of the veil.

Rawls's technique may have value, but it is unfair to achieve consensus by fiat. What we really have to do is to leave the original position, and argue on the common ground of this planet earth. We have to consider the possibility that we can all choose to be saints and that we can set up institutions that allow us to do this. Once we have explored the real-life potential of humankind in the concrete context, it may then be valuable to go back behind the veil and work the theory

with a set of general facts about human nature that are more fairly derived. I suspect, however, that once we have the answers on this side of the veil, we won't need to resort to abstraction. The proof will lie in the lives we will live.

This essay has criticised in particular Rawls's quickness to use abstraction. This is not to suggest that theory and abstraction are without value. The suggestion made here is a more modest one. Theory has value, as long as we remember that real people create theory and that real people live their lives in worlds affected by theory. Half of those people are women, and their experiences can teach us something about justice.[96]

THE SEXUAL CONTRACT[97]

Carole Pateman[98]

In *A Theory of Justice*, the parties in the original position are purely reasoning entities. Rawls follows Kant on this point, and Kant's view of the original contract differs from that of the other classic contract theorists, although in some other respects his arguments resemble theirs. Kant does not offer a story about the origins of political right or suggest that, even hypothetically, an original agreement was once made. Kant is not dealing in this kind of political fiction. For Kant the original contract is 'merely an idea of reason, an idea necessary for an understanding of actual political institutions'. Similarly, Rawls writes in his most recent discussion that his own argument 'tries to draw solely upon basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation'. As an idea of reason, rather than as a political fiction, the original contract helps us 'work out what we now think'. If Rawls is to show how free and equal parties, suitably situated, would agree to principles that are (pretty near to) those implicit in existing institutions, the appropriate idea of reason is required. The problem about political right faced by the classic contract theorists has disappeared. Rawls's task is to find a picture of an original position that will confirm 'our' intuitions about existing institutions, which include patriarchal relations of subordination.

Rawls claims that his parties in their original position are completely ignorant of any 'particular facts' about themselves. The parties are free citizens, and Rawls states that their freedom is a 'moral power to form, to revise, and rationally to pursue a conception of the good', which involves a view of themselves as sources of valid claims and as responsible for their ends. If citizens change their idea of the good, this has no effect on their 'public identity', that is, their juridical standing as civil individuals or citizens. Rawls also states that the original position is a 'device of representation'. But representation is hardly required. As reasoning entities, the parties are indistinguishable one from another. One party can 'represent' all the rest. In effect, there is only one individual in the original position behind Rawls's 'veil of ignorance'. Rawls can, therefore, state that 'we can view the choice [contract] in the original position from the standpoint of one person selected at random'.

Rawls's parties merely reason and make their choice – or the one party does this as the representative of them all – and so their bodies can be dispensed with. The

96 *Ibid*, pp 626–29.

97 Polity Press, 1988.

98 At the time of writing, Professor of Political Science, University of California.

> representative is sexless. The disembodied party who makes the choice cannot know one vital 'particular fact', namely, its sex. Rawls's original position is a logical construction in the most complete sense. It is a realm of pure reason with nothing human in it – except that Rawls, of course, like Kant before him, inevitably introduces real, embodied male and female beings in the course of his argument. Before ignorance of 'particular facts' is postulated, Rawls has already claimed that parties have 'descendants' (for whom they are concerned), and Rawls states that he will generally view the parties as 'heads of families'. He merely takes it for granted that he can, at one and the same time, postulate disembodied parties devoid of all substantive characteristics, and assume that sexual difference exists, sexual intercourse takes place, children are born and families formed. Rawls's participants in the original contract are, simultaneously, mere reasoning entities, and 'heads of families', or men who represent their wives.
>
> Rawls's original position is a logical abstraction of such rigour that nothing happens there. In contrast, the various states of nature pictured by the classic social contract theorists are full of life. They portray the state of nature as a condition that extends over more than one generation. Men and women come together, engage in sexual relations and women give birth. The circumstances under which they do so, whether conjugal relations exist and whether families are formed, depends on the extent to which the state of nature is portrayed as a social condition.[99]

FEMINISM AND MARXISM

Marxism has long been a site of special research interest for feminist scholars. The writings of Karl Marx[100] and Friedrich Engels[101] concerning the structure and evolution of society, the fundamental importance of the economic base as the determinant of social relations and class structures in society, and the ideological function of law in supporting the economic base, represented a startling philosophical challenge to all political and legal thinkers. For jurists trained in classical Western political thought, Marx offered a strong challenge, for an essential feature of all Marxist thought is that law – far from being the central feature of society – is but a reflection of, and supporter of, the economic base, the *infrastructure*. Law is thus part of the *superstructure*: but part of those features of society – religion, politics, history and philosophy, which are secondary – in terms of the unfolding of society – to the economic base. As a result Marxists are not primarily interested in law, but rather in demonstrating the unfolding of society in a manner analogous to Hegel's dialectical, and natural, process. For Marx, the dialectical process is that of the material – or economic – base. Society evolves through differing stages, essentially from feudalism, to capitalism, to socialism and finally to communism.

In the section which follows Hugh Collins first explains the limited role which law plays in Marxist theory. Next considered is Friedrich Engels' analysis of the evolution of the family and the role of women. It is Engels' thesis that in

99 At pp 41–43

100 1818–83.

101 1820–95.

early times succession came about through the female line. This 'mother right' had to be early overthrown if men were to gain the economic ascendency in the family.

Engels' analysis is subjected to criticism by Simone de Beauvoir. In the extract from *The Second Sex*[102] the author is critical of an explanation which has as its basis the assumption that history may be explained by historical materialism alone. Private property as the 'enslaving' construct does not, without more, explain women's subordination.

In *Looking Again at Engels' 'Origins of the Family, Private Property and the State'*[103] Rosalind Delmar explains Engels' analysis of the means by which women will be emancipated: through their inclusion in socially productive work outside the family. This solution, the author argues, is insufficient so long as women remain primarily responsible for domestic and child care responsibilities within the home.

In *The Sexual Contract*,[104] Carole Pateman criticises Engels' over-reliance, in her view, on a class analysis to explain female subordination, and for women's emancipation. Engles argued that women in the family were analogous to the proletariat, whereas the husband assumed the role of the bourgeoisie. Thus woman was the slave, the husband the owner. Where this analysis breaks down, Pateman argues, is in ignoring the husband's sexual interest. Engels' assumption that the 'social contract' is blind to sexual difference and is akin to the gender-neutral relations in the capitalist market, misses the real dimension which explains women's subordination.

MARXISM AND LAW[105]

Hugh Collins[106]

> Marxism is a theory about the meaning of history. However aimless the wanderings of mankind may have seemed to others, Marxists have discerned a regular evolutionary pattern controlling the human condition. Behind the complexity and particularity of isolated events human civilisation has been gradually moving towards the goal of history. Once the direction of this progress and the reasons for social change are perceived, then the secrets of the future can be glimpsed. According to Marxism the meaning of history is that man's destiny lies in the creation of a Communist society where men will experience a higher stage of being amounting to the realisation of true freedom ...[107]
>
> *Is there a Marxist Theory of Law?*
>
> It has often been remarked that there is no Marxist theory of law. At first sight this is a strange assertion for it is in the nature of Marxism as a general theory of the evolution of societies that it will pass comment on significant institutions such as the law. Admittedly the main thrust of Marxist analysis is directed

102 1949.

103 In *The Rights and Wrongs of Women* (eds) J Mitchell and A Oakley (Penguin, 1976).

104 Polity Press, 1988.

105 Oxford University Press, 1982.

106 University of Oxford.

107 *Marxism amd Law*, p 2.

towards the economic infrastructure and the organisations of power in a community. That emphasis stems naturally from Marx's insight that the source of social change and the revelation of the destiny of man can only be discovered from the material circumstances of life and how man has responded to them. It follows that law is not a central focus of concern for Marxists. Neither is law a prominent analytical concept of comparable importance to social class or capitalism for example ...[108]

... To demand a general theory of law from a Marxist is to ask him to run the risk of falling prey to what can be termed the fetishism of law. What is meant by the term 'fetishism of law'? In simple terms it is the belief that legal systems are an essential component of social order and civilisation. This belief is a pervasive feature of social and political theories outside the Marxist tradition. It serves as the foundation for most liberal political theory. In addition, this notion underlies all the important general theories of law which are in currency today. Because Marxism does not subscribe to the fetishism of law it also resists the directions of speculative thought which seek to provide a general theory of law. We can understand this point more clearly if the attributes of legal fetishism are examined in greater detail.

There are three features of legal fetishism which should be highlighted. In the first place there is the thesis that a legal order is necessary for social order: unless there is a system of laws designed to ensure compliance with a set of rules which define rights and entitlements then no civilisation is possible; if laws and legal institutions were abolished anarchy would immediately break out. HLA Hart expresses this idea with his claim that there must be a minimum content of law. Unless there are rules governing ownership of property and enforcing prohibitions against physical violence, he says, society would be impossible. If a legal system, or at least some kind of coercive system failed to provide such rules, the community would disintegrate. For those who fetishise law, legal rules are at the centre of social life, forming the basis for peaceful social intercourse ...[109]

... A second contention of legal fetishism is that law is a unique phenomenon which constitutes a discrete focus of study. Legal systems are not simply types of a broader species of systems of power, but they possess distinctive characteristics. In particular, modern jurisprudence identifies three exclusive features of legal systems. First, there are regular patterns of institutional arrangements associated with law such as the division between a legislature and a judiciary. Second, lawyers communicate with each other through a distinctive mode of discourse, though the exact nature of legal reasoning remains controversial. Third, legal systems are distinguished from simple exercises of force by one group over another; for legal rules also function as normative guides to behaviour which individuals follow regardless of the presence or absence of officials threatening to impose sanctions for failing to comply with the law. Together these three features of law, its institutional framework, its methodology, and its normativity, are considered to make law a unique phenomenon. They constitute the background for the whole enterprise of modern jurisprudence which seeks to provide a general theory of law. Whereas the first thesis of legal fetishism encouraged us to believe that law contains the answers to the problem of the origin of civilisation and thus made a general theory of law of interest, the second feature of legal fetishism, a belief in the

108 *Ibid*, p 9.

109 *Ibid*, pp 10–11.

uniqueness of law, suggests that it is possible to isolate legal phenomena and to study their nature. A final aspect of legal fetishism makes a general theory of law not only interesting and possible but also crucial to political theory.

This third feature is the doctrine of the rule of law. The meaning of this idea is complex. For the time being a crude approximation to its meaning will suffice to demonstrate its link to legal fetishism. The core principle of the doctrine is that political power should be exercised according to rules announced in advance ...[110]

... Marxists have rejected these three aspects of legal fetishism. To begin with, the notion that society rests on law is too simplistic ...[111]

... Equally Marxists deny that there is a special and distinctive phenomenon which we can term law. Because Marxism has approached law tangentially, treating it as one aspect of a variety of political and social arrangements concerned with the manipulation of power and the consolidation of modes of production of wealth, there has been no commitment towards an identification of the unique qualities of legal institutions. What is more important for a Marxist is to notice how laws or law-like institutions serve particular functions within a social formation. The focus is switched from proposing a definition and drawing up of lists of functions of law to devising an explanation of the functions which laws together with other social institutions help to perform in particular historical contexts. Guided by the emphasis upon materialism, Marxists avoid assumptions about the uniqueness of legal phenomena or their essence, and so they rarely offer a general theory of law.

The final aspect of legal fetishism, the doctrine of the rule of law, illustrates one of the functions which laws help to perform, and as such it has been of great interest to Marxists. Since legal rules can inhibit the arbitrary exercise of power, even if their control is precarious, law can contribute an important dimension to political philosophies seeking to explain or justify the existing structures of political domination on the ground that the powerful are constrained by the demands of due process of law. The ideal of the rule of law encapsulates this legitimising function of legal systems. The bulk of Western jurisprudence uses the rule of law doctrine as a standard by which to judge the success of desirability of a general theory of law. It is crucial for these legal philosophers to demonstrate the superiority of their approach towards the problem of the identification of the laws of a particular legal system because they can then argue that they have proved the coherence of the predominant legitimating ideology of power in liberal society. Marxists, however, are obviously uninterested in putting forward a theory of their own, for their purpose is to challenge rather than defend the present organisation of power. Accordingly you will not find here those elaborate analyses of the structures of legal systems which parade as legal theory in the law schools. Nevertheless, the rule of law and the function of law in modern theories of the legitimation of power remain of vital interest to Marxists in their search for a critical understanding of the complexities of modern social system. Therefore a general theory of law in the conventional mode would be an anathema to Marxism, though legal phenomena must constitute a central focus of enquiry ...[112]

110 *Ibid*, pp 11–12.

111 *Ibid*, pp 12–13.

112 *Ibid*, pp 13–14.