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INTRODUCTION: FEMINIST ADVOCACY, CONSTITUTIONS AND LAW

Penelope (Penny) Andrews¹

*Feminist analysis is like friendship: an ongoing process of deepening complexity, interactive, contradictory, insightful, emotional, enlightening, challenging, conflicted.*²

The programs and projects of the last few decades of feminist advocacy have been applauded, resisted, and vilified.³ Despite these divergent responses, there is no doubt that in societies across the globe women's voices in the legal and political realm are no longer muted. Organizing and lobbying on all five continents, aided and abetted by the liberating possibilities of the innovative communications technology, especially the internet, women advocates have created the discursive space in the political, legal, social, and economic realm to influence governmental policies, law and practice.

Developments in the last few decades have illustrated the concerted efforts by women activists and scholars from across the globe to bring women's issues from the margins of

¹ Professor of Law, Valparaiso University School of Law and Chair in Law, La Trobe University School of Law.

² Nancy E. Dowd, *Introduction*, FEMINIST LEGAL THEORY (Nancy E. Dowd and Michelle S. Jacobs eds. 2003) 5.

³ See FEMINISM IN POPULAR CULTURE (Joanne Hollows and Rachel Moseley eds. 2006); CASSANDRA LANGER, WHAT'S RIGHT WITH FEMINISM: HOW FEMINISM HAS CHANGED AMERICAN SOCIETY, CULTURE, AND HOW WE LIVE FROM THE 1940'S TO THE PRESENT (2001); WHO'S AFRAID OF FEMINISM?: SEEING THROUGH THE BACKLASH (Ann Oakley and Juliet Mitchell eds. 1997).

political and legal discourse to a place where women's concerns and priorities are at least recognized.⁴

Feminism's journey in the past few decades has been exciting, rancorous, emotional, and innovative. The trajectory of feminist legal theory has mirrored these developments, embracing parallel and competing narratives of rights. This has resulted in a rich and innovative body of legal theory that has forced the law to embrace the concerns of women.⁵

A few decades back women in the Western democracies embarked on well-orchestrated campaigns to effect changes in the political and legal spheres. The 1960's and 1970's witnessed the emergence of a groundswell of legal scholarship and activism, on the one hand providing impetus for the emerging legal universe of equality and non-discrimination, and on the other, responding to the policy and legal successes embodied in anti-discrimination laws and policies.⁶

If one examines the legal systems of North America, the U.K., the European Union, or Australia, for example, the impact of feminist activism is apparent. Feminist jurisprudence has unsettled the field of legal theory, transforming many areas of domestic

⁴ See CATHERINE ESCHLE AND BICE MAIGUASHCA, MAKING FEMINIST SENSE OF THE GLOBAL JUSTICE MOVEMENT (2010); see also ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY (2006).

⁵ See, for example, FEMINIST LEGAL THEORY, Vols. 1 & 2 (Frances Olson ed. 1995); see also MARTHA ALBERTSON FINEMAN, FEMINIST AND QUEER LEGAL THEORY (2009); and VISIBLE WOMEN: ESSAYS ON FEMINIST LEGAL THEORY AND POLITICAL PHILOSOPHY (Susan James and Stephanie Palmer eds. 2002).

⁶ See THE WOMEN'S MOVEMENTS OF THE UNITED STATES AND WESTERN EUROPE (Mary Fainsod Katzenstein & Carol McClurg eds. 1987).

law and forcing the law to accommodate women's experience. A cursory glance at the areas of criminal law (particularly rape and domestic battery), family law, constitutional law, and tort law, reveals the impact of feminist jurisprudence.⁷ One also sees the impact of feminist legal theory in the areas of immigration and refugee law, for example, where the discrete experiences of women, for example as rape victims in war, or those subjected to government condoned private violence, are increasingly seen as grounds for political asylum.⁸ Although the male bias in the law persists, the situation of women, particularly those in the middle and upper classes, has improved dramatically in the past few decades, and this change is a direct result of feminist law reform efforts.⁹

But of course not all women have benefited in the same way – and indeed the twin processes of racism and poverty have rendered legal victories somewhat pyrrhic to a significant proportion of poor women and women of color.¹⁰ In addition, lesbian women, despite gains in some areas, perpetually remain subject to heterosexual orthodoxies that marginalize their experiences.¹¹ That is the situation too with women who suffer from mental and physical disabilities – their disabilities a stark contrast to

⁷ See, for example CHANGING FAMILY VALUES: FEMINIST PERSPECTIVES (C. Wright and G. Jagger eds. 1999); see also DEBORAH RHODE & CAROL SANGER, GENDER AND RIGHTS (2005).

⁸ See GENDER AND U.S. IMMIGRATION: CONTEMPORARY TRENDS (Pierette Hondagneu-Sotelo ed. 2003); see also Janet Calvo, *Spouse Based Immigration Laws: The Legacies of Coverture*, 28 San Diego Law Review 593 (1991).

⁹ See generally, ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING AND LEGAL THEORY *supra* note 3; see also CATHARINE A. MCKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).

¹⁰ See CRITICAL RACE FEMINISM: A READER (Adrien Wing ed. 2003).

¹¹ See LEGAL QUEERIES: LESBIAN, GAY AND TRANSGENDER LEGAL STUDIES (Leslie J. Moran, et al. eds. 1998). See also Ruthann Robson, *Assimilation, Marriage and Lesbian Liberation*, 75 TEMPLE LAW REVIEW 709 (2002); see also Ruthann Robson, *Making Mothers: Lesbian Legal Theory and the Judicial Construction of Lesbian Mothers*, 22 WOMEN'S RIGHTS LAW REPORTER 15 (2000) and Ruthann Robson, *To Market, to Market: Considering Class in the Context of Lesbian Legal Theories and Reforms*, 5 UNIVERSITY OF SOUTHERN CALIFORNIA JOURNAL OF LAW AND WOMEN'S STUDIES 173 (1995).

deeply ingrained notions of femininity.¹² Overall though, the legal imagination and legal reality at least now formally embrace the notion of women's equality, however disparate and unevenly implemented.

Not satisfied with only local victories, Western feminists¹³ also began shifting their focus and directing their energies to challenging prevailing international legal theories and policies. They targeted what they perceived as the male bias of international law and the major institutions of international law, especially the United Nations. They demanded a more vigorous enforcement of international law, particularly human rights law, and also called for greater gender sensitivity at the United Nations. They demanded a reorientation in United Nations enforcement mechanisms and procedures, and specifically challenged the organization to be more gender sensitive in its overall operation, including the appointment of women at middle and senior levels.¹⁴

Although these global feminists purported, to a greater or lesser extent, to represent the world's women, the global reality reflects vast economic, geographical, cultural, and social differences between women, particularly between those in the developed world and their counterparts in the developing world. These differences are to be found within countries themselves, where economic disparities are apparent between local elites (mostly based in the urban centers) and poorer women (mostly residing in the rural

¹² See CAROL THOMAS, *FEMALE FORMS: EXPERIENCING AND UNDERSTANDING DISABILITY* (1999).

¹³ I use the term "Western feminist" very loosely. I am referring to those constituencies of women, mostly White, who reside in the U.S.A., Europe, Canada and Australia. They are largely schooled in the Judeo-Christian tradition.

¹⁴ These issues are explored in a seminal article, Hilary Charlesworth et. al., *Feminist Approaches to Law*, 85 *AMERICAN JOURNAL OF INTERNATIONAL LAW* (1991) 613.

areas). Despite this ontological unevenness, global women activists have pursued a collective mobilization of women against patriarchy and male domination in all its various guises.¹⁵

Feminist activists, particularly those from the poorer countries involved in various nationalist struggles for independence or other democracy driven projects, were also involved in strategically successful lobbying of the United Nations to ensure that the organization more vigorously pursues women's rights.¹⁶ They organized on a host of fronts, forming coalitions to amplify their efforts. Women activists globally have energized the plethora of non-governmental organizations (NGOs) that continue to proliferate. The individual and combined efforts and lobbying of these NGOs have forced governments to consider gender issues; these NGOs have "engendered" organs of civil society. Examples of such activism abound: for example, the major international human rights NGOs like Amnesty International and Human Rights Watch all have significant programs that focus on women's issues. In addition, groups like Equality Now and Global Rights were established to focus entirely on women's issues.

¹⁵ I am not suggesting here that this mobilization has not been fraught with conflict, disagreement, and dissension. Much anger has been unleashed in the various global women's campaigns – and continue to be – as women engage in battles of representativity, voice, transparency. See, for example, BELL HOOKS, *AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM* (1999) and CHANDRA TALPADE MOHANTY, *FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTISING SOLIDARITY* (2003).

¹⁶ My chronological account should not be interpreted as suggesting that women activists in the poorer countries took their political and activist cues from Western feminists. Rather, women in colonial and other undemocratic societies were very engaged political actors, in which the eradication of gender discrimination was assumed (albeit falsely) to be part of the national liberation struggle. So their liberatory impulses were not just directed against sexism and patriarchy – but against the whole super-structure of suppression and subordination. One such example was the struggle against the eradication of apartheid in South Africa. See *PUTTING WOMEN ON THE AGENDA* (Susan Bazilli ed. 1990).

The result of much of this activism has meant that despite formidable obstacles to women's equality in a vast array of economic, social, and political areas, there now exists a highly organized, politically astute, articulate, and vocal group of women activists who have committed themselves to eradicating the vestiges of sex discrimination and subordination, not only within their borders, but on a global scale.

At the beginning of the 21st century, the importance of gender equality at the global level is reflected in its inclusion as one of the eight Millennium Development Goals (MDGs) endorsed in 2000 by every member nation of the United Nations as part of the Millennium Declaration.¹⁷ The Declaration calls on governments to “promote gender equality and empower women”. Although the much awaited major review of the MDGs by world leaders in New York in September 2005 was rather disappointing, gender equality remains an important global goal.¹⁸ In addition, regional political entities have also incorporated gender equality as significant aspirational goals. For example, the Declaration of the Southern African Development Community set a target of a minimum of 50% female representatives in office by 2015.¹⁹ The European Union too has endeavored to improve the conditions of European women in a host of areas.²⁰ Across the globe dozens of feminist activists are now Cabinet Ministers, diplomats and high level political leaders. The pursuit of gender equality is reflected in the four major

¹⁷ GA RESOLUTION A/55/L.2. 18 September, 2000, at:

<http://www.un.org/millennium/declaration/ares552e.pdf>.

¹⁸ GLOBAL MONITORING REPORT 2005: MILLENIUM DEVELOPMENT GOALS FROM CONSENSUS TO MOMENTUM, The World Bank (2005).

¹⁹ SADC PROTOCOL ON GENDER AND DEVELOPMENT (2008), Article 12 at:

<http://www.sadc.int/index/browse/page/465>.

²⁰ See Yvonne Galligan and Sara Clavero, *Gender, Democratization, and the European Union: Influencing Women's Political Opportunities in Central and Eastern Europe*, (2005) at:

http://www.allacademic.com/meta/p_mla_apa_research_citation/0/8/7/6/8/pages87682/p87682-1.php.

global documents and initiatives that have the possibility of transforming women's lives. They are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Vienna Declaration on Violence Against Women, the Beijing Program and Platform for Action (including Beijing Plus Five and Beijing Plus Ten), and the United Nations Millennium Development Plan with gender equality as one of the goals.

Feminist legal theorists have generated methodologies that provide scholars and advocates with a renewed approach to viewing the world and therefore to engage in strategies that may transform many institutions, particularly where they impact negatively on women's equality.²¹ Feminist legal theorists insist on an exploration of laws, policies and practices that center the experiences and concerns of women. Indeed, feminist explorations have been likened to an "archaeological dig". Hilary Charlesworth, the Australian international lawyer, has elaborated that "there are various layers of practices, procedures, symbols, and assumptions to uncover and different tools and techniques may be relevant at each level".²²

Feminist theoretical explorations therefore involve searching for the silences in and the omissions of the law; these often correlate with the distinct experiences of women.

²¹ See, for example, MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY (2003); see also FEMINIST LEGAL THEORY *supra* note 2 and CATHARINE A. MC KINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989)

²² Hilary Charlesworth, *Feminist Methods in International Law*, in FEMINIST LEGAL THEORY, *supra* note 2 at 78.

Feminist legal theorists have insisted on removing what is seen as a false dichotomy between the public and the private sphere, arguing that private harms, frequently occurring to women, be recognized as worthy of public opprobrium and punishment.²³ These developments are most evident in the campaigns to outlaw marital rape, domestic battery and a call for mandatory arrests in cases of domestic violence. For feminist legal theorists, the distinction between the private space, essentially that of women, and that which is deemed public, results in the demeaning of women's status, roles and rewards in society at large.²⁴ This is not however a settled question, since women advocates continue to differ about the appropriateness of the divide between the public and private.

These differences surface frequently in contexts where women and their communities have experienced national authorities as oppressive and abusive, and where suspicion of the police and government authority is rife. An example is the situation with Aboriginal women in Australia where despite widespread private violence against women (from their husbands and intimate partners) mandatory arrest policies appear particularly draconian in the face of documented deaths in police custody and other instances of maltreatment of Aborigines in the criminal justice system.²⁵ Similarly, in South Africa, where suspicion of the police lingers in the face of extensive police abuse during apartheid, feminists insisting on removing the divide between the public and the private

²³ See Celina Romany, *Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, 6 HARVARD HUMAN RIGHTS JOURNAL (1993) 87.

²⁴ Rhonda Copelon, *Domestic Violence as Torture*

²⁵ Penelope E. Andrews, *Violence Against Aboriginal Women in Australia: Redress from the International Human Rights Framework*, 60 ALBANY LAW REVIEW 917 (1997).

as a practical matter remain difficult, even though the South African Constitution outlaws private violence against women.²⁶

Feminist legal theorists have worked consistently to challenge assumptions about femininity and masculinity. They have insisted that law and its institutions and legal processes expose and redress the underlying societal assumptions and prejudices that bolster these categories and which perpetuate the subordination of, and discrimination against, women.

Divergent and critical voices amongst feminist legal theorists have attempted to ensure that the feminist legal project be inclusive; that it is one that encourages and incorporates the many voices of women. In this they have found common cause with women challenging racism and other forms of discrimination and who insist that these struggles intersect and engage with the struggle against sexism. These “multi-racial” and “multi-ethnic” voices have insisted that the category “woman” be constantly challenged and also embrace other indicators of a women’s identity, including class, race, sexual orientation, geography, religion, disability, and culture.²⁷

²⁶ Penelope E. Andrews, *Violence Against Women in South Africa: The Role of Culture and the Limitations of the Law*, 8 TEMPLE POLITICAL AND CIVIL RIGHTS LAW REVIEW 425 (1999).

²⁷ See Hope Lewis, *Embracing Complexity: Human Rights in Critical Race Feminist Perspective*, 12 COLUMBIA JOURNAL OF GENDER AND LAW 510 (2003); see also Penelope E. Andrews, *Globalization, Human Rights Critical Race Feminism: Voices from the Margins*, 3 JOURNAL OF GENDER, RACE AND JUSTICE 373 (2000) and Tracy E. Higgins, *Ant-Essentialism, Relativism, and Human Rights*, 19 HARVARD WOMEN’S LAW JOURNAL 89 (1996)

For a feminist legal analysis, context is central to analyzing the situation of women in any given situation. Critical feminist scholars, including third world feminists and feminists of color, have in their writing incorporated the cultural context as part of a deeper and more totalizing reality.²⁸ They have argued that such reality be unfolded, layer by layer, with the express goal of gender equality. In short, they have invited all women advocates to engage with the claims of culture as a parallel liberatory vision in which women's sense of identity and longing cannot be extricated from their demands for equality. Louise Halper, the late American legal scholar, makes this point thoughtfully in her analysis of the twin liberatory discourses of Islam and feminism in Iran.²⁹ Although recognizing the heavy burdens that women in Iran still bear as a consequence of the imposition of Islamic law after the Islamic revolution in 1979, she nevertheless traces how Iranian women have strategically engaged with the ruling class to pursue equality in education, access to employment and access to reproductive health care. Halper concludes that there is much currency in the idea that a specific "Islamic feminist" has emerged, with developments for women in Iran a key indicator of such feminism.³⁰

Feminist legal theorists have generated rich and innovative approaches to uncovering the many layers of female subordination in a variety of contexts. Isabelle Gunning has boldly suggested that American feminists engage in "world traveling", an empathetic and humble approach to analyzing the conditions of women considered as "other".³¹ She

²⁸ See CRITICAL RACE FEMINISM: AN INTERNATIONAL READER (Adrien Wing ed. 2000).

²⁹ Louise Halper, *Law and Women's Agency in Post-Revolutionary Iran*, 28 HARVARD JOURNAL OF LAW AND GENDER, 85 (2005).

³⁰ *Ibid.*

³¹ Isabelle Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUMBIA HUMAN RIGHTS LAW REVIEW 189 (1992).

exhorts her feminist colleagues to recognize the context of women's oppression elsewhere and to construct a transformative vision of equality that eschews degrading stereotypes about "civilized us" and "barbaric them".³² Angela Harris has cautioned against a narrow essentialism that unquestioningly universalizes and homogenizes women's experiences, without regard to other important markers of women's identity like race and class.³³ Taunya Banks,³⁴ Leslye Obiora,³⁵ Hope Lewis,³⁶ and Karima Bennoune³⁷ have all argued for a contextual approach to equality that embodies the multifaceted aspects of women's identities, recognizing that such identities are fluid, constantly evolving and at times contradictory.³⁸

Feminist legal theorists have also attacked the hierarchy of human rights, instead calling for an integrated approach to all layers of rights. They insist that the divide between civil and political rights, the so-called first-generation rights, on the one hand, and economic, social and cultural rights, termed second-generation rights, on the other, be removed.³⁹ They have argued forcefully, for example, that the right to free speech or

³² *Ibid.*

³³ Angela Harris, *Race and Essentialism in Feminist Theory*, 42 STANFORD LAW REVIEW 581 (1990).

³⁴ Taunya Banks, *Toward a Global Critical Feminist Vision: Domestic Work and the Nanny Tax Debate*, 3 JOURNAL OF GENDER, RACE AND JUSTICE 1 (1999).

³⁵ Leslye Amede Obiora, *New Skin, Old Wine: (En)gaging Nationalism, Traditionalism, and Gender Relations*, 28 INDIANA LAW REVIEW 575 (1995).

³⁶ Hope Lewis, *Embracing Complexity*, *supra* note 23.

³⁷ Karima Bennoune, *Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression and Women's Equality Under International Law*, 45 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 367 (2007)

³⁸ Other scholars who have contributed to a more contextual approach to human rights include: Dianne Otto, *Rethinking the Universality of Human Rights Law*, 29 COLUMBIA HUMAN RIGHTS LAW REVIEW (1997) 1 and Cyra Choudhury, *Comprehending 'Our' Violence: Reflections on the Liberal Universalist Tradition, National Identity and the War on Iraq*, 3 MUSLIM WORLD JOURNAL OF HUMAN RIGHTS (2006) 1.

³⁹ Barbara Stark, *United States' Ratification of the Other Half of the International Bill of Rights in HUMAN RIGHTS IN THE UNITED STATES: LOOKING INWARD AND OUTWARD* (David P.

security deserves the same credence as the right to health, since both sets of rights are predicated on the existence of the other. These second generation rights, in addition to third and fourth generation rights (group rights and women's rights, respectively), are not nearly as well integrated into the existing international instruments dealing with reporting, evaluation, and monitoring procedures of human rights violations. But if women's lives are to be altered, these deficiencies have to be addressed.

The authors who have contributed to this volume explore some of the abovementioned issues in their respective articles.

In the first article, Cyra Choudhury examines the lens through which liberal (Western) feminists tend to view Muslim men and women, and the reification of the dangerous and “violently patriarchal” Muslim male, on the one hand, and the subjugated and oppressed Muslim female, on the other. Choudhury urges her liberal feminist colleagues to eschew the narratives of victimhood and rescue on behalf of Muslim women, and instead opt for a narrative that recognizes the interdependence of Muslim women to their families and communities. They (Muslim women) are often forced to negotiate the liberatory possibilities of their religion, as well as their own demands for equality, in the face of marginalization and discrimination that Muslim communities experience in the post-9/11 world. Choudhury exhorts liberal feminists to pursue the goals of, and engage in, a partnership with Muslim women in the pursuit of gender justice.

Forsythe ed. 2000) 75; *see also* Berta Hernandez-Truyol and Shelbi D. Day, *Property, Wealth, Inequality and Human Rights: A Formula for Reform*,³⁴ INDIANA LAW REVIEW (2001) 1213.

Turning her analysis to United States immigration law, Janet Calvo explores the citizenship of women as wives and their lack of protection under the Constitution as well as statutory law. Calvo places the contemporary immigration system in its historical context, arguing that in fact today's immigration laws regarding married women are shackled by historic legal decisions, and that despite changing cultural, political, and social norms, the law in this area has not evolved to provide the protections that women, especially married women, rightly deserve.

In the third article of this volume, Fiona De Londras argues against a widely held interpretation regarding the implementation and enforcement of human rights, namely that international law is inferior, and domestic (American) constitutional law, superior. Using the example of the pursuit of LGBT rights in Europe, through the European Convention on Human Rights, De Londras makes a compelling argument that American constitutional law and international law might have the capacity to develop a "synergistic relationship", despite some fairly weighty obstacles.

Highlighting the situation of women in Uganda, Donna Young explores the linkages between poverty, domestic violence and HIV/AIDS. She argues that legal policies and programs to address each, requires a comprehensive response. For example, legal attempts to stem domestic violence must also engage with lack of economic choices that women face. In addition, attempts made to minimize the spread of HIV/AIDS amongst women need to acknowledge that married women are particularly vulnerable to HIV/AIDS infection because of domestic violence and their inability to negotiate safe sex

practices. This same vulnerability precludes them from insisting on sexual fidelity from their partners, or demanding economic resources on an equitable basis within the marriage. Young acknowledges the limitations of the law in the face of these cultural and social impediments to gender equality, yet recognizes the power of the law to provide a structure and a language to pursue rights for women.

Roberta Hirsch explores the possibilities of democracy and justice for Liberia with the election of Ellen Johnson Sirleaf, the first woman to be appointed as the President of an African nation. In the wake of economic collapse and widespread trauma after fourteen years of civil war, Hirsch examines three areas that President Sirleaf has directed her administration's efforts towards, and that has garnered widespread support from the international community. These three areas are national development, including a commitment to gender equality and the eradication of violence against women, efforts to stamp out corruption, and endeavors towards national reconciliation. Hirsch concludes that President Sirleaf is an appropriate person to lead the country at this historical juncture, as she possesses the requisite personal qualities and professional qualifications to lead, and she inspires confidence both within Liberia and internationally.

In the concluding article in this volume, Susan Bazilli and Marilou McPhedran examine the strategies adopted by feminist advocates in Canada and South Africa to ensure that women's right to equality were included in their respective constitutional frameworks. They provide a narrative about the strategies adopted by individual women and women's organizations to ensure that lawmakers pay attention to their demands and respond

accordingly. Both authors were active participants in the Canadian constitutional debates in the 1980's, and one, Susan Bazilli, was also involved in gender advocacy in the transitional period in the South Africa before the adoption of a Bill of Rights in that country. Bazilli and McPhedran tell the story of their involvement in these constitutional debates with passion, arguing that it was only the vigilance of women that ensured that the Canadian Charter of Rights and Freedoms and the South African Bill of Rights incorporated the gender equality provisions for which both documents are admired globally.

This volume is a modest contribution to the ongoing discourse around women's rights and the place of law and constitutions in advancing those rights.

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