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**Feminist engagement with law in the new millennium**

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Feminist Engagement with Law in the New Millennium

Harriet Samuels

A thesis submitted in partial fulfillment of the requirements of the University of  
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## Feminist Engagement with Law in the New Millennium

### Abstract

The works presented for the PhD by publication are all connected by a commitment to using law and human rights for feminist ends. They are located within the feminist discourse on the utility of law and human rights, and stress the inherent connection between feminist theory and activism.

They counsel against a turning away from law, as suggested by some feminists, and instead set about explaining how existing legal structures and concepts can be made more responsive to women's lived realities.

The thesis demonstrates that law is an important site of power and public discourse where feminism in all its forms needs to have a presence. Several of the publications address feminist challenges to human rights, but advocate feminist participation in the political and legal processes that provide for the development, adoption and enforcement of universal norms. Using examples from the past and present the published works show that feminism is a force that has the capacity to interrupt and to intervene in law and human rights mechanisms. It has the potential to create, adapt and subvert legal principles through dialogic and feminist legal methods.

# Feminist Engagement with Law in the New Millennium

## Table of Contents

1. 0 General Introduction

1.1 Research Methods

1. 2 Introduction to Feminisms

1. 3 Feminism and Strategic Essentialism

2. 0 Feminism and the Utility of Law

2. 1 Harnessing Law's Power

3. 0 Feminism and Rights

3.1 Feminist Critiques of Human Rights

3.2 Feminist Engagement with Human Rights

3.3 Feminism and Human Rights Iterations

3.4 Feminising Human Rights and the Adjudicatory Process

4.00 Conclusion

Bibliography

Appendix 1The published works in order of publication

## Feminist Engagement with Law in the New Millennium

### List of Publications (in order of publication)

#### Abbreviations

*Sexual Harassment: A Defining Moment 2004*: Harriet Samuels 'A Defining Moment: A Feminist Perspective on the Law of Sexual Harassment in the Workplace in the Light of the Equal Treatment Amendment Directive' (2004) 12 *Feminist Legal Studies*, 181

*Feminist Activism and Third Party Interventions 2005*: Harriet Samuels, 'Feminist Activism, Third Party Interventions and the Courts' (2005) 13 *Feminist Legal Studies* 1

*Child Slavery in Hong Kong 2007*: Harriet Samuels, 'A Human Rights Campaign? The Campaign to Abolish Child Slavery in Hong Kong 1919-1938' (2007) 6 *Journal of Human Rights* 361

*An Uneasy Alliance 2009*: Harriet Samuels, 'An Uneasy Alliance? The Relationship between Feminist Legal Studies and Gender, Sexuality and Law' (2009) 17 *Feminist Legal Studies* 297

*Women, Culture and Human Rights 2010*: Harriet Samuels 'Women, Culture and Human Rights: Feminist Interventions in Human Rights Law?' in Reza Banakar (ed), *Rights in Context: Law and Justice in Late Modernity* (Ashgate 2010) 317-332

*Roberts v Hopwood 2010*: Harriet Samuels, 'Roberts v Hopwood', in Rosemary Hunter, Clare McGlynn, and Erica Rackley (eds), *Feminist Judgments: From Theory to Practice*, (Hart 2010) 387-400

*Feminist Legal Theory 2013*: Harriet Samuels, 'Feminist Legal Theory' in Reza Banakar and Max Travers, (eds) *Law and Social Theory*, (Hart 2013) 129-145

*Feminizing Human Rights Adjudication 2013*: Harriet Samuels, 'Feminizing Human Rights Adjudication: Feminist Method and the Proportionality Principle' (2013) 21 *Feminist Legal Studies*, 39

*Judicial Deference and Feminist Method 2014*: Harriet Samuels 'Feminist Method and Judicial Deference' [2014] Summer *Public Law* 512

## 1.0 General Introduction

Feminists have always had an ambivalent relationship with law and human rights. This is reflected in the rich and diverse scholarship produced by legal feminists. Some scholars regard the achievements of legal feminism as 'substantial and cumulative'.<sup>1</sup> Others caution against an over reliance on law warning against complicity, and of exaggerating law's power.<sup>2</sup> My thesis is mindful of the feminist critique of liberalism, and the problematic nature of political and legal categories such as rights, equality and of the limits of law more generally.<sup>3</sup> But nevertheless it maintains that legal principles, methods and concepts are susceptible to feminist influence. Using examples from the past and present it shows that feminism is a force that has the potential to interrupt and to intervene in law. It has the capacity to create, adapt and subvert legal principles through dialogic and feminist legal methods. The thesis demonstrates that law is one of a number of sites of power and public discourse where feminism in all its forms needs to have a presence. The published works presented for the PhD by publication are located within the feminist discourse on the utility of law and human rights. They focus on feminist legal theory and method, but draw more broadly on feminist theory when appropriate. They also emphasize the inherent connection between feminist theory and activism.

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<sup>1</sup> Ngaire Naffine, 'In Praise of Legal Feminism' (2002) 22 *Legal Studies* 71

<sup>2</sup> Carol Smart, *Feminism and the Power of Law*, (Routledge 1989), Wendy Brown and Janet Halley, 'Introduction', in Wendy Brown and Janet Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002), Aileen McColgan, *Women Under the Law: The False Promise of Human Rights*, (Longman 1999)

<sup>3</sup> Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press 1995), Smart (n 2)

The nexus between feminism and human rights is a central pre-occupation of the thesis on at least two levels. On the first level the work maintains an interest in international human rights, and considers their potential to push forward particular agendas. On the second level it engages very specifically with human rights and domestic jurisprudence. It attempts to demonstrate that legal doctrines and processes are potentially, sufficiently pliable to be deployed in ways that are productive for feminists, and that on occasion the courts have, perhaps unwittingly, used feminist method to decide cases.<sup>4</sup> It addresses many of the criticisms of human rights from within feminist theory.<sup>5</sup> But rather than rejecting human rights it urges feminists to reconstruct or reform rights instead of abandoning such a powerful discourse. It supports the adoption of a dialogic approach to rights that produces an interactive universalism.<sup>6</sup> It understands rights as iterations that are the subject of an ongoing conversation.<sup>7</sup> Feminists need to join this conversation to influence the way in which rights are defined and deployed.

1.1 Various different research methods have been adopted in the course of my writing and research. The majority of the works have used documentary analysis and traditional legal methods, which as Webley notes, are a form of

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<sup>4</sup> See *Judicial Deference and Feminist Method* 2014 1

<sup>5</sup> Ratna Kapur, *Erotic Justice and the New Politics of Colonialism*, (Glasshouse Press 2005), Diane Otto, "'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart 2005) and Shereen Razak, 'Domestic Violence as Gender Persecution: Policing the Borders of Nation, Race and Gender' (1995) 8 *Canadian Journal of Women and Law* 45

<sup>6</sup> Seyla Benhabib, 'The Legitimacy of Human Rights' (2008) *Daedalus*, 94, and Siobhan Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism*, (Hart 2006)

<sup>7</sup> Seyla Benhabib, 'Democratic Iterations: The Local, The National and the Global' in Robert Post (ed), *Another Cosmopolitanism* (OUP 2006)



qualitative research.<sup>8</sup> This has involved studying case law, legislation, policy documents, scholarly works and other secondary materials. Some articles have involved archival research and examination of documents at the Public Records Office, Tower Hamlets Archive, the House of Lords and the Anti Slavery League. Several of the articles involved interviews with activists and lawyers about their experiences of legal and human rights processes. The process of re-writing a judgment as part of the feminist judgment project provided an opportunity to experiment with new methods of interrogating law. Using a judicial method of thinking and writing enabled me to understand the possibilities and constraints of adjudication, and gain insight into how a judge might experience law delivering in turn a more informed understanding of how feminist theory might best contribute to this adjudicative process.<sup>9</sup>

## 1.2 Introduction to Feminisms

This section reflects on the different types of feminism that are relied on in my thesis. It discusses the centrality of the relationship between feminist activism and the academy. It notes the contradiction between the views that feminism is too weak and divided to make a difference, that it is irrelevant and that it has become overly powerful. It discusses Halley's well-known intervention that there is a need to 'take a break' from feminism to gain fresh

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<sup>8</sup> Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M. Kritzer (eds) *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010) 927-950, 927

<sup>9</sup> Rosemary Hunter, Clare McGlynn, and Erica Rackley (eds) *Feminist Judgments: From Theory to Practice*, (Hart 2010)

perspectives.<sup>10</sup> It rejects this suggestion on the grounds that feminism has repeatedly shown itself to be open to new ways of thinking.

There is no authoritative definition of feminism, but there are a set of distinct ideas. These include a pre-eminent commitment to exposing and bringing to an end women's exclusion from various spheres in society and its institutions.<sup>11</sup> Feminism is a practical movement that seeks through theory, politics, culture, law and other means to expunge gendered practices. It sets out to imagine and recreate a world without gender hierarchy.<sup>12</sup> Legal feminists seek to interrogate, explore and deploy law in this broader project.

There are profound differences between feminists exemplified by their loose categorization into the well-known schools of thought.<sup>13</sup> These disputes include interrogating whether the category of 'woman' exists and whether women have an 'essential' nature.<sup>14</sup> These different strands of feminist theory have influenced my work, but I do not champion any particular one. In *Feminist Legal Theory 2013*, where I give an overall account of the subject, I adopt a thematic approach that discusses feminism in terms of its key

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<sup>10</sup> Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press 2006)

<sup>11</sup> Denise G. Reaume, 'What is Distinctive about Feminist Analysis' (1986) 2 *Legal Theory* 265

<sup>12</sup> I am drawing here on the many definitions of feminism including those from Vanessa Munro, *Law and Politics at the Perimeter: Re-Evaluating Key Debates in Feminist Theory*, (Hart 2007) 11, Ngaire Naffine, 'In Praise of Legal Feminism' (n 1) and Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351

<sup>13</sup> For an accounts of the various schools of feminist thought see Patricia A. Cain, 'Feminism and the Limits of Equality' (1990) 24 *Georgia Law Review* 803, Rosemarie Tong, *Feminist Thought: A Comprehensive Introduction*, (Routledge 1994) and Maggie Humm, *Feminisms: A Reader* (Harvester Wheatsheaf 1992)

<sup>14</sup> Judith Butler, *Gender Trouble* (Routledge 2007) These issues are both addressed further at 1.3

conceptual critiques namely public/private and equality, and look at the different contributions made from the disparate schools. My use of theories of rights, equality and autonomy provides a clear connection with liberal feminism. However, my articles on sexual harassment look at several theories including the radical feminism of MacKinnon, and her dominance thesis.<sup>15</sup> Although I would agree with most other commentators that MacKinnon has not sufficiently problematized the category of woman I think her work is an important reference point in legal feminism.<sup>16</sup> My writing on feminist legal method often draws on some of the more relational theoretical approaches derived from cultural feminism.<sup>17</sup> I explore how these ideas might be used to develop alternative legal modalities.<sup>18</sup> But I would reject the idea that women have a fixed and enduring nature. Post-modern feminism is referenced throughout as a method of critique to expose the limits of law and to reconstruct the subject. Its theories are robust in holding law and feminism to account, but it is often less useful in proposing alternatives to the current frame. My use of any particular theory depends on its utility and its contribution to the feminist legal project. This approach also informs my use of human rights theory discussed below. As Bottomley and Conaghan state this means that ‘...the strength of feminist jurisprudence is tested not by claims to

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<sup>15</sup> Catherine A MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989)

<sup>16</sup> For criticisms of MacKinnon’s essentialism see Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (n3) and Angela Harris, ‘Race and Essentialism’ in Feminist Theory’ in Adriene K. Wing (ed) *Critical Race Feminism: A Reader* (New York University Press, 1997) 11-18, 13

For a defence of MacKinnon’s views see Ann Scales, *Legal Feminism: Activism, Lawyering and Legal Theory*, (New York University Press 2006) 13. The feminist debate on essentialism is discussed at 1.3 below

<sup>17</sup> Carol Gilligan, *In a Different Voice*, (Harvard University Press 1982) and Robyn West, ‘Jurisprudence and Gender’ (1988) *University of Chicago Law Review* 1

<sup>18</sup> *Feminizing Human Rights Adjudication* 2013 and *Judicial Deference and Method* 2014

internal coherence but rather by an ability to deliver.<sup>19</sup> I would add that it is the *potential* to yield results that is crucial. This is consistent with my theme that legal feminism is a practical project and it has a responsibility to try to shape law and its adjudicatory processes.

My work is underpinned by an understanding of the value of feminism, in its various forms, as a force for change. This puts me at odds with Halley's exhortation to, 'take a break from feminism'. Halley sees feminism as stifling other new and innovative modes of thinking by its relentless focus on what she describes as m>f, and carrying a brief for f.<sup>20</sup> Halley argues that feminism is obsessed with women's subordination and victimization. It exercises real power and has morphed into 'governance feminism' that 'walks the halls of power', is a force to be contended with in the culture wars and its views on sexual harassment and rape have become ubiquitous.<sup>21</sup> According to Halley feminists who rely on post-modern or post-colonial ideas are diverging and suspending their feminist impulses in order to pursue different avenues of thought.<sup>22</sup> Halley severely underestimates the extent to which feminism enthusiastically adopts other ideologies and disciplines as exemplified by the various schools of thought that draw, inter alia, on socialism, psychology and post structuralism. Feminist legal scholars have also relied, for instance, on

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<sup>19</sup> Anne Bottomley and Joanne Conaghan, *Feminist Theory and Legal Strategy* (Blackwell 1993) 1

<sup>20</sup> Halley (n 10) 17. Halley states that for a theory to be feminist there are three elements. First, there must be a distinction between m and f. Second, there must be some sort of subordination between m and f. Thirdly, there must be opposition to the subordination of f. Halley (n 10) 18

<sup>21</sup> Halley (n10 ) 20-22

<sup>22</sup> Halley (n10) 19-20

critical legal studies and legal realism.<sup>23</sup> It is feminism's openness, absorption of other ideas and its willingness to adapt that leads me to reject Halley's exhortation that it is necessary to 'take a break from feminism' to obtain fresh perspectives. There have always been lively debates within feminism about the dangers of the over regulation of sexual conduct, and the need to pay attention to a diversity of interests including those of heterosexual men.<sup>24</sup> Her work seems to pay insufficient attention to lived realities, and as Cooper has noted, '[o]n one level social change politics seems almost completely absent from *Split Decisions*'.<sup>25</sup> Taking a break from feminism would come at too high a cost at a time when the political and legal environment requires that attention be paid to gender hierarchies.

The premise of my thesis is that feminism needs to work with the existing legal and political structures whilst imagining alternatives. It is not the powerful force, visualized by Halley, nor is it disempowered or irrelevant. Feminism, as discussed below, has been successful in removing formal legal barriers, and influencing national and international political agendas. It does sometimes 'walk the corridors of power'. Governments and international organizations have created institutions that have gone some way to embed feminism in the state through the creation of a feminist architecture.<sup>26</sup> This carries the risk of

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<sup>23</sup> Ngaire Naffine 'In Praise of Legal Feminism' (n 1) 80

<sup>24</sup> Lynne Segal, 'Comments on *Split Decisions: How and Why to Take a Break from Feminism*' (2010) *International Journal of Law in Context* 112 and Ngaire Naffine, *Gender and Justice* (Ashgate, 2002) 1

<sup>25</sup> Davina Cooper, 'The Pain and Power of Sexual Interests: responding to Split Decisions' (2010) *International Journal of Law in Context* 94, 97. See also Joanne Conaghan 'Feminist Legal Studies: General Introduction' in *Feminist Legal Studies*, (Routledge 2009) 10

<sup>26</sup> Sylvia Walby, *The Future of Feminism* (Polity 2011) 58-61. See generally on state feminism Vicky Randall and Georgina Waylen (eds), *Gender, Politics and the State*

feminism losing its independence and critical edge and of being instrumentalised.<sup>27</sup> It means that feminism takes place within and outside the state, and that at times it has to struggle to maintain its own priorities in the face of competing state discourses.<sup>28</sup> But there is little evidence to suggest that it has morphed into the overly powerful 'governance' feminism that Halley describes. The numbers of women in positions of power and authority still remains stubbornly low, and hard won gains are vulnerable to policy shifts.<sup>29</sup> However, I would also reject the idea that feminism has become irrelevant or is the weak, washed out or weary force described by others.<sup>30</sup> Feminism does have a presence in the legal and political sphere that enables it to contribute to the ongoing conversations about gender. It is informed by its activism within and without the state, but it is submitted here that it maintains its basic theoretical and political shape.

Feminism's heterogeneity should, in general, be seen as a strength rather than a weakness.<sup>31</sup> In terms of scholarship the difference between feminist theories is seen here as a set of rich resources on which to draw rather than

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(Routledge 2002) and Joyce Outshoorn and Johanna Kantola, (eds) *Changing State Feminism* (Palgrave Macmillan 2007)

<sup>27</sup> Angela McRobbie, *The Aftermath of Feminism: Gender, Culture and Social Change* (Sage 2009). These issues are pursued in brief at 2.00

<sup>28</sup> See below at 2.0

<sup>29</sup> For the numbers of women in positions of power and authority in the United Kingdom see Fawcett Society, *Sex and Power 2013: Who Runs Britain*, 2013, <http://www.fawcettsociety.org.uk/sex-and-power-2013-who-runs-britain/> (last accessed January 28<sup>th</sup> 2014). See also Joni Lovenduski, 'Feminizing British Politics' (2012) *The Political Quarterly* 697

<sup>30</sup> It has been argued that there has been a feminist resurgence that is evidenced by the activity on the internet, protests, university activity, membership groups, UK networking groups and individual activism. Catherine Redfern, and Kristin Aune, *Reclaiming the F Word*, (Zed Books 2010). See also Ealasaid Munro, 'Feminism: A Fourth Wave?' (2013) *Political Insight* 22

<sup>31</sup> Redfern and Aune Ibid 2

an encumbrance.<sup>32</sup> It is also important not to overplay the differences between feminist scholars who are often supportive of similar policy recommendations.<sup>33</sup> Activists navigate difference through working in coalitions and networks. These provide pathways through which feminist ideas and methods enter the mainstream.<sup>34</sup> Much of my work is directed at suggesting how feminist scholarship and activism can find a route into the legal process. *Feminist Activism and Third Party Interventions 2005*, for example, explores feminist legal activism in the UK. It notes that litigation strategies have never been as organized and targeted as in North America, but there has been a steady stream of activity that has focused on law reform and strategic litigation.<sup>35</sup> The article examines the use of third party interventions after the introduction of the Human Rights Act 1998 (HRA) as a means of influencing judicial decisions and the developing human rights jurisprudence. This work is rooted in the assumption that there is a dynamic and fluid body of ideas that emanates from feminist groups and scholars that should be pursued. My writing on human rights draws on the international human rights principles

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<sup>32</sup> This approach was taken in the Feminist Judgments Project, which relied on various strands of feminism. Rosemary Hunter, Clare McGlynn and Erica Rackley (n 9) Edwards in her analysis of feminism and international human rights also states that she prefers not to rely on any particular strand of feminism. She finds it more helpful to use the various perspectives as tools of analysis. Alice Edwards, *Violence Against Women Under International Human Rights Law*, (Cambridge University Press, 2010) 38

<sup>33</sup> Ann Phillips, 'Feminism and the Politics of Difference. Or, Where have all the Women Gone?' in Susan James and Stephanie Palmer (eds), *Visible Women: Essays in Feminist Legal Theory and Political Philosophy* (Hart, 2002) 11–28, 13

<sup>34</sup> Sylvia Walby (n 26) 61-63

<sup>35</sup> For a recent discussion of feminist legal activism in the United Kingdom see Susan Millns and Charlotte Skeet, 'Gender Equality and Legal Mobilisation in the United Kingdom: Using Rights for Lobbying, Litigation, Defence and Attack' (2013) 28 *Canadian Journal of Law and Society* 169

developed by transnational and domestic women's groups.<sup>36</sup> It pre-supposes that there is a sufficiently coherent set of norms that can be translated into legal principles. Where feminist ideas conflict, and there are different sets of solution to a legal problem, Gotell argues that the feminist response should be to present the court with multiple interventions. She suggests that this makes it clear that legal arguments are the subject of political positions. She acknowledges the risks but also sees that it presents possibilities for feminists.<sup>37</sup> Rather than see feminist difference as a disadvantage it can provide the basis for a judicial decision based on a full knowledge of the underlying controversy.<sup>38</sup>

In sum, my work adopts a broad definition of feminism that sees it as a set of sometimes conflicting ideas that continues to have purchase. It holds open the prospect that feminism can gain legal traction, and can at a minimum bring the lived reality of people's lives to law's centre. It sees feminism as

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<sup>36</sup> Some of my earlier work also explores the use of international human rights norms by non government organisations. See Carole Petersen and Harriet Samuels, 'The International Convention on the Elimination of all Forms of Discrimination Against Women: A Comparison of its Implementation and the Role of Non-Governmental Organizations in the United Kingdom and Hong Kong' (2002) 26 *Hastings International and Comparative Law Review* 1-50

<sup>37</sup> Lise Gotell, 'LEAF's Changing Approach to Charter Equality' in Radha Jhappan (ed.) *Women's Legal Strategies Canada* (University of Toronto Press 2002) 135-174, 164

<sup>38</sup> This was the position in *Quila*. Here the court had to decide on the legality of the government's amendments to the Immigration Regulations on mixed nationality marriages. The government introduced the changes in order to deter forced marriage. Southall Black Sisters intervened to argue against the amendments whereas another women's group, Karma Nirvana, intervened in favour of the government view. The Supreme Court decided against the government on the grounds that the changes to the Immigration Regulations were disproportionate and breached the right to a family life in Article 8 of the Convention. See *R (Aguilar Quila and another) v Secretary of State for the Home Department* [2011] UKSC 45. This case is discussed in *Judicial Deference and Feminist Method 2014*



being able to infuse law with some of its priorities and encourages the use of legally orientated solutions.

### 1.3 Feminism and Strategic Essentialism

My thesis that feminists should have an active presence within the legal arena is potentially undermined by the essentialist critique, which questions whether there is sufficient commonality between women for them to be a credible constituency. This critique has been described as a 'particular bane for feminist jurisprudence'.<sup>39</sup> And before I proceed it is necessary to explain how I reconcile the essentialist critique with my commitment to feminist mobilization around law.

The essentialist critique, originally associated with critical race theory, takes feminists to task for imposing a category of woman with a fixed or essential nature, which fails to capture the diversity of the human experience, and underplays differences based on race, class and other categories.<sup>40</sup> Post-modernists have also been instrumental in this analysis, and the consequence has been to destabilise the female subject.<sup>41</sup> For many postmodern feminists the category of woman is regarded as defunct, and gender is seen as performative. The subject is dissolved, and politics is conducted by making

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<sup>39</sup> Jill Marshall, *Humanity, Freedom and Feminism* (Ashgate 2005) 76

<sup>40</sup> Combahee River Collection, 'A black feminist statement' in Zillah Eisenstein (ed), *Capitalist Patriarchy and the Case for Socialist Feminism*, (Monthly Press Review 1994) and Angela Harris, 'Race and Essentialism in Feminist Legal Theory' in Adrien Katherine Wing (ed), *Critical Race Feminism: A Reader* (New York University Press 1997) 7-17

<sup>41</sup> Bordo has described this combination as an 'academic marriage' that has 'brought indigenous feminist concerns over ethnocentrism and unconscious racial biases of gender theory into theoretical alliances with ... poststructuralist thought', Susan Bordo, 'Feminism, Postmodernism and Gender Scepticism' in Linda Nicholson (ed), *Feminism/Postmodernism*, (Routledge 1990) 133-156, 135

gender trouble; existing gender categories are confused through subversive acts.<sup>42</sup> Conaghan, in her seminal essay, states that the essentialist critique poses two main problems. It threatens to rob feminism of women as an identifiable political constituency, and it makes it difficult for feminism to speak of women's experiences without minimizing their diversity.<sup>43</sup>

In *An uneasy Alliance 2009* my premise, that maintaining the category of woman is vital for feminism, is made explicit. This is a short piece, which discusses the different but related issue of the relationship between the scholarship on feminist legal studies and gender, sexuality and law. It argues that dissolving the category of woman is to imply that feminism has run its course, and that it discounts the possibility, in particular contexts, that women may have interests distinct from others. Without adopting a totalizing view it is possible to see that there is sufficient evidence of commonality, in areas of the human experience, for women to form alliances.<sup>44</sup> A failure to see women as a broad based group means that it is difficult to organize politically and, it is submitted that this is too great a loss for feminism which needs power and influence if it is to effect change.<sup>45</sup>

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<sup>42</sup> Judith Butler (n 14) 35

<sup>43</sup> Conaghan also notes that the feminist anxiety over essentialism has discouraged empirical legal research that has a socio economic focus in favour of abstract theorizing on the gendering of cultural and legal representations. See Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (n 12) 370

<sup>44</sup> Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law', (n 12) 373 Jill Marshall (n 39) 89

<sup>45</sup> Marshall argues that dissolving the subject without reconstructing it may lead to 'chaos and meaninglessness' leaving no basis to improve people's lives. See Jill Marshall (n39) 83

Along with many other feminist scholars I support the use of strategic essentialism.<sup>46</sup> This recognizes the danger of invoking woman as a stable character with a fixed identity. But as the category of woman is one that finds general acceptance in most societies it advocates relying on essentialism for achieving certain goals. However, it requires the development of methods and strategies to minimize the risk of ignoring differences and ensuring greater inclusivity. The result is that feminist theory is able to interact with feminist practice and to remain rooted in the experiential realm. This must be read through Marshall's critical insight that the methods needed to guard against the imposition of a dogmatic feminism are to be found in the deconstructive techniques of postmodernism.<sup>47</sup> This ensures there is constant reflection and openness. It goes some way to providing a response to the critics of strategic essentialism who see it as a method of avoiding the challenges of identity politics, and of being excessively instrumental.<sup>48</sup> Sustained deliberation and contextualization mean that each use of essentialism, the motive of the actor and every legal strategy, must be scrutinized.<sup>49</sup>

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<sup>46</sup> This term has its origins in the work of Spivak. See Gayatri Spivak 'Subaltern Studies: Deconstructing Historiography' in Ranajit Guha and Gayatri Spivak, (eds), *Selected Subaltern Studies*, (Oxford University Press 1988) and Gayatri Spivak, with Ellen Rooney, 'In a Word: Interview with Gayatri Chakravorty Spivak with Ellen Rooney' in Naomi Schor and Elizabeth Weed (eds), *the essential difference*, (Indiana University Press 1994) 98-115.

<sup>47</sup> Jill Marshall (n 39) 78

<sup>48</sup> Vanessa Munro (n 12) 117. Other reservations over the use of strategic essentialism are that it may become permanent and be used for reactionary means. See Diana Fuss, 'Reading Like a Feminist' in Naomi Schor and Elizabeth Weed, *The Essential Difference* (n 46) 107. See also the critique of Rosalind Dixon, (2008) 'Feminist Disagreement (Comparatively) Recast' (2008) 31 *Harvard Journal of Law and Gender* 277

<sup>49</sup> Fuss observes that Spivak's approach focuses on the motivation behind the use of essentialism, and she re-emphasises the need to scrutinise who is practicing it. See Diana Fuss, 'Reading it Like a Feminist' *ibid* 108

## 2.0 Feminism and the Utility of Law

This section situates my work in the context of the feminist debate on the utility of law, and in particular challenges Smart's advice to feminists to abstain from litigation and law reform. It explains the background to Smart's intervention as a critical response to the reliance on law by previous generations of feminists. It goes on to explain how some of the published pieces fit into this part of the thesis. It then dwells on the work done in *Sexual Harassment: A Defining Moment 2004* to demonstrate how it foregrounds many of the issues developed in later work.

My work makes the case for a feminist commitment to the use of law to progress feminist aims. It is not a rejection of existing critiques of liberalism and law, but a recognition of feminism's capacity to use law for its own ends.<sup>50</sup> Most accounts of feminist engagement with law start with the call, by first wave feminists, for women to be treated as equals by the law.<sup>51</sup> This centred on the demand for women to be recognized as legal persons, to enter the

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<sup>50</sup> An early analysis of women's position within the liberal rights frame is provided, most famously, by Mary Wollstonecraft, *A Vindication of the Rights of Women*, (Penguin Books 1982) and John Stuart Mill, *On the Subjection of Women* 1869 (Cambridge University Press 1989). For more general feminist critiques of liberalism see Susan Molly Okin, *Women in Western Political Thought*, (Princeton University Press 1979), Carol Pateman, *The Sexual Contract* (Blackwell Publishers 1988) and Alison M. Jaggar, *Feminist Politics and Human Nature* (Rowman and Littlefield Publishers 1988)

<sup>51</sup> For an alternative account that argues that Victorian feminists eschewed the language of equality see Rosemary Auchmuty, 'The Married Women's Property Acts' in Rosemary Hunter (ed), *Rethinking Equality: Feminist Challenges*, (Hart 2009) 13-39. Feminist activism is traditionally described in waves. The first wave was during the late 19<sup>th</sup> and early 20<sup>th</sup> century and the second wave was in the 1960's and 1970's. The third wave usually refers to the 1990's or the so-called 'post feminist era'. Perhaps there is now a fourth wave of feminist activism beginning in 2010 given an apparent resurgence in visible feminist activity. See Catherine Redfern, and Kristin Aune (n 30) and Ealasaid Munro (n 30). Conaghan notes that the 'wave typology' does not always accurately reflect the location and timing of feminist work. For example events could be organized thematically and she notes that some feminists would deny there is a third feminist wave. Joanne Conaghan, *Law and Gender* (Oxford University Press 2003) 130

professions, and to be able to vote.<sup>52</sup> The feminist judgment in *Roberts v Hopwood* 2010 makes reference to some of the relevant legal changes.<sup>53</sup> The common law and the judiciary were either indifferent or hostile towards these initiatives.<sup>54</sup> Second wave feminism, beginning approximately in the mid 1960's, moved from dismantling formal barriers to equality, to a focus on more substantive areas of law that had a particular impact on women such as domestic violence, rape, abortion and employment law.<sup>55</sup> There was a historical shift from opposing blatantly discriminatory laws to using the law to end discrimination.<sup>56</sup> This absorption of women into the liberal legal frame and the achievement of formal equality was gained by what Fredman describes as a 'painfully slow and conflictual process'.<sup>57</sup> This has resulted in the elimination of most formal barriers, but many issues of substantive inequality remain well into the twenty-first century. This is evidenced by, for instance, the high levels of violence against women, dissatisfaction with the law on rape, the gender

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<sup>52</sup> For accounts and analysis of these events see Ray Strachey, *The Cause: A Short History of the Women's Movement in Great Britain* (Virago 1978) and Albie Sachs and Joan Hoff Wilson, *Sexism and the Law: A Study of Male Beliefs and Judicial Bias* (Martin Robertson 1978)

<sup>53</sup> These include the Representation of the People Act 1918, the Parliament (Qualification of Women) Act 1918 and the Sex Disqualification Removal Act 1918

<sup>54</sup> Sachs and Hoff Wilson (n 52)

<sup>55</sup> Kathleen Bartlett, and Rosanne Kennedy, 'Introduction' in Kathleen Bartlett, and Rosanne Kennedy (eds), *Feminist Legal Theory: Readings in Law and Gender*, (Westview Press 1991). For an overview of the state of the law in the United Kingdom in this period from a feminist perspective see Susan Atkins, and Brenda Hoggett, *Women and Law*, (Blackwell 1981)

<sup>56</sup> Jaggard (n 50) 35. In the United Kingdom this manifested itself in the introduction of legislation such as the Sex Discrimination Act 1975, the Equal Pay Act 1970 and the Domestic Violence and Proceedings Act 1976

<sup>57</sup> Sandra Fredman, *Women and the Law*, (Clarendon Press 1997) 95

pay gap, the disproportionate impact of austerity measures on women and discrimination on the grounds of pregnancy.<sup>58</sup>

In addition to criticizing discriminatory laws and working on law reform there was a trend within legal feminism from the 1980's onwards that interrogated the gendered nature of the legal discourse. Conaghan identifies three strands in this thinking.<sup>59</sup> They are first, feminists who provide an analysis of how supposedly gender-neutral laws disadvantage women through their differential impact, secondly, those who examine how liberal ideas themselves, such as autonomy and privacy, exclude women and their concerns. Thirdly feminists have examined how law constructs images of women such as the 'good' mother and the 'real' rape victim.<sup>60</sup> For radical feminist scholars such as MacKinnon the consequence of this type of analysis of law was to conclude that the law was male because it was written by men, it ignores women's reality and embodies male power over women.<sup>61</sup>

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<sup>58</sup> For examples of recent NGO, government reports and websites that discuss gender equality see The Fawcett Society, *The Impact of Austerity on Women*, March 2012 [http://www.fawcettsociety.org.uk/?attachment\\_id=407](http://www.fawcettsociety.org.uk/?attachment_id=407) (last accessed 28<sup>th</sup> January 2014), Home Office, *The Stern Review: A Report by Baroness Stern CBE of an Independent Review into how Rape Complaints are Handled by Public Authorities in England and Wales*, 2010 [http://webarchive.nationalarchives.gov.uk/20100418065537/equalities.gov.uk/stern\\_review.aspx](http://webarchive.nationalarchives.gov.uk/20100418065537/equalities.gov.uk/stern_review.aspx) (last accessed 28th January 2014), Home Office, *Ending Violence Against Women and Girls*, 2013, <https://www.gov.uk/government/policies/ending-violence-against-women-and-girls-in-the-uk/supporting-pages/domestic-violence> (last accessed January 26th 2014)

<sup>59</sup> Joanne Conaghan, 'Reassessing the Feminist Theoretical Project in Law' (n 12) 360-61. See also Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (Allen and Unwin 1990) especially chapter 1

<sup>60</sup> Ibid Conaghan 361

<sup>61</sup> MacKinnon states that, 'In the liberal state, the rule of law-neutral, abstract, elevated, pervasive-both institutionalizes the power of men over women and institutionalizes power in its male form'. Catherine A. MacKinnon, *Toward A Feminist Theory of the State* (n 15) 238. Some of MacKinnon's language feels dated because of her use and juxtaposition of the categories of male and female. As Conaghan notes feminist scholars have eschewed the 'law is male' analysis as it fails to acknowledge that masculinity is also constructed, and it is seen as essentialist and reductionist. Instead law is described as gendered. Conaghan *Law and Gender* ( 51) 75. However, much of MacKinnon's reasoning is sound. Her point that law's neutrality is a sham is one that is still supported by many feminists.

MacKinnon concludes that it is necessary to create a feminist jurisprudence to expose law's maleness, to embody women's experiences and to redress this male bias. For Smart this is to concede too much to law. Her seminal book *Feminism and The Power of Law* cautions feminists against excessive faith in law.<sup>62</sup> Smart, influenced by Foucault, sees law as exercising power by claiming that it has the methods to establish truth and thus disqualifies other forms of knowledge and experience as inferior.<sup>63</sup> Relying on Mossman, she declares that legal method is impervious to feminism.<sup>64</sup> Smart disapproves of law reform and the attempts of scholars such as MacKinnon to develop a 'grand theory' or feminist jurisprudence.<sup>65</sup> She points out law's shortcomings as a method of achieving change and warns that by using law feminists confer it with a special privilege in solving problems faced by women.<sup>66</sup> She urges feminists to consider non-legal strategies.<sup>67</sup> In her later work she criticizes, what she sees as a tendency for feminists to shy away from theorizing law in an attempt to retain law's practical values.<sup>68</sup> Sandland explains Smart's refutation of law as follows,

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<sup>62</sup> Smart (n 2) 10

<sup>63</sup> Smart, as a postmodernist, is also critical of feminists for their belief in the possibility of truth. Drakopoulou, in response, points out that by recognizing something as untrue one must inevitably recognize something else as a 'better truth'. See Maria Drakopoulou, 'Postmodernism and Smart's Feminist Critical Project in Law, Crime and Sexuality' (1997) 1 *Feminist Legal Studies* 107, 113

<sup>64</sup> Mary Jane Mossman, 'Feminism and Legal Method: The Difference it Makes' (1987) 3 *Wisconsin Journal of Law and Society* 30

<sup>65</sup> Catherine MacKinnon, *Towards a Feminist Theory of the State* (n15)

<sup>66</sup> This debate is also summarized and discussed in Harriet Samuels, 'Women and the Law in Hong Kong: A Feminist Analysis in Raymond Wacks (ed), *China, Hong Kong and 1997: Essays in Legal Theory* (Hong Kong University Press 1993)

<sup>67</sup> Carol Smart, *The Power of Law* (n 2) 164. And also Carol Smart, *Law, Crime and Sexuality: Essays in Feminism*, (Sage Publications 1995)

<sup>68</sup> Carol Smart, 'The Woman of Legal Discourse' (1992) *Social and Legal Studies* 29, 30

‘When law is engaged with on its own terms so much is always already given that such engagement can only be counter-productive. From her point of view, for example, all cases are wrongly decided, and they would still be wrongly decided if the substantive outcome [had] been different, since all cases must fall to be decided within a given (legal) framework which fails to challenge the deployment of sex(uality)/gender-as-identity, on the one hand, and which legitimizes Law on the other.’<sup>69</sup>

It is difficult to overestimate the importance of Smart’s book.

It appears to have a very clear message and poured a bucket of very cold water over second wave feminists’ enthusiasm for trying to use law for women.<sup>70</sup> This has led to a disjuncture between feminist theorising and practice, which is regretted by many feminists.<sup>71</sup> It is my disquiet about this call to turn away from law, and the belief that legal feminists, both scholars and activists, have a responsibility to engage with law that underpins the thesis. Critique of law is insufficient. There is a need to use law’s tools in traditional and imaginative ways not only to expose its gendered character but to find new ways of doing law. This aligns the thesis alongside feminists who seek to reconstruct liberal values rather than reject them outright.<sup>72</sup> Feminists have interrogated liberalism and found it wanting. They have critiqued the individualistic and autonomous nature of the liberal subject, the dualism that

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<sup>69</sup> Ralph Sandland, ‘Between “Truth” and “Difference”: Poststructuralism, Law and the Power of Feminism’ (1995) 3 *Feminist Legal Studies* 4, 16

<sup>70</sup> Joanne Conaghan, ‘Reassessing the Feminist Theoretical Project in Law’ (n 12) 363.

<sup>71</sup> Joanne Conaghan *ibid.*, 356 and Vanessa Munro (n 12) 69, Siobhan Mullally, (n 6) 223

<sup>72</sup> See, for example, Rosemary Hunter, Clare McGlynn, and Erica Rackley (n 9), Jill Marshall (n 39) Siobhan Mullally (6), and Vanessa Munro (12),



liberalism presents in its divisions between the rational versus the emotional, its formal view of equality, the vision of the neutral state and its separation of the public and the private realm.<sup>73</sup> Jaggard concludes that feminism has often relied on liberal ideas and has many reasons to be grateful to liberalism, but that it is incapable of bringing about the changes desired.<sup>74</sup> Nussbaum, on the contrary, accepts much of the critique of liberalism, but she has famously mounted a spirited defence of its principles of 'personhood, autonomy, rights dignity [and] self respect'.<sup>75</sup> She has pointed out the diversity of liberal thinking, and notes that it has attempted to respond to feminist criticisms. She tries to persuade the reader that, '[t]he deepest and most central ideas of the liberal tradition are ideas of radical force and great theoretical and practical value'.<sup>76</sup> Nussbaum's own project, based on human capabilities, articulates a set of needs necessary for autonomy and human flourishing.<sup>77</sup>

My concern that Smart's exhortations to desist from legal engagement, are overly dismissive of law's possibilities, are shared by other legal feminists and

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<sup>73</sup> See Alison Jaggard (n 50) Susan Molly Okin (n 50), Carol Pateman (n 50). For legally focused critiques see, for example, Katherine O'Donovan, *Sexual Divisions in the Law* (Weidenfeld and Nicolson 1985), Ngaire Naffine, *Law and the Sexes: Explorations in Feminist Jurisprudence* (n 59), Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart, 1998)

<sup>74</sup> Alison Jaggard (n 50) 47

<sup>75</sup> Martha C Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 56

<sup>76</sup> Ibid 56. For a critique of Nussbaum's theory see Ann Phillips, 'Feminism and Liberalism Revisited: Has Martha Nussbaum got it Right?' (2001) 8 *Constellations* 249. Other feminists also make use of liberal ideas in their work. Notably, Cornell relies on the liberal values of equal worth and the capacity for self-determination. She marries this with psychoanalytic and postmodern theory to create the imaginary domain where individuals have the chance to become a person. See Drucilla Cornell, *The Imaginary Domain* (Routledge 1995). For a comparison of Cornell and Nussbaum see Karen Van Marle "'The Capabilities Approach", "The Imaginary domain" and "Asymmetrical Reciprocity" Feminist Perspectives on Equality and Justice" (2003) *Feminist Legal Studies* 255

<sup>77</sup> Martha C. Nussbaum 'Human Capabilities, Female Human Beings' in Martha.C. Nussbaum and Jonathan Glover (eds), *Women, Culture and Development: A Study of Human Capability* (Oxford University Press 1995) 60-104

critical theorists. Sandland criticizes Smart for creating a dichotomy between politics/philosophy and between deconstruction/reform thus closing down all political and legal options.<sup>78</sup> Being outside the system as a form of resistance is, according to Sandland, a strategy of 'no resistance'. He sees Smart as being overly pessimistic, by dismissing the significance of cases such as *R v R*, where the judges removed the marital rape exemption, there is a danger of feminism 'understating its own political and jurisprudential purchase as a subversive force interrupting the "unmodified" liberal paradigm'.<sup>79</sup> Feminism needs to use the tension between recognition and denial of law to evaluate the merits of legal intervention on a case-by-case basis. Sandland sees there being value in finding the gaps in law that provide a space to struggle over law's meaning.<sup>80</sup> Lacey appears sympathetic to Smart's theoretical project, and to Smart's insight that law's belief that it is objective, true and impartial inflates its status so that it appear superior to other forms of knowledge. This makes it harmful to women.<sup>81</sup> But she also has reservations about Smart's political strategy and argues that it would be unfortunate to give up attempts at legal reform. She notes that it is unclear that other institutions such as the family, religion or politics are more susceptible to reconstruction than law.<sup>82</sup> Writing just under ten years later Munro argues that feminism should not relinquish its attempts to reconstruct law. She is not uncritical of liberal values, but given law's resistance to competing discourses she thinks there are

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<sup>78</sup> Ralph Sandland (n 69) 33

<sup>79</sup> Ralph Sandland (n 69) 29-36, *R v R* [1992] 1 AC 599. See also Conaghan's recent re-evaluation of *R v R* in Joanne Conaghan, *Law and Gender* (n51)51-59

<sup>80</sup> Ralph Sandland (n 69) 28

<sup>81</sup> Nicola Lacey, *Unspeakable subjects* (n 73) 172

<sup>82</sup> *Ibid*

pragmatic reasons for using law rather than remaining silenced by an oppositional stance.<sup>83</sup>

My view is that feminist strategy must maintain a foothold in the legal camp. Law should not be given up to those who may be less sympathetic to its concerns.<sup>84</sup> But this is not a call to give up on theory or to go easy on law.<sup>85</sup> Smart's warning about the dangers of feminism being co-opted by the mainstream and being disempowered by dominant discourses are well made. A few examples from outside law should suffice. The trend for feminists to make political claims that are market orientated, rather than state centric, has been described by Squires and Kantola as leading to 'market feminism'. Feminists often promote gender equality in the neo liberal language of efficiency and good business sense. This can shape feminist policies and practices, which may become concerned with supplying relevant technical knowledge rather than proposing new agendas.<sup>86</sup> Fraser has also problematized the relationship between feminism and neo-liberalism. For her, second wave feminist critiques of the state have, unwittingly, been used by neo liberalism to advance its ideology.<sup>87</sup> McRobbie also makes a similar point when she describes how elements of feminism have been absorbed into

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<sup>83</sup> Vanessa Munro (n 12) 62

<sup>84</sup> Vanessa Munro (n 12) 84

<sup>85</sup> For a thoughtful discussion of legal feminism and theory see Anne Bottomley, 'Theory is a Process not an End: A Feminist Approach to the Practice of Theory' in Janice Richardson and Ralph Sandland, (eds), *Feminist Perspectives on Law and Theory*, (Cavendish 2000)

<sup>86</sup> Johanna Kantola and Judith Squires, 'From State Feminism to Market Feminism' (2012) *International Political Science Review* 1. The relationship between feminism and the state is complex and Kantola and Squires refer to the problem of feminists being co-opted by the state. They discuss the changing nature of the state and its relationship with the private sector. They see the market as opening up new opportunities for feminists, but their focus is on exploring the complexities and ambiguities of 'market' feminism.

<sup>87</sup> Nancy Fraser, *Fortunes of Feminism, From State Managed Capitalism to Neoliberal Crisis*, (Verso, 2013), According to Fraser feminist critiques of, inter alia, the family wage and welfare paternalism have been co-opted by neo liberalism.

mainstream institutions. Feminist ideas appear in the media, popular culture and the state in the form of an individualistic neo liberal discourse using the language of empowerment and choice. This may lead to a disarticulation of feminism, as equality and freedom are regarded as having been achieved and feminism is seen as redundant.<sup>88</sup>

The danger of feminist disempowerment through engagement with mainstream institutions is real, and feminists must exercise caution. But this does not mean that feminists should refrain from using law. Smart's warnings about law's strength mean that feminists must try to effect changes in law's methods and process as well as trying to improve the substantive law in particular areas such as rape and domestic violence. It is not sufficient just to expose law's lack of impartiality and gendered nature. Law as a set of ideas and practices should be opened up to other influences through the refashioning of old methods and the introduction of new ones.

## 2.1 Harnessing Law's Power

The position adopted here is that legal feminism does have the power to impose its authority on law. Law is not impervious to feminist method.<sup>89</sup> Hunter observes that the feminist judgments project, which she along with others initiated, 'flatly contradict –or attempt to contradict[s]...'this view. It endeavours to write women back into law by 'harnessing' legal methods.<sup>90</sup> It sees law as porous and malleable rather than a closed system. In writing my

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<sup>88</sup> Angela McRobbie (n 27) 10 and 27. But for a contrary view see Sylvia Walby, (n 26). See also the discussion above at 1.3

<sup>89</sup> Rosemary Hunter, 'The Power of Feminist Judgments?' (2012) *Feminist Legal Studies* 135

<sup>90</sup> *Ibid* 138

judgment in *Roberts v Hopwood* 2010, as part of the feminist judgment project, I attempt to show that the legal techniques, and principles of judicial review themselves did not inevitably lead to a decision that was adverse to equality. There was nothing about legal method that dictated the outcome. Using the legal principles, norms and precedents, available at the time (1925), it was possible for judges to reach a conclusion that supported the local authority's decision to provide equal pay for men and women, and to develop the common law to support equality. I also insisted on writing as a female judge (even though it would have been difficult for a woman to be appointed as a judge in the nineteen twenties) because of the view that judges bring their own experiences to the adjudicatory process depending on where they are situated.<sup>91</sup> Feminists are better placed now, than when Smart wrote *The Power of Law*, to influence the course of the law. Twenty years ago there were few if any feminist judges.<sup>92</sup> But since this time there have been examples of feminist judges able to apply law in alternative modes thus showing the potential for feminism to shape the law.<sup>93</sup>

In *Feminist Legal Theory* 2013 I provide an overview of my approach to legal engagement. The chapter discusses the feminist analysis of two of liberalism's key conceptual tools namely equality and the public/private

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<sup>91</sup> See Stephanie Palmer, 'Commentary on Roberts v Hopwood' in Rosemary Hunter, Clare McGlynn, and Erica Rackley, (n) 381. This makes the need to increase judicial diversity more urgent. For the statistics on judicial diversity in the United Kingdom see Judiciary of England and Wales, Court Diversity Statistics 2013 <http://www.judiciary.gov.uk/publications-and-reports/statistics/diversity-stats-and-gen-overview> See also Kate Maleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) *Journal of Law and Society* 376 and Erica Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge 2013)

<sup>92</sup> Rosemary Hunter (n 89) 139

<sup>93</sup> Rosemary Hunter (n 89) 139

binary.<sup>94</sup> It outlines the attempts by feminists to overcome the sterility of formal equality by the use of concepts such as mainstreaming and the equality duty that introduce more substantive notions of equality.<sup>95</sup> It warns that the dismantling of the feminist architecture such as mainstreaming and the equality duty are retrograde steps that feminists should resist.<sup>96</sup> The feminist critique of the public/private spheres is also re-examined in the context of more contemporary dilemmas such as the debate around forced marriage, and the divide in public law between public authorities subject to the HRA and those deemed to be private and outside its jurisdiction.<sup>97</sup> The chapter finds that this analysis has been valuable in detecting the gendered nature of legal boundaries and at unmasking the law's claim to objectivity. It then goes on to discuss how feminist legal methods can use this critique to avoid less gendered outcomes. It argues that there are occasions when using law is a risky strategy and that feminists need to desist. This is evident, for example, in the debate around the criminalization of forced marriage.<sup>98</sup> I argue that feminists are sufficiently skilled to understand when legal remedies may be retrograde. But nevertheless law and its methods are too powerful to be left to their own devices but must be interrogated, challenged and moulded from within.

Sexual harassment is particularly relevant to my analysis of the utility of law. It can be seen as a successful strategy where feminists identified conduct that

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<sup>94</sup> *Feminist Legal Theory* 2013

<sup>95</sup> *Ibid* 130-137

<sup>96</sup> *Ibid* 137

<sup>97</sup> *Ibid* 157-141

<sup>98</sup> *Ibid* 137-140

was previously regarded as harmless behaviour, and named it so that it was recognized as a form of sex discrimination.<sup>99</sup> *Sexual Harassment: A Defining Moment* 2004 builds on my previous work in this area.<sup>100</sup> It makes the case for both political and legal engagement in law by demonstrating that it was a combination of pressure within both institutions that determined the direction of travel towards more effective legislation.<sup>101</sup> The article discusses the overly formalistic approach to equalities law adopted by the domestic courts. In addition there have been evidential difficulties establishing unwelcome behaviour, comparable to the problem of proving lack of consent in rape cases.<sup>102</sup> It studies the unimaginative approach of the House of Lords in *Pearce* where the court upheld the refusal of a remedy to a lesbian teacher who suffered sex-based harassment by her students.<sup>103</sup> It makes the point that there was no third party intervention in the case and no reference to alternative and more substantive notions of equality by the all male judges.<sup>104</sup> There was very little emphasis on doing justice to the claimant. This

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<sup>99</sup> The early seminal work on sexual harassment is by Catherine MacKinnon. See Catherine MacKinnon, *Sexual Harassment of Working Women*, (Yale University Press 1979). For an account of the various feminist theories of sexual harassment see *Sexual Harassment: A Defining Moment* 2004, 183-186 and Harriet Samuels, 'Sexual Harassment in the Workplace: A Feminist Analysis of Recent Developments in the UK' (2003) 26 *Women's Studies International Forum* 467. Most feminist accounts of sexual harassment have welcomed its inclusion within the legal frame, but have critiqued its application. For a critique of sexual harassment based on sexual desire see Vicky Schultz, 'Reconceptualising Sexual Harassment' (1998) 107 *Yale Law Journal* 1683. See also Janet Halley's concern that sexual harassment laws can lead to an over regulation of sexuality see Janet Halley (n) 10 and the response by Ann Scales (n 16) 159-144

<sup>100</sup> Harriet Samuels, 'Sexual Harassment in the Workplace: A Feminist Analysis of Recent Developments in the UK' *Ibid* and 'Sexual Harassment in Employment: Asian Values and the Law in Hong Kong' (2001) *Hong Kong Law Journal* 432-453

<sup>101</sup> For a recent discussion of feminist activism within the EU see Rachel A. Chichowski, 'Legal Mobilization, Transnational Activism, and Gender Equality in the EU' (2013) 28 *Canadian Journal of Law and Society* 209

<sup>102</sup> Harriet Samuels, *Sexual Harassment: Recent Developments* (n 99) 470-477 and *Sexual Harassment: A Defining Moment* 2004, 193-195

<sup>103</sup> *Pearce v Governing Body of Mayfield Secondary School* [2003] UKHL 34

<sup>104</sup> *Sexual Harassment: A Defining Moment* 2004, 193 and *Feminist Activism and Third Party Interventions* 2005, 38

anticipates themes in my later work that sees adjudication, particularly in human rights cases, as needing to be deliberative and participatory as a means of allowing fresh interpretations and insights to emerge. It also stresses the need to consider how alternative forms of legal reasoning based on feminist method can lead to more egalitarian outcomes.

The article highlights the significance of the law reforms driven by political actors that resulted in the Equal Treatment Amendment Directive (ETAD).<sup>105</sup> Whilst feminist legal method is crucial in helping to mould judge made law and guiding judicial interpretation, it is obvious that there is often a need for well-timed legislative intervention to clarify the law or to set it in a different direction. The ETAD provided a definition of sexual harassment obviating the need for a comparator, and establishing sexual harassment as a separate wrong, thus dealing with many of the weaknesses that had emerged in the case law. The Directive frames sexual harassment as an issue of substantive equality, and by referencing the key international human rights treaties reinforces the idea of women's rights as human rights and draws strength from the various international treaties.<sup>106</sup> The Directive was particularly welcome in the UK where the failure of the judges to take responsibility for applying the law in a more teleological manner meant that legislative intervention was necessary. However, as the article notes, without any understanding by the courts of the gender politics around sexual harassment the interpretation of the law may not result in the improvements sought; thus

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<sup>105</sup> Directive 2002/73/E.C.

<sup>106</sup> Preamble 1 (2), Directive 2002/73/E.C.



feminist intervention in the adjudicatory and political processes will continue to be necessary.

Sexual harassment, as a legal concept, has taken root within the law although its impact is uneven, and its application often flawed. The introduction of terms such as sexual harassment have not only named pre-existing wrongs, but have brought them into the public consciousness.<sup>107</sup> Smart rightly draws attention to the need to evaluate legal strategies such as these. But this does not justify an overly timid approach. The problem with Smart's work is that it can create a sense of disorientation that distracts legal feminists from deciding what they want from law, and how this can be achieved. Her thesis was never an outright rejection of law as she clearly states that some issues such as rape are already within the legal domain and therefore cannot be ignored.<sup>108</sup> Invited to reflect on *Feminism and the Power of Law* some twenty years after its publication Smart explains that her motive for writing it was to provide a more critical perspective for her feminist inclined students who she felt were overly committed to campaigning for law reform.<sup>109</sup> She claims that her call to de-centre law was not a call to ignore law or a suggestion that feminists should not engage with it. She points out the irony of her current concern that feminists have been silent in areas that excited interest in the past. She states that her strongest concern is that law should reflect the 'complex' lived experiences of women's lives.<sup>110</sup> Despite what Smart may state, her work *has* generally been taken as a disincentive to engage with law.

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<sup>107</sup> Ngaire Naffine, 'In Praise of Legal Feminism' (n 1) 71,75

<sup>108</sup> Carol Smart *The Power of Law*, (n 2)

<sup>109</sup> Carol Smart, 'Reflection' (2012) 20 *Feminist Legal Studies* 161-165,162

<sup>110</sup> *Ibid*

This is evidenced by the fact that most UK feminist legal scholars who work within the legal frame, take seriously Smart's anti law argument, and expend considerable energy justifying their decision to use the law.<sup>111</sup> In *Feminist Activism and Third Party Interventions 2005* I point out that, although there is an element of speculation, Smart's legal skepticism can be seen as *one* of the factors that has meant that feminist legal activism has been more contained than in North America, and has taken longer to emerge. This, of course, has to be viewed in conjunction with the absence of a bill of rights in the UK, before the introduction of the HRA, the historic lack of legal mechanisms and the problems of funding legal actions.<sup>112</sup> However, it is suggested that the time has come to understand Smart's work as discouraging the kind of proactive collaboration that is needed between feminist legal academics, activists and practitioners that is necessary to produce new and creative means of using law.

Having explained why it is necessary for legal feminism to go beyond critique, and to actively work within the law it is necessary to consider what techniques might suitably be deployed. The next section considers the value of rights based strategies. It then discusses how feminist legal methods combined with a deliberative view of human rights can work within the adjudicatory process to produce more egalitarian outcomes. Feminism needs to change law from

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<sup>111</sup> For example Rosemary Hunter, Clare McGlynn and Erica Rackley argue that contrary to Smart's view they believe that it is useful to intervene in law to challenge gendered constructions. They state that whilst law reform is not an exclusive strategy and that feminists should not be unrealistic about the effectiveness of law. '...but so long as women appear before the law, and law continues to have material effects on women's lives, we must continue to engage with it.' Rosemary Hunter, Clare McGlynn, and Erica Rackley (n 9) 9

<sup>112</sup> See the discussion in *Feminist Activism and Third Party Interventions 2005*

within and legal feminists are well placed to do this. It is not just about law reform but about reworking and recasting feminist methods.

### 3.00 Feminism and Rights

Rights based activism has been a core part of campaigning for generations of feminists, and continues to be an important site of activity. A commitment to using, retaining and reconstructing rights, where necessary, is a theme running through my work. Rights are seen as a powerful tool of feminist politics. There is a focus in my publications on the use of both international and domestic rights and their interrelationship. But this commitment to rights is certainly not one that is shared by all feminist scholars, and there has been a steady stream of feminist scholarship critical of the rights based discourse.<sup>113</sup> The first part of this section situates my human rights publications in the context of the feminist engagement, and critique of rights. It explains how feminists can influence the development of human rights through a deliberative approach that provides for the circulation of ideas between the global and the local. It adopts Benhabib's iterative or jurisgenerative thesis, and considers how deliberative theories facilitate and justify the application by feminists of international human rights norms within the domestic legal sphere.<sup>114</sup> The second part of this section shows how feminist legal method can be applied within the adjudicatory process in human rights cases. This advances feminist aims and also provides an opportunity for the law to produce a more nuanced version of the subject thus addressing

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<sup>113</sup> See for example Carol Smart, *Feminism and the Power of Law* (n 2), Elizabeth Kingdom, *What's Wrong with Rights: Problems for Feminist Politics of Law* (Edinburgh University Press 1991) and Wendy Brown, 'Suffering Rights as Paradoxes' (2000) *Constellations* 208

<sup>114</sup> Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Polity 2011)

one of the most significant criticisms of human rights by feminists. In essence, there are two interlocking themes that are explored by my work. These are the benefits of human rights for feminism in the circulation of ideas, from the global to the local, and the use of the courtroom as a forum to influence and develop the application of rights.

### 3.1 Feminist Critiques of Rights

Traditionally feminists have used rights based language to make political and legal claims within the domestic sphere. Rights were, for example, the vehicle through which feminists have pressed claims from the right to be considered persons and to vote to the right to choose to have an abortion and to be free from violence.<sup>115</sup> The language of human rights has also taken on increasing significance within the United Kingdom with the introduction of the HRA, which makes much of the European Convention on Human Rights (the Convention) enforceable in domestic law. During the 1990s global feminist activism culminated in a series of advances in the international sphere. This was part of a campaign to gain recognition that 'women's rights are human rights'.<sup>116</sup> Activists made use of the process of international norm setting in an attempt to include women within the human rights frame. It has led to the creation of a body of both hard and soft human rights law that promotes, inter alia, equality, reproductive autonomy and the freedom from violence. In particular, the campaign on Violence against Women (VAW) was regarded as pivotal. As Mertus states these provisions:

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<sup>115</sup> See Albie Sachs and Joan Hoff Wilson (n 52), Elizabeth Kingdom *ibid*

<sup>116</sup> See generally Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re Vision of Human Rights' (1990) 12 *Human Rights Quarterly* 486

‘...did not suddenly emerge from the minds of diplomats and magically flow from their pens. Rather, the unprecedented attention devoted to violence against women was the product of years of dedicated NGO advocacy at the domestic level, creative networking at international stages, wide-ranging leadership training institutes, revealing investigative reports, and on going educational campaigns.’<sup>117</sup>

Through the strategies, noted by Mertus, women’s human rights have been at least acknowledged, if not realized, as part of the family of international human rights.<sup>118</sup> This is not to over romanticize the process of norm creation in international forums. Boxi reminds us it is wise to be cautious about the real achievements that result from these declarations and treaties; NGOs’ sense of accomplishment is often disproportionate given the ultimate outcome.<sup>119</sup> Nevertheless, the international documents produced have been relied upon globally and locally to pressure states to adopt more effective laws and policies on violence against women. They also act as a platform from which

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<sup>117</sup> Julie A. Mertus, ‘Road Blocks, Blind Spots, Speed Bumps: A Feminist Look at the Post-9/11 Landscape for NGOs’ in Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance*, (Hart 2011) 97-108, 98

<sup>118</sup> See generally Alice Edwards (n 32). Some of the developments included The Declaration on the Elimination of Violence Against Women, A/RES/48/104, 1993, the recognition of women’s rights as human rights in the Vienna Declaration and Programme for Action, 1993, UN Doc A/Conf. 157/23, 1993, The Fourth World Conference on Women, Declaration and Platform for Action, Beijing, UN Doc A/Conf. 177/20 1995, CEDAW General Recommendation on Violence Against Women, No. 19 (11th session, 1992) and the Appointment of a Special Rapporteur on Violence Against Women, E/CN.4/1994/132. For a sample of the accounts of the developments in International Humanitarian Law and International Criminal law see Valerie Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harvard Human Rights Journal* 55-84 and Kelly Askin, ‘Prosecuting War Time Rape and other Gender Related Crimes Under International Law: Extraordinary Advances, enduring Obstacles’ (2003) *Berkeley Journal of International Law*, 288

<sup>119</sup> Upendra Baxi, *The Future of Human Rights* (Oxford University Press 2002) 91

the effectiveness of enacted laws can be judged, and as a barometer for the need for future developments.

The use of rights based strategies in both the domestic and international spheres has been the subject of extensive feminist scrutiny.<sup>120</sup> The individualistic and 'selfish' nature of liberal conceptions of rights has been problematic. Much of this is bound up with liberalism's concept of the subject, which is modeled on a particular version of the atomized and rational male. Naffine describes how law's ideal subject is the 'man of law' who is the 'human prototype' and is 'free, mobile, able bodied and self sufficient'.<sup>121</sup> It is argued that this fails to represent the experience of women whose lives, are traditionally centred around care giving (a responsibility that directly impinges on freedom, self sufficiency and mobility). Thus, it is claimed, women are far more relational in their thinking, and tend to stress the connectiveness between people.<sup>122</sup> By contrast rights, particularly conceived of as trumps, encourage a type of competitiveness between individuals. This can lead to a multiplicity of conflicting claims that are of limited value in resolving disputes.<sup>123</sup> It is argued that rights are too abstract, place the onus on the individual to take action and may be appropriated by the more powerful.<sup>124</sup> They place too much emphasis on the role of the 'neutral' state

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<sup>120</sup> For a general account of feminist critiques of human rights see Nicola Lacey, *Feminist Legal Theory and the Rights of Women* in Karen Knop (ed), *Gender and Human Rights* (Oxford University Press 2004) 13-54 and Siobhan Mullally (n 6)

<sup>121</sup> Ngaire Naffine, *Law and the Sexes Explorations in Feminist Jurisprudence* (n 59) 123

<sup>122</sup> Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development*, (n 17) and Robin West, 'Jurisprudence and Gender' (n 17)

<sup>123</sup> Carol Smart, *The Power of Law* (n 2) 155 and Elizabeth Kingdom (n 113)

<sup>124</sup> See Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social History* (n 73) 39. For an overview of the feminist critique on rights see Vanessa Munro (12) esp. ch. 3

and its institutions to vindicate rights.<sup>125</sup> As a result other criticisms of rights are that they prioritize civil and political rights, and distract from the need for more radical ideologies of redistribution.<sup>126</sup>

At the time of the introduction of the HRA in the UK McColgan famously warned about the threat to existing women's rights.<sup>127</sup> Her prediction, based on the Canadian experience, that the rape shield laws, campaigned for by feminists, would most likely be found to be inconsistent with Article 6 of the Convention proved to be prophetic. Shortly after the entry into force of the HRA the House of Lords used their strong interpretive powers, under section 3 of the HRA, to read in words to the relevant statute to ensure that it was consistent with the Convention.<sup>128</sup> This effectively undermined the legislative protection given to the complainant in a rape trial.<sup>129</sup> McColgan's critique of the HRA should also be seen in the broader context of the constitutional debate on human rights within the UK and the perceived shift in power from parliament to the judiciary.<sup>130</sup>

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<sup>125</sup> Andrea Cornwall, 'The Politics of Rights-Dilemmas for Feminist Praxis: an introduction' (2006) *Third World Quarterly*, 1176,1185

<sup>126</sup> Judy Fudge and Harry Glasbeek, 'The Politics of Rights: A Politics with Little Class' (1992) *Social and Legal Studies* 45. For a particularly thoughtful discussion of rights based strategies see Didi Herman, 'The Good, the Bad and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms' (1994) *Oxford Journal of Legal Studies* 589

<sup>127</sup> Aileen McColgan, *Women Under the Law: The False Promise of Human Rights*, (n 2). For a less pessimistic view of the HRA see Susan Millns, 'Bringing Rights Home: Feminism and the Human Rights Act 1998' in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish 1999). See also Stephanie Palmer, 'Feminism and the Promise of Human Rights: Possibilities and Paradoxes' in Susan James and Stephanie Palmer (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (Hart 2002) 91-116

<sup>128</sup> The relevant legislation was section 41 of the Youth Justice and Criminal Evidence Act 1999.

<sup>129</sup> *R v. A (No 2)* [2001] UKHL 25. See the discussion of this decision in *Feminist Activism and Third Party Interventions* 2005

<sup>130</sup> See generally Danny Nicol, 'Are Convention rights a no-go zone for Parliament?' [2002] *Public Law* 438. See also Brice Dickson, *Human Rights and the United Kingdom Supreme*

The inclusion of women's rights within the international human rights canon has also generated a related but distinct critique of rights discourse.<sup>131</sup> As we have seen the flurry of activity, by feminist academics and activists in the eighties and nineties, saw international law as a new arena to challenge discrimination.<sup>132</sup> However, by the turn of the millennium, feminist scholars began to express doubt about the impact of feminist activism in the international sphere, and whether it has made any real change. In particular, postmodern and post colonial feminists' concerns included a fear that the universal human rights agenda is driven by the West, fails to reflect local priorities and does little to improve the lives of those who are the object of concern.<sup>133</sup> This critique of human rights has been directed most often at feminist activism on Violence Against Women (VAW). Kapur acknowledges the successes of the VAW campaign, but she is critical of the portrayal of women as 'victim subjects' brutalized by their own 'primitive' culture.<sup>134</sup> For her, insufficient account is taken of factors such as ethnic, religious and class differences.<sup>135</sup> Interventions by campaigners invite comparisons with the 'civilised' West bringing to mind imperial interventions in native cultures during the time of empire.<sup>136</sup> Kapur also states that concentrating on VAW produces

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*Court* (Oxford University Press 2013) and the discussion on judicial deference in *Judicial Deference and Feminist Method* 2014

<sup>131</sup> Ratna Kapur (n 5) Diane Otto (n 5) Shereen Razak (n 5). For an account of the feminist critiques of international human rights law see Karen Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches*, (Hart 2005)

<sup>132</sup> See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester University Press 2000)

<sup>133</sup> See for example Ratna Kapur (n 5) Diane Otto (n 5) Shereen Razak (n 5)

<sup>134</sup> Ratna Kapur (n 5) 95

<sup>135</sup> Ratna Kapur (n 5) 104

<sup>136</sup> See also Anne Orford, 'Feminism, Imperialism and the Mission of International Law' (2002) 71 *Nordic Journal of International Law*, 275



heavy-handed legal responses that are conservative and authoritarian; they are not motivated by improving women's rights.<sup>137</sup> Similarly, Otto observes that feminist campaigns on human rights carry an 'imperial baggage' and produce '...a "native victim" subject in need of rescue and rehabilitation and re-privileges the figure, and the culture of the European woman as normative...'<sup>138</sup> Both Kapur and Otto are calling attention to the possible hazards of using the language of human rights.

### 3.2 Feminist Engagement with Human Rights

Nevertheless, as I have pointed out in *Feminizing Human Rights Adjudication 2013*, there is a body of feminist scholarship that engages with rights. Munro, for example, appears sympathetic to the use of rights. She argues that there is a distinction between being selfish and valuing the self.<sup>139</sup>

Nussbaum, in her defence of liberalism, warns against abandoning its values and tools including rights arguing that they have the ability to challenge the law's non interventionist stance in the private realm of home and family. She claims that liberalism has not been individualistic enough, and has failed to live up to its own standards in its treatment of women within the domestic sphere. Nussbaum's argument that '...all human beings have a core of moral personhood that exerts claims on government...' is a powerful statement indicating that rights still have the potential to dismantle gendered barriers.<sup>140</sup>

Williams, from a critical race perspective, has also cautioned against the

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<sup>137</sup> Ratna Kapur (n 5) 119

<sup>138</sup> Diane Otto, (n 5) 122. See also Alice Miller, 'Sexuality, Violence Against Women and Human Rights: Women Make Demands and Ladies Get Protection' (2004) 7 *Health and Human rights* 17

<sup>139</sup> Vanessa Munro (n 12) 79

<sup>140</sup> Martha Nussbaum (n 75) 71

abandonment of rights noting that minorities who were previously deprived of rights often cherish them.<sup>141</sup> The view taken here is that rights remain part of a dominant discourse, and for feminists to turn their back on rights risks exclusion from a key political and legal ideology. It would also further widen the gap between feminist scholarship and activism undermining the practical nature of the feminist project. It is argued that the most convincing feminist scholarship engages with rights and attempts to reformulate and reconstruct them.<sup>142</sup>

Human rights should be of interest to feminism because as sometimes political, moral and legal claims they create a space to progress feminist themes and ideas.<sup>143</sup> Human rights can be concretised in law to provide practical remedies, but they always have an aspirational element that lends itself towards fresh modes of thinking providing the possibility for feminist interjection.<sup>144</sup> My published works, to varying degrees, borrow from all of the schools of human rights, as identified by Dembour. She classifies human rights scholars into the following categories.

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<sup>141</sup> Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University press 1991)

<sup>142</sup> Feminists who have attempted to conceive of rights as less individualistic include Martha Minnow, *Making All the Difference: Inclusion, Exclusion, and American Law*, (Cornell University Press 1990), Elizabeth M. Schneider, 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement' in Martha Albertson Fineman and Nancy Sweet Thomadsen (eds) *At the Boundaries of Law: Feminism and Legal Theory* (Routledge 1991), Jennifer Nedelsky, 'Reconceiving Rights and Constitutionalism' (2008) *Journal of Human Rights* 139. See also Drucilla Cornell's attempt to reconstruct rights. Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex and Equality* (Princeton University Press 1998)

<sup>143</sup> 'Klug states that 'Human rights are best understood as part law, part philosophy and part political movement'. Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights*, (Penguin Books, 2000) 18

<sup>144</sup> Nicola Lacey, 'Feminist Legal Theory and the Rights of Women' (n 120) 47

‘...“natural scholars” conceive of human rights as *given*; “deliberative scholars” as *agreed*; “protest scholars” as *fought for*; and “discourse scholars” as *talked about*.’<sup>145</sup>

These rather sketchy groupings convey the essence of some of the varying theories, and allow us to extrapolate the elements useful to the feminist scheme of rights put forward here. Feminism does not sit snugly within any particular school, and it is possible to find feminist scholars who fit into each category and some ideas will correspond with more than one.

My writing respects and uses the discourse scholars to critique rights, but my perspective on human rights echoes many of the characteristics of the deliberative school. It does not see human rights as trumps.<sup>146</sup> But it locates rights as part of a dialogic process where conclusions are reached based on a process of rational deliberation and justification in a variety of public forums. Deliberative scholars see human rights and democracy as interlocking. Rights are built into democracy rather than antagonistic to it.<sup>147</sup> It presupposes that

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<sup>145</sup> Marie-Benedicte Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (Cambridge University Press 2006) 232. Dembour describes natural scholars as believing that human rights exist as entitlements, based on nature, in the sense of a divinity, the universe or other transcendental source. In Dembour’s view protest scholars also believe in human rights, but see them as a language of protest rather than as entitlements. They see human rights as having the potential to redress injustice. She goes on to describe deliberative scholars as those who do not believe in rights, but are committed to using them as legal and political principles that enable democracy to function. Discourse scholars are those who are skeptical about human rights, and want to expose their defects. They argue that human rights only exist because they are talked about. However, Dembour acknowledges that there are overlaps between the classifications and that followers of one school may well rely on alternative theories when this assists them. Marie-Benedicte Dembour Ibid 244

<sup>146</sup> Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978)

<sup>147</sup> Jurgen Habermas, *Between Facts and Norms* (Polity Press 1996) As Hugh Baxter explains ‘What Habermas is arguing.... is that conceptual accounts of law that privilege basic rights over democracy, or democracy over basic rights, are misguided. The two terms, rightly understood, mutually pre-suppose one another in the idea of legitimate law’ Hugh Baxter,

there are certain agreed values that allow the dialogue to take place. But beyond this deliberative scholars disagree on the extent to which substantive values can inform the process.<sup>148</sup> My own view is that although it is important to allow human rights to emerge as part of a dialogic process there is also a need, consistent with the view of the protest scholars, to see the purpose of human rights as being to remedy injustice and to consider the interests of the marginalized.<sup>149</sup> This means that when formulating, interpreting and adjudicating on human rights political actors and judges have, at a minimum, to be mindful of this aim.<sup>150</sup>

Deliberative theories emphasize the importance of forums where rational discourse can take place thus encouraging participation in the development and interpretation of rights. This stress on participation mirrors the priority of feminists. They have criticized the absence of women's voices, when human rights were being formulated, with the consequence that they were sculpted in the image of men sidelining or ignoring women's interest.<sup>151</sup> In turn deliberative models have been critiqued by feminists for their universalism,

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*Habermas: The Discourse Theory of Law and Democracy*, (Stanford University Press 2011) 74

<sup>148</sup> For a classic proceduralist view see John Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980). For an argument in favour of a more substantive view of deliberative democracy see Amy Guttmann and Dennis Thompson, *Why Deliberative Democracy* (Princeton University Press 2004). There is a prolific literature on deliberative democracy, constitutionalism and human rights. See generally Michael Ignatieff, *Human Rights: Politics and Human Rights* (Princeton University Press 2001), Cass R. Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press 2001)

<sup>149</sup> See for example Upendra Baxi, *The Future of Human Rights* (n 119) 59

<sup>150</sup> See Lady Hale's comments on the purpose of human rights being to secure the rights of minorities even if they are unpopular. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 605. See also her comments in Lady Hale, 'A Minority Opinion?' (2008) *Proceedings of the British Academy* 319, 326

<sup>151</sup> See for example Hilary Charlesworth, 'What are "Women's International Human Rights"' in Rebecca J. Cook (ed), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania 1994) 58-84

excessive proceduralism, emphasis on rationality and narrow view of the public sphere.<sup>152</sup> But rather than reject them out of hand some scholars have recognized the potential of deliberative theories as providing tools for feminists to renegotiate and reconstruct rights.<sup>153</sup> Deliberative theories, as shown below, provide a means for feminists to be part of a discursive progress through which rights circulate between international and national political and judicial processes.

### 3.3 Feminism and Human Rights Iterations

Feminists have mobilized at the international level with the aim of ensuring that women's interests and concerns are part of the human rights canon. As discussed briefly above the burdens and benefits of this activity, and the extent to which it replicates earlier imperial agendas has cast doubt on the feminist project. Nevertheless, there is now a well-established body of law and norms that have been produced as a result of this activism and that has been deployed as part of a progressive feminism within the domestic and international sphere. Benhabib has given one of the most persuasive accounts of this process. She understands the fear that human rights may lead to a 'moral imperialism' or may be instrumentalised for political ends'.<sup>154</sup> Her intervention is intended to provide a method of reconciling the universality

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<sup>152</sup> For a general discussion of Habermas's theory and feminism see Joanna Meehan (ed), *Feminists Read Habermas: Gendering the Subject of Discourse* (Routledge 1995)

<sup>153</sup> See Seyla Benhabib, *Dignity in Adversity* (n 114) 117 and Siobhan Mullally (n 6). See also CJ Harvey, 'Engendering Asylum Law: Feminism, Process and Practice' in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish Publishing 1999) 211-243, 220

<sup>154</sup> Seyla Benhabib, 'The Legitimacy of Human rights' (n 6) 98. But see also Seyla Benhabib, *Dignity in Adversity* (n 114) and Seyla Benhabib, 'Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty' (2009) 103 *American Political Science Review* 691

of human rights with a need to retain decision-making at the municipal level so that democratic legitimacy is retained. But rather than endorsing minimalist versions of human rights or Rawls' 'overlapping consensus' she argues that human rights should be seen as part of an iterative process.<sup>155</sup> Through these iterative re-statements of international norms domestic societies make them their own. They do this by applying them in the most context appropriate manner that retains the transcendent element of human rights while adapting them sufficiently to satisfy local democracy and culture. Iterations enables human rights norms to assume 'flesh and blood'.<sup>156</sup>

Other theorists such as Levitt and Merry have also explored the transmission and adaptation of human rights norms by what they have termed 'vernacularization'.<sup>157</sup> Through their anthropological research they show how 'the global women's rights package' is 'repackaged' by domestic organizations to meld with local cultures and combined with other 'discourses of social justice'.<sup>158</sup> Levitt and Merrit characterize the relationship between human rights activists and legal actors as symbiotic.<sup>159</sup> Social movements use the legal element of human rights to strengthen their work, but they may go beyond the law creating new meanings and claims. Legal activists focus more on building cases, appealing to UN agencies and on monitoring governments. However, the legal aspects of human rights strengthen social activists' claims,

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<sup>155</sup> See Seyla Benhabib 'The Legitimacy of Human Rights' ibid 95

<sup>156</sup> Seyla Benhabib 'The Legitimacy of Human Rights' ibid 101

<sup>157</sup> Peggy Levitt and Sally Merry 'Making Women's Human Rights in the Vernacular: Navigating the Culture/Rights Divide' in Dorothy .L. Hodgson, (ed) *Gender and Culture at the Limits of Rights*, (University of Pennsylvania Press 2011), 81-100, 91

<sup>158</sup> Ibid 448

<sup>159</sup> Ibid 460

whilst legal activists need social movements to facilitate the implementation of human rights by generating public concern and putting pressure on governments.<sup>160</sup> Vernacularization provides a helpful means to conceptualize the influence of human rights norms on local cultures. But Benhabib's thesis of the iterative or jurisgenerative potential of human rights further explains how legal meanings in domestic law can be altered by the use of international human rights norms. Jurisgenerative is a term that was used by Cover, and refers to the process by which legal terms acquire meanings through interpretation. These interpretations rely on the 'nomos' or world of norms that is largely created by groups and communities.<sup>161</sup> As adapted by Benhabib the jurisgenerative function of human rights moves away from the notion of international human rights as a 'command', but rather stresses its ability to act as a source of extra legal norms that can be used within the domestic sphere.<sup>162</sup> This transmission of norms from the international to the local provides a useful conduit for feminist ideas that have been formed as part of international human rights law. They may be used to provide mechanisms or legitimacy for the adoption of new or the expansion of existing claims.

The jurisgenerative or iterative process relies on a view of an independent civil society that is able to coalesce around issues to effect change. So, for example, when states ratify international treaties Benhabib observes that it

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<sup>160</sup> Ibid 459

<sup>161</sup> Robert Cover, 'Nomos and Narrative' in Martha Minnow, M. Ryan and A. Sarat, (eds), *Narrative, Violence and the Law: The Essays of Robert Cover* (University of Michigan Press, 1995) 96-172.

<sup>162</sup> Seyla Benhabib, *Dignity in Adversity* (n 114) 125

'...give[s] rise to a public language of rights articulation and claims-making for all sorts of civil society actors, who range from compliance-monitoring NGOs to women's groups, church groups, advocacy associations, and the like. This new language of public claims articulation circulates in the unofficial public sphere and can, and often does, impact further institutional reform and legislation.'<sup>163</sup>

My thesis stresses the role of women's groups and other civil society actors in pressing their claims through the political and legal systems, by lobbying in international and national fora, initiating litigation or intervening in cases, to ensure outcomes accordant with their aims. I see this as a positive strategy that allows feminist principles to act as a catalyst for change, and through the work of legal feminists, as influencing jurisprudential developments.<sup>164</sup>

In *Child Slavery in Hong Kong 2007* I re-consider the anti mui tsai campaign (1919-1938), and suggest that it can be seen as early human rights activism.<sup>165</sup> The article recounts how the adoption of the vocabulary of the emerging international norms on slavery were used to protest against the mui tsai system, and to demand that the United Kingdom government live up to its promise to outlaw slavery and prevent trafficking. The work of the local

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<sup>163</sup> Seyla Benhabib, 'The Legitimacy of Human Rights' (n6) 100-101

<sup>164</sup> The role of women's groups in pressing claims is discussed in most of my works. There is an account of the legal activism of women's groups in the UK in *Feminist Activism and Third Party Interventions 2005*

<sup>165</sup> The mui tsai system was practiced throughout China and much of South East Asia. Girls were sold, through a formal deed of gift by, usually poverty stricken, parents to work for another, wealthy, family as domestic servants. The girls were not paid wages, but when they reached maturity a marriage would be arranged. The custom was defended by the Chinese establishment as a form of philanthropy by wealthy families and as a means for poor families to secure the future of their daughters who might otherwise be abandoned. The view of those who opposed the mui tsai system was that it led to the trafficking in girls and often to prostitution and domestic abuse.



activists created what Keck and Sikkink refer to as the “boomerang” effect. By feeding information to those on the outside, including international commissions from the League of Nations, they put pressure on their own government.<sup>166</sup> The activists practiced “accountability politics” by holding governments to account for previously accepted standards and policies.<sup>167</sup> They also used the techniques of human rights organizations in their work by creating transnational networks.<sup>168</sup> Local groups and activists worked with established and more experienced organizations such as the Anti-Slavery League.<sup>169</sup> This led to a cross fertilization of ideas and information that gave the activists leverage over more powerful institutions and organizations. So for example, my research shows that, lobbying ensured that the definition of slavery in the Slavery Convention 1926 was interpreted by, the various League of Nations Committees on slavery and trafficking to include domestic slavery such as the mui tsai system.<sup>170</sup> This meant that the League of Nations Slavery Committee was able to receive reports on the mui tsai despite objections from the Chinese delegation.<sup>171</sup> The mui tsai were constructed either as slaves or as girls who were trafficked to fit within the jurisdiction of the slavery and trafficking committees.

This episode provides an interesting early instance of the application of nascent international human rights in a domestic setting. Here the circulation

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<sup>166</sup> Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders*, (Cornell University Press 1998) 24

<sup>167</sup> Margaret Keck and Kathryn Sikkink (n) 12

<sup>168</sup> *Child Slavery in Hong Kong* 2007 374

<sup>169</sup> *Child Slavery in Hong Kong* 2007 373-375

<sup>170</sup> Slavery Convention 1926 60 L.N.T.S. 253

<sup>171</sup> *Child Slavery in Hong Kong* 2007 372-373

of norms between the international and the local meant that the terms 'slavery' and 'equality' were iterations that were received and refined by domestic and international civil society actors. They lobbied insistently for the mui tsai system to be re-interpreted as an abusive practice, and they pressured the government to take responsibility. This is not to ignore the colonial overtones of the campaign or the problematic classification of the mui tsai system as slavery.<sup>172</sup> But it is to draw attention to an aspect of the incident often ignored by other scholars, and deepens understanding of the effectiveness of trans global mobilization in effecting change.

More contemporary examples of the migration of international human rights norms from the international to the domestic sphere are analyzed in both *Women, Culture and Human Rights 2010* and *Feminist Legal Theory 2013*. In these pieces I discuss and give examples of how international human rights norms have been used by domestic courts in the UK to progress feminist claims on violence against women. In the feminist judgment in *Roberts v Hopwood 2010* I rely on the principle of equality between the sexes that had begun to develop in international law in the early twentieth century.<sup>173</sup> I demonstrate how the council's action, to introduce a policy of equal pay between the sexes, might have been legitimized by emerging principles of international law. In the United Kingdom courts the reliance on international human rights law sources to bolster the validity of a particular interpretation of legislation has been particularly noticeable in the judgments of Lady Hale.

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<sup>172</sup> *Child Slavery in Hong Kong* 377-379

<sup>173</sup> Article 388 and Article 427 Treaty of Versailles 1919. These provisions created the International Labour Organisation and established the principle of equal pay between men and women.

She has consistently used international human rights law to justify decisions that reinforce human rights.<sup>174</sup> This underlines the benefit of the presence of powerful domestic actors, who are open to the use of international norms, if they are to be adopted locally.

The influence of international human rights law can be seen in the House of Lords' decision in *Fornah* which is discussed in *Women, Culture and Human Rights 2010*.<sup>175</sup> Here the House of Lords decided that a woman who left her own country, because she feared being made to undergo female genital mutilation (FGM), was entitled to refugee status even though the Refugee Convention does not include sex as one of the grounds of persecution.<sup>176</sup> The chapter examines how the court's reliance on international human rights law, campaigned for by feminists, legitimated the court's decision and allowed it to interpret the Refugee Convention to include a gender-based harm.<sup>177</sup> I also point out that framing FGM as a human rights issue meant that the court could conceptualise FGM as a matter of equality. This had the advantage that the court was able to de-exoticise FGM. It is seen as a part of an international pattern of violence against women that is an obstacle in the path of attaining

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<sup>174</sup> Lady Hale has commented on the importance of international law and the role of intervenors in bringing developments to the courts' attention. See Lady Hale, 'Who Guards the Guardians' 14th October 2013 (paper given at the Public Law Project Conference <http://www.supremecourt.gov.uk/docs/speech-131014.pdf> (last accessed 15th January 2014)

<sup>175</sup> *Fornah v Secretary of State for the Home Department* [2006] UKHL. The court held that uninitiated women from Sierra Leone formed part of a social group, and if they left Sierra Leone because they feared female genital mutilation then they should be granted refugee status.

<sup>176</sup> Article 1A(2) *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189 as amended by the 1967 Protocol

<sup>177</sup> For an account of feminist campaigning on asylum and immigration in the UK see Susan Millns and Charlotte Skeet (n 35) 178

substantive equality. This is preferable to the more parochial approach of making a comparison with UK national law.<sup>178</sup>

The jurisgenerative impact of international human rights law is apparent in the Supreme Court's decision in *Yemshaw v London Borough of Hounslow*, which I discuss in *Feminist Legal Theory 2010*.<sup>179</sup> As in *Fornah* the court looked to the global norms on violence against women to validate its interpretation of the law. In this case it was the term 'violence' in section 177(1) of the Housing Act 1996 that was under consideration. Relying on international law definitions the Supreme Court held that violence went beyond physical conduct and included other forms of behavior such as psychological abuse.<sup>180</sup> The Women's Aid Federation of England, through its third party intervention, brought to the attention of the court the *nomos* on domestic violence that had

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<sup>178</sup> Lady Hale states that 'Hence, it is a human rights issue, not only because of the unequal treatment of men and women, but also because the procedure will almost inevitably amount either to torture or to other cruel, inhuman or degrading treatment within the meaning, not only of article 3 of the Convention, but also of article 1 or 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, article 7 of the International Covenant on Civil and Political Rights, and article 37(a) of the Convention on the Rights of the Child.' *Fornah* Ibid [para 94] (Lady Hale)

<sup>179</sup> *Yemshaw v London Borough of Hounslow* [2011] UKSC 3. The claimant had left the family home claiming that she was scared of her husband's threatening behavior although there had been no physical violence. As there was no physical violence the authority held that she could not be considered to have left her accommodation because of domestic or other violence in accordance with section 177 of the Housing Act 1986 and therefore was not considered homeless and entitled to accommodation.

<sup>180</sup> Lady Hale gave the leading judgment. Her reasoning has attracted criticism for departing from a literal interpretation of the statute, and for her purposive approach to statutory interpretation. See Chris Bevan, 'Interpreting Statutory Purpose-Lessons from *Yemshaw v Hounslow London Borough Council*' (2013) 76 *Modern Law Review* 742 and Richard Ekins, 'Updating the meaning of Violence' (2013) *Law Quarterly Review* 17. For more positive commentaries see Jonathan Herring, 'The Meaning of Domestic Violence: *Yemshaw v London Borough of Hounslow*' [2011]UKSC 3 (2011) *Journal of Social Welfare and Family Law* 297 and Susan M. Edwards, 'Domestic Violence Not a Term of Abuse but a State of Consciousness' (2011) 41 *Family Law* 1244

been developed in international law.<sup>181</sup> This along with advances in national policy provided support for the court's interpretation of the term 'violence'. It enabled the judges to use a contemporary definition. This facilitated the claimant's access to housing a vital remedy for victims of domestic violence if they are to be able to leave an abusive environment.<sup>182</sup>

Both of these cases demonstrate how international human rights' precepts can broaden the meaning of existing domestic laws for the benefit of the vulnerable. There is an opening in the domestic law that is seized on by activists and lawyers who press for the interpretation of the law to better address a gendered harm. In both cases the court re-articulates a right that has already been adopted by the domestic law, thus not usurping sovereignty or being overly judicially active. But the court then extends the right in its definition of a refugee (*Fornah*) and of violence (*Yemshaw*) to offer greater human rights protection. The international law is deployed to articulate the most recent understandings of violence against women, and also expresses an aspirational vision of life as free from physical and psychological harm (*Yemshaw*), and from harmful non-consensual customs (*Fornah*).

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<sup>181</sup> The Women's Aid Federation of England and the Secretary of State for Communities and Local Government intervened in the decision. The court noted that the definition of violence in General Recommendation 19 of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) and in the Declaration on the Elimination of All Forms of Violence Against Women 1993 include psychological or mental harm or suffering.

<sup>182</sup> The court also referred to the broader definition of domestic violence that had been adopted by a practice direction of the family court, Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2) [2009] 1 WLR 251 and government guidance and policy documents on domestic violence. *Yemshaw* (n179) [paras 27-30] (Lady Hale)

### 3.4 Feminizing Human Rights and the Adjudicatory Process

The potential of the HRA, as a means of progressing feminist ends, has been the subject of several of my publications. I see the HRA as providing fertile ground for feminist participation in the promotion and development of human rights. Finding points of pressure and influence within the law is crucial, if women's interests are to be taken into account. Attempts to repeal the HRA or withdraw from the Convention should be resisted as acts that will close down the conversation on rights and reduce the scope for feminist influence.<sup>183</sup> The weak system of judicial review, introduced by the HRA, allows the court to make a declaration that the law is incompatible with the Convention, but it does not permit the courts to invalidate legislation. It is for the executive and Parliament to decide whether or not to change the law.<sup>184</sup> This is contrasted with a strong system of judicial review that permits the court to quash legislation.<sup>185</sup> This weak form of judicial review produces an institutional

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<sup>183</sup> For an account of this controversy see Helen Fenwick, 'Conservative Anti-HRA Rhetoric, the Bill of Rights "Solution" and the Role of the Bill of Rights Commission' in Roger Masterman and Ian Leigh, (eds) *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (Oxford University Press 2013) 309-342

<sup>184</sup> Sections 3 and 4 of the Human Rights Act. Young explains that the distinguishing feature of inter institutional democratic dialogue is that it is, '...a legal mechanism for the interaction between the judiciary and the legislature'. It is also different from dialogue as conversation, for example between the parties to a case or exchanges between judges, because it is more formal and is intended to provide for a resolution of a problem. It has the aim of protecting rights while respecting democracy. See Alison L. Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart 2009) 117

<sup>185</sup> There is a vibrant dispute between legal scholars on the legitimacy of judicial review of legislation in the human rights context. Waldron argues forcefully against judicial review of legislation by unelected judges arguing that it undermines democracy and the right to participate, which is the 'right of rights'. See Jeremy Waldron, 'A Rights Based Critique of Constitutional Rights' (1993) 13 *Oxford Journal of Legal Studies* 18 and Jeremy Waldron, *Law and Disagreement* (Oxford University Press 1999). For supporters of Waldron's general view see Tom Campbell, Keith Ewing, and Adam Tomkins (eds), *Skeptical Essays on Human Rights*, (Oxford University Press 2001) and Keith Ewing, *Bonfire of the Liberties* (Oxford University Press 2010). For those who write in favour of judicial review of legislation see generally the groundbreaking work of Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978). For a rebuttal of Waldron's thesis see Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press 2009)

dialogue on human rights.<sup>186</sup> It encourages both *intra* and *inter* institutional exchanges on rights.<sup>187</sup> This creates a space for civil society actors, including feminists, to participate in the formal and informal conversations it generates. The constitutional structure of the HRA means that feminists must press their claim within *various* institutions rather than relying exclusively on the courts or Parliament neither of which can be described as providing full representation for women.<sup>188</sup> This description of the dialogic process under the HRA may seem a tad chimeric, to some, given the criticisms that has been made of the quality of dialogue between the courts and Parliament.<sup>189</sup> But nevertheless the HRA has meant that rights claims can be made directly in the UK courts creating the chance for judges to consider the rights implications in cases

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<sup>186</sup> There is also a dialogue between the United Kingdom courts and the European Court of Human Rights. See generally Merris Amos, 'The dialogue between United Kingdom courts and the European Court of Human Rights' (2012) *International and Comparative Law Quarterly* 557

<sup>187</sup> Section 4 of the HRA permits the court to make a declaration of incompatibility stating that the law conflicts with the Convention. But it is ultimately up to Parliament to decide whether the law should be changed. This is described as a weak form of judicial review. This is contrasted with strong forms of judicial review that allow the court to invalidate legislation. Weak forms of judicial review are often described as dialogic because they lead to an exchange between the court and other institutions of government on human rights. However, some critics have argued that in fact weak forms of judicial review do not lead to real dialogue as in practice the legislature will accept the court's ruling. See Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 185). For a general discussion of weak forms of judicial review see Mark Tushnet, 'New-Forms of Judicial Review and the Persistence of Rights-And Democracy Based Worries' (38) *Wake Forest Law Review* 813. For a discussion of the interaction between the courts and parliament under the Human Rights Act see Danny Nicol, 'Law and Politics after the Human Rights Act' [2006] *Public Law* 272, Jeffrey Jowell, 'Parliamentary Sovereignty under the New Constitutional Hypothesis' [2006] *Public Law* 562, Alison L. Young, *Parliamentary Sovereignty and the Human Rights Act* (n 184) and Tom Hickman, *Public Law after the Human Rights Act* (Hart 2010). For two recent defences of dialogue, in the context of the HRA, see Aruna Sathanapally, *Beyond Disagreement: Open Remedies in Human Rights Adjudication* (Oxford University Press 2012) and Po Jen Yap, 'Defending Dialogue' [2013] *Public Law* 527.

<sup>189</sup> Gavin Phillipson, 'The Human Rights Act, Dialogue and Constitutional Principles' in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives* (n 183) 25-50, 39 and Colin R.G. Murray, 'The Continuation of Politics, by other Means: Judicial Dialogue under the Human Rights Act 1998' in Roger Masterman and Ian Leigh (eds), *The United Kingdom's Statutory Bill of Rights: Constitutional and Comparative Perspectives Ibid*. See also the debate between Danny Nicol, 'Law and Politics after the Human Rights Act' *Ibid* and Tom Hickman. 'The Courts and Politics after the Human Rights Act: A Comment' [2008] *Public Law* 84 and generally n 183 above.

concerned with gender. Judges can tackle rights claims head on without having the final word. The HRA scheme ensures that feminist energies are not only directed at the legal sphere, but also at the various sites in the political sphere thus increasing the opportunity to engage.<sup>190</sup>

My publications on human rights consider how, in this context, feminists can work within the HRA. I argue that the key adjudicatory tools of human rights, namely proportionality and deference, can be interpreted and applied in accordance with feminist method. Feminist methods encompass a set of techniques that include 'asking the woman question'.<sup>191</sup> This is to uncover the gendered meaning of law but also extends to rooting out other hidden interests based on race, class or other categories. It emphasizes practical rather than abstract reasoning that tries to do justice to the parties before the court.<sup>192</sup> It further imposes a responsibility on the court to safeguard the interests of the disadvantaged.<sup>193</sup> I refer to the judgments of Lady Hale to illustrate that feminist techniques can be feasibly used by judges within the existing legal paradigm. I also discuss the use of third party interventions, which can provide 'social framework information' and experiential

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<sup>190</sup> For a discussion of whether feminists should progress claims through the courts or lobby for legislative or policy changes in the political sphere see Tsvi Kahana and Rachel Stephenson, 'The Promise of Democratic Constitutionalism: Women, Constitutional Dialogue, and the Internet' in Beverley Baines, Daphne Barak-Erez and Tsvi Kahana (eds), *Feminist Constitutionalism: Global Perspectives*, (Cambridge University Press 2012) 240-259.

<sup>191</sup> Katherine T. Bartlett, 'Feminist Legal Methods' (1990) 103 *Harvard Law Review*, 829

<sup>192</sup> Katherine T. Bartlett Ibid, Rosemary Hunter, "An Account of Feminist judging" in Rosemary Hunter, Clare McGlynn and Erica Rackley (n9) 30-43, Martha Minow, 'Justice Engendered' in Patricia Smith (ed), *Feminist Jurisprudence*, (Oxford University Press 1993), 217-243 and Patricia Smith, 'On Adjudication: Patriarchy, Neutrality and Judicial Reasoning' in Patricia Smith (ed), *Feminist Jurisprudence*, (Oxford University Press 1993) 210-215

<sup>193</sup> Ruth Colker, 'Section 1, Contextuality, and the Anti-Disadvantage Principle' (1992) 42 *University of Toronto Law Journal* 77



perspectives to the court.<sup>194</sup> They allow the court to make a decision fully aware of the consequences. It also provides the chance to persuade the court to adopt feminist interpretations of the law, and may, on some occasions, be a means of ensuring that the judiciary do not undo gains made by feminists.

I see the courtroom as a site of deliberation that should be accessed by feminists to press their claims. In *Feminizing Human Rights Adjudication 2013* I rely on the work of Fredman and Kavanagh both of who defend the role of courts in upholding rights, and reject the argument that courts usurp the role of other branches of government.<sup>195</sup> Fredman, drawing on deliberative theories argues that courts are reinforcing democracy when they are adjudicating on rights, and should apply the values of accountability, participation and equality.<sup>196</sup> Similarly Kavanagh points out the benefits of the judicial process in upholding rights, which include providing a channel for those written out of the democratic system, and of protecting rights that are necessary for a functioning democracy.<sup>197</sup>

To facilitate access to the court there is a need for legal aid, generous rules of standing and the use of plain language.<sup>198</sup> This is to swim against the current

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<sup>194</sup> *Feminist Activism and Third Party Interventions* 2005. The term 'social framework' information is borrowed from Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley, *Feminist Judgments, From Theory to Practice* (n 9) 37

<sup>195</sup> Aileen Kavanagh (n 183) Sandra Fredman, *Human Rights Transformed: Positive Rights and positive duties* (Oxford University Press 2008)

<sup>196</sup> Sandra Fredman, *Human Rights Transformed* ibid103

<sup>197</sup> Aileen Kavanagh (n 183) 379

<sup>198</sup> Sandra Fredman, *Human Rights Transformed* (n 195) 107

political tide in the United Kingdom.<sup>199</sup> But this is all the more reason for legal feminists to stress the value of these principles, and to resist the narrowing of rules of standing, attempts to curtail third party interventions and the reduction of legal aid.<sup>200</sup> There is also a need to see the court as having a distinct role to that of the legislature, in the enforcement of rights, and not simply replicating political debate.<sup>201</sup> The adjudicatory process is another public forum, but one with different institutional mechanisms that is able to apply human rights values within the distinct context of an ongoing dispute. This has its limitations but it also means the courts examine human rights in different circumstances to Parliament and are able to highlight when the burden of a law or policy is disproportionate.<sup>202</sup> For example in my examination of the House of Lords' case of *Kehoe* in *Feminizing Human Rights Adjudication 2013* I argue that the court should have made a declaration of incompatibility under section 4 of the HRA. This would draw attention to the burden imposed by the legislation on the claimant, a single mother, in not being able to access the courts to pursue her maintenance claim. It would have left the ultimate decision on changing

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<sup>199</sup> At the present time the government is considering narrowing the rules of standing in judicial review cases to prevent the courts being used as a forum for political campaigning. There are no plans to change the victim test in human rights cases. The government is also consulting on imposing costs on third party intervenors where the intervention has increased the cost to the parties in the case. See Ministry of Justice, *Judicial Review: Proposals for Further Reform*, September 2013, Cm 8703. For a critical response to these proposals see The Bingham Centre for the Rule of Law, *Response to Ministry of Justice Consultation Paper CM 8703*, 1<sup>st</sup> November 2013 (available at <http://publiclawforeveryone.wordpress.com/2013/11/01/bingham-centre-response-to-latest-judicial-review-proposals/> last accessed January 10<sup>th</sup> 2014)

<sup>200</sup> For the changes to legal aid see the Legal Aid, Sentencing and Punishment of Offenders Act 2012. For the proposals to further restrict legal aid see Ministry of Justice, *Transforming Legal Aid: Next Steps*, September 2013, (CP14/2013).

<sup>201</sup> See Aileen Kavanagh (n 183)

<sup>202</sup> Sandra Fredman, *Human Rights Transformed* (n) 123

the law to parliament, but it would have been a means of putting this issue on the political agenda.<sup>203</sup>

The argument that human rights adjudication and dialogic structures politicize the court overestimates the degree to which courts are politically neutral and impartial. Feminist legal scholars have stressed that judicial decision-making is value laden, and that the degree of choice judges have when applying legal principles should not be underestimated. This is not to argue that judges have carte blanche when deciding cases, but that legal methods often provide judges with a high degree of flexibility.<sup>204</sup>

In *Women, Culture and Human Rights 2010* I suggest that feminists should consider how the proportionality principle might be developed to accord with feminist values. In *Feminizing Human Rights Adjudication 2013* I take this idea further and explain, using examples from the case law, how feminist methods might be applied to the proportionality test so as to enable relational and interactive decisions to emerge in human rights cases.<sup>205</sup> The proportionality test is usually applied when the court is considering whether a limitation on a right is justified, and requires rights and interests, to be balanced against each other.<sup>206</sup> It forces the court to contextualize universal

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<sup>203</sup> *R (Kehoe) v Secretary of State for Work and Pensions* [2006] 1 AC 42. See the discussion in *Feminizing Human Rights Adjudication 2013*

<sup>204</sup> This is the premise that underlies the Feminist Judgment Project. See Rosemary Hunter, Clare McGlynn and Erica Rackley, *Feminist Judgments: From Theory to Practice* (n) 5

<sup>205</sup> The cases discussed include *Campbell v MGN* [2004] 2 AC 457, *Re P (Adoption: Unmarried Couple)* [2009] 1 AC 173 and *Kehoe*

<sup>206</sup> For the leading cases see *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing and Others* [1999] 1 AC 69, *R v Daly* [2001] 2 WLR 1622 and *Huang v. Secretary of State for the Home Department and Kashmiri v Secretary of State for the Home Department* ([2007] UKHL 11).

precepts and ensures that rights are applied in a less individualistic and abstract manner.<sup>207</sup> Rights are not seen as trumps but must be interpreted and applied in accordance with other interests including those of the community. I argue that this resonates with ethic of care theories that stress that individuals should be seen as situated within networks of relationships rather than as isolated actors.<sup>208</sup> It directs attention to relational obligations, and to power structures in interpreting and applying rights, an approach that lends itself to a more realistic recognition of women's lives.

The proportionality test provides for greater scrutiny of decisions and of legislation by demanding that decisions and laws are explained and justified in accordance with human rights precepts. This transparency means that the gendered assumptions that underpin rights are more likely to be exposed.<sup>209</sup> When the court applies the minimal impairment test or balances rights overall it is likely to consider alternative legislative or administrative possibilities. This provides an opening for the parties and others, such as third party intervenors, to give the court the benefit of their knowledge and expertise, and to enter into a dialogue with the court thus making the interpretation and application of rights more participative.<sup>210</sup> I analyze the case of *Kehoe* and show how a more structured application of the proportionality test, by Lady

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<sup>207</sup> There is a considerable literature on the legitimacy of proportionality, the different formulations that can be used by the court and critiques of how it has been applied. Some of the key writing include Robert Alexy, *A Theory of Constitutional Rights*, (Oxford University Press 2002), Tom Hickman, 'The substance and structure of proportionality' [2008] Public Law 694, Julian Rivers, 'Proportionality and variable Intensity of review' (2006) 65 *Cambridge Law Journal*, 174, Gregoire Webber, 'Proportionality, balancing and the cult of constitutional rights scholarship' (2010) *Canadian Journal of Law and Jurisprudence*, 179 and David M Beatty, *The Ultimate Rule of Law*, (Oxford University Press 2003)

<sup>208</sup> For the seminal work on ethic of care see Carol Gilligan (n17) and Robin West (n17)

<sup>209</sup> See the discussion in *Feminizing Human Rights Adjudication* 2013 52-57

<sup>210</sup> Ibid

Hale in her dissenting judgment, would have made it easier for her to act more boldly and grant a declaration of incompatibility.<sup>211</sup>

In *Women, Culture and Human Rights 2010* and in *Feminizing Human Rights Adjudication 2013* I argue that when the court is using the proportionality test to balance the rights of groups and individuals to decide whether a restriction on a right is justified, it has to have regard to the needs and interests of the subject as well as the community. This creates the possibility of constructing a less essentialised, more relational and nuanced subject. This goes some way towards addressing the feminist criticism of the individualistic nature of rights. But reconstructing the subject is not an easy task. This is shown by my discussion of Lady Hale's attempt to grapple with the issues of culture, religion and human rights in *R (SB) v Governors of Denbigh High School*.<sup>212</sup> Lady Hale balances the claimant's Article 9 right to manifest her religion, by wearing the religious dress of her choice, against the schools desire to adopt a strict uniform policy to achieve harmony and equality between students. She uses feminist legal methods by attempting to seek out the interests of all concerned. She enters into a dialogue with the dissenting judge in the European Court of Human Rights in the case of *Sahin* and refers to the feminist literature.<sup>213</sup> She sees the claimant as an individual with agency and challenges gendered attitudes of consent to religious attire. Lady Hale's judgment may be flawed, but she does use the proportionality frame to ask

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<sup>211</sup> Ibid

<sup>212</sup> [2007] 1 AC 100

<sup>213</sup> Ibid Lady Hale 133. See *Şahin v Turkey* (2012) 54 EHRR. 20

the right questions and to try to create a more grounded and less essentialised subject.<sup>214</sup>

*Judicial Deference and Feminist Method 2014* is also premised on the utility of rights as applied in accordance with feminist techniques. It discusses how deference in human rights cases might be exercised in accordance with feminist method. It builds on the themes of earlier articles of trying to embed feminist principles within the legal frame. Deference occurs when the court 'exceptionally out of respect for other branches of government and in recognition of their democratic decision making role, declines to make its own independent judgment on a particular issue'.<sup>215</sup> The exercise of deference may lead to areas of law being off limits to the court, and may well be the reason why it refuses to uphold a right denying justice to the individuals before the court.<sup>216</sup> The article looks at the existing theories of judicial deference, and how they might fit with feminist legal method.<sup>217</sup> It is argued that the courts' discretionary exercise of deference to other institutions of government or to a public authority could benefit from adopting feminist legal techniques. This would include avoiding rigid categorization, greater reflexivity and a concern for the disadvantaged. Reflexive judging requires judges to consider not just their own sources of knowledge and experience, when deciding whether to

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<sup>214</sup> For a summary of the critique and an analysis see *Women, Culture and Human Rights 2010*, 324 and 329

<sup>215</sup> Lord Steyn 'Deference: a tangled story' [2005] *Public Law* 346, 349

<sup>216</sup> Martha Minow, 'Justice Engendered' (n192) 236.

<sup>217</sup> There is a considerable literature on deference. For a selection of the key works see T.R.S. Allan, 'Human Rights and Judicial Review: a Critique of Due Deference' (2006) *Cambridge Law Journal* 671, Jeffrey Jowell 'Judicial Deference: Servility, Civility or Institutional Capacity?' [2003] *Public Law* 592 and Aileen Kavanagh, 'Defending Deference in Public Law and Constitutional Theory' (2010) 126 *Law Quarterly Review* 222 and Alison L.Young, 'In Defence of Due Deference' (2009) 72 *Modern Law Review* 554

defer, but also needs them to be attentive to other perspectives. Again I stress the significance of courts being open to social framework material and real life experiences through third party interventions. I also explain how the rigid distinction between the private and the public led to women's experiences being excluded from law. This history means that feminists are wary of categorizations such as positive and negative obligations and that between law and policy. I argue that the underlying values of these distinctions should be interrogated and made explicit. I use the leading judgment in *Quila*, a case concerned with forced marriage, to show how the majority of the Supreme Court avoided deferring by refusing to decide the case on the basis of whether the obligation was positive or negative or to classify issues as one of policy.<sup>218</sup>

A cluster of Supreme Court decisions, involving the right to family life in Article 8 of the Convention, are discussed to demonstrate how the method the courts used in a series of immigration cases, where they refused to be overly deferential to the executive, can be understood as an example of feminist method. In these decisions, mainly concerned with the splitting up of families through immigration law, the courts have insisted that the cases are decided on their facts. They have sought out the hidden interests of children, and grounded their decision in the practicality and relational nature of family life.<sup>219</sup>

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<sup>218</sup> *Quila* (n 38)

<sup>219</sup> The cases discussed include *EB (Kosovo) v Secretary of State for the Home Department* [2009] 1 AC 1159, *ZH (Tanzania) (F) v Secretary of State for the Home Department* [2011] 2 AC 166, *Beoku-Betts v Secretary of State for the Home Department* [2009] 1 AC 115 and *Chikwamba v Secretary of State for the Home Department* [2008] 1 WLR. 1420. See the recent commentary on this group of cases by Helena Wray, 'Greater Than The Sum of their Parts: UK Supreme Court decisions on family migration' [2013] *Public Law* 838. The application of Article 8 of the Convention has been an ongoing source of conflict between the

These cases are significant because they show that legal methods can capacitate a form of judging that is less abstract and takes account of the interests of the marginalized. It is important to highlight these decisions to show that different forms of judging are possible, and that it is worthwhile for feminists to press for these methods to become more routinely used in the adjudicatory process.

To sum up, engaging with rights should not only take the form of initiating litigation or intervening in cases. It extends to persuading judges to reflect on the modalities of judging, and to try to embed feminist techniques within the legal process to make them mainstream. My method of examining key legal tools, such as proportionality and deference, and exploring how they might be applied in accordance with feminist techniques shows that legal methods are open to feminist influence, and that there is evidence from the case law that these methods can take root.

#### 4.00 Conclusion

Feminists have consistently challenged law's neutrality, and its exclusion of women's interests. Law has sometimes failed to live up to feminist expectations frustrating attempts to make it more sensitive to lived realities. For many scholars this is evidence of law's intransigence, and is reason to

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executive and the judiciary. For a discussion of some of the issues around the Immigration Rules see Robert Thomas, 'Agency Rule making, Rule-type, and Immigration Administration' [2013] *Public Law* 135. At the time of writing clause 14 of the Immigration Bill 2013 seeks to reduce the weight given to the right to a private life by a court or tribunal.



turn away from law to seek alternative means of advancing feminist aims. This has widened the gap between scholarship and activism, and has the disadvantage of reducing feminism's influence on law. Law's reluctance to address feminism's critical appraisal is not a reason to absolve law from its responsibility to provide an inclusive form of justice. The various examples presented show how law has, on occasion, been willing to acknowledge gendered harms, such as sexual harassment, female genital mutilation and domestic violence, even if they have been clumsily dealt with and the gains made are halting and incremental. The question for legal feminists is how to make law more responsive to women's interests and needs? My thesis argues that there are opportunities for feminist principles to make an impact. The use of strategic litigation, third party interventions, reliance on human rights and persuading judges to use feminist methods can all contribute towards making law more receptive.

Feminism, if it is to remain relevant, must, consistent with its history, continue to draw on ideas that come from the ground up, and which are rooted in people's lives. The deployment of the universal values of international human rights, that speaks to these needs, can have a decisive outcome in domestic courts as the decisions in *Yemshaw* and *Fornah* demonstrate. The dynamic flow of ideas between the local and the global, stimulated by feminist activism, has a positive impact on the practice of law. Similarly, the spaces created by the formal and informal structure of the HRA are also useful to feminists allowing for the circulation of norms and providing for the possibility of conversations and exchanges with interested parties, and multiple political and legal institutions. My writing has explained the advantages of working

within law's parameters by drawing on its existing tools. All of the publications presented have contributed to this thesis in their different but integrated ways. My work shows how feminist values have made their mark on law, and can continue to do so, by appropriating legal concepts and revitalizing them to achieve feminist ends. This pragmatic predilection for law and human rights needs to be combined with the feminist capacity to think imaginatively, to push at law's boundaries, and to insist that law can be done differently.

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