

What Can Legal Feminism Do? —The Theoretical Reflections on Gender, Law and Social Transformation

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Abstract

This paper seeks to introduce and reflect upon the debates within legal feminism in both the western and non-western world. These debates are centred around the issue of feminism adding women's experiences of law through political struggle, which contains the recognition of feminism's normative and transformative aspirations. It thus asks three key questions: Can law fully express women's experiences? Can law improve women's lives? Can feminist law reform help advance women's project? The author proposes a theoretical interpretation by relating feminist legal claims with the broader political struggle for gender justice. It then analyses the tensions within legal feminism, defines feminist struggle as a feminist legal strategy that is contingent and subject to changing social contexts, and finally proposes a particular perspective for feminist legal theorizing and activism in the post-colonial context.

Key Words: legal feminism (or feminist legal theory), legal subject Woman, women's movement, women's political involvement

The challenge of feminist legal theory to legal scholarship has gained ground within the legal academy over the last twenty years in western countries. This has been explored from the critique of gender injustice of individual regulation to the reflection on the very nature of law itself. Analytically, legal feminism, with the intention of treating sex/gender as an important social structure, claims that sex/gender likely influences the shaping of law. Ethically and politically, this claim has been focused on legal reform as the prime objective in order to be associated with feminist political projects. The relationship between a feminist critique of law, the politics of legal change, and the objectives of the women's movement will be the main focus of this paper.

There is a tension that once the feminist project in law is restricted to a normative aspect focusing on the negative consequences of law upon women's lives and the reconstructions designed to alleviate these, there is always an impression that feminist engagement with law is often seen as symptomatic of the women's movement's attempt to transform women's reality; and, in turn, the transformation itself is frequently understood within the narrow confines of the politics of legal change (Drakopoulou, 2000: 208). This paper aims to analyse this tension, clarifying that feminist engagement with law also reflects on the view of the role of law in society and, in turn, the meaning of transformation that can be developed to a deeper extent through law reform.

The theoretical development of legal feminism has been engaged in the problem of essentialism in the category "Woman" that is powerful in claiming gender justice but is often criticised for the fact that there are differences among women. This paper firstly explores the tensions inherent in western feminist legal analysis in its representation of woman as an essential category, and the feminist response to this tension. Different responses to the tension have been associated with different standpoints on the politics of law reform. This paper secondly examines the theories which consider the effects of law reform and the politics of women's rights; and then considers, from a feminist point of view, how legal

struggles over meanings about gender are reproduced, legitimized, and refashioned. Taking into account the dilemmas of western feminist legal theory, the review thirdly reflects on the engagements of the post-colonial world with feminist perspectives on gender, law, and social transformation.

These three dimensions of theoretical exploration enable us to come to a further understanding of feminism using the law, where we seek to unveil the problem of subjectivity in legal discourses concerning law's changes, to develop a perspective on the effects of law reform, and also to explore law reform's relation to the operation of different settings of power in the post-colonial context. We hope to reunite these three dimensions together to help us to demarcate women's political participation in law and understand the limitations and possibilities for the future. Hopefully, the discussion in this paper will provide a link to the situation in Taiwan—feminist legal struggle has been focusing on adding women's experiences in law with the intention of improving women's lives and advancing feminist agenda.

I. Translating Women's Experiences into Law

A. Problem of Essentialism in the Category "Woman"

Western feminism scholars (Fineman, 1983, 1991; Lacey, 1992; MacKinnon, 1987, 1989; Minow, 1986; Naffine, 1990; Smart, 1989, 1995) have long been critical of mainstream legal scholarship because it fails to take adequate, if any, account of women's voices, practices, and experiences in its analysis of law (Naffine, 2002b). By placing women's experiences at the centre of their scholarship, western legal feminists have long engaged in challenging traditional understandings of legal order. Liberal feminism challenges legal arrangements whereby women's experiences are denied access to the "public sphere" of life and are relegated to the "private sphere" of the home and the family. Liberal feminists accept the distinction between the public and the

private, and argue the case for shifting some issues traditionally perceived as “private” into the “public” arena of legal regulation. It suggests that the principle of “equality” (often understood as formal equality) should apply to issues such as equal marital status, equal parental responsibility, equal property rights, and so on. In this approach, to add women’s experiences in law is equivalent to claim that the “private” is “public,” and shifting the distinction at both the descriptive and normative levels (Lacey, 1993).

However, this liberal understanding of law and women’s experiences has been theoretically criticized. O’Donovan (1985) reveals the conceptual divide between the public and private masks and ignores the substantial inequality of women in the marketplace and within the family. Thus, the liberal discussions on women’s differences and similarities to men are criticized as leading “to assimilation of women to men in the public world and to a denial of needs and responsibilities arising from the private” (O’Donovan, 1985: 174). It is further argued that although liberal law, on the surface, does not regulate the private sphere, it does actually control the very meaning of the most private sphere of life (Barnett, 1998: 127-134). As Naffine (2002b: 85) puts it:

Law, as one of the central institutions of public meaning, gets into the private and helps to define what can be thought there, what is intelligible. Indeed, law quite explicitly, and with considerable force, asserts and defines the distinction between public and private and then further defines the constituent parts of the private realm: what it is to be a family; what it is to be a man; and what it is to be a woman; and what it is to be a child.

This leads us to the recognition that law has played a major part in setting the public conventions of what it is to be public and what it is to be private. This also encourages us to turn our attention to the important aspects of women’s experiences in law and its relation to the subjects’ positions of women constituted and maintained in the social world. This kind of development has constituted two distinct approaches: radical legal feminism and

difference legal feminism, which will be the focus of the following discussions.

MacKinnon, a radical feminist, and Irigaray, a difference feminist, argue that women's experiences are not accurately reflected in the law due to women's inability to speak and the 'personhood' that women lack (Barnett, 1998: 143-176). But they follow different scholarly approaches in their efforts to explain how such a misperception and misconstruction of women's experiences in law has actually happened and how it can be changed. MacKinnon's dominance theory (1987, 1989) refers to women's experiences as gender oppression and the law as the legitimacy of this gender oppression since law is constructed based on male lines and reflects male perceptions of self and other. MacKinnon demands recognition of woman's lack of identity and urges a reconstruction that makes gender difference irrelevant to law. Irigaray's difference feminism (1985) argues through psychoanalytic, philosophical and linguistic analyses, that laws and the legal profession are male constructs which exclude women's differences. Her agenda is to challenge the foundation of our social and cultural order by searching out women's differences and female subjectivity in law. Both MacKinnon and Irigaray are searching for the "woman's voice" and the reconstruction of law's subject.

However, these two approaches have been criticized because they rely on the "essential woman's voice". This means that they always seek to highlight and explore the gendered content of law and attempt to reconstruct law's subject by using "essential" women's experiences and voices. As the feminist perspective on law has increasingly gained momentum within the legal academy over the last 20 years, a tension has existed reflected in the question of "does 'woman' exist?" (Murphy, 1997) and "how can we gain knowledge of women's experiences" (Bartlett, 1991)? It is argued that if feminism seeks to construct a universal woman as the "subject," then that figure will inevitably be just as partial as her male opposite (Palmer, 2002: 94). Or in Bottomley's (2004) words,

feminist scholarship in law might be characterized as establishing a form of orthodoxy which is only “part of the construction of an orthodoxy”.

This can be characterized as “the problem of essentialism” as a basis for universal claims in which women are analysed as a category. This problem of essentialism makes us hesitate to refer to the “woman’s voice” as if this were capable of representing all women. The postmodernist view thus suggests that feminist theory cannot speak on behalf of the essential universal ‘woman’. Rather, feminism must embrace the differences between women, taking into account factors such as race, class, ethnicity, age and sexual orientation, and must accept that only a limited knowledge is ever possible. In order to avoid “the problem of essentialism,” we suggest that we need to focus on studying the legal construct of the person instead of engage in positing a “woman’s voice” in law. The next section will therefore explore the legal construct of the person and how a limited knowledge can still serve to improve women’s status before the law.

B. Legal Construct of the Person

As to the problem of essentialism, Conaghan (2000: 367) points out that “to claim to speak for all women is, inevitably, to exclude the voices and experiences of some while privileging those of other.” In other words, feminist legal studies may aid in achieving some desirable social ends, however, its analysis and claims also risk reproducing “the form of thought, the very rhetoric” that feminist legal studies are opposed to.

Faced with the anxiety of defining a legal subject representing the “woman’s voice” and attempting to avoid the problem of essentialism, feminist legal strategy has developed its own framework. According to Lacey (2002: 126-127), there are two primary types. The first, called “contextualization as critique,” emphasizes the construction of legal subjectivity as a contextualization which represses “the other,” leading to the need to look at the broader interpretative frames which shape the

impact and meaning of doctrine. The second, called “contextualization as strategy,” seeks to broaden the ways in which the legal subject is contextualized and break down the association of the legal subject with the masculine (2002: 127-128). Both kinds of feminist legal projects, through their analysis, can release at least some of the anxiety associated with the problem of essentialism.

However, there is still a further tension in seeking to answer the question of “how only a partial knowledge of woman can achieve ethical and political advances. “The feminist response is “to draw a distinction between ‘Woman’ as a discursively constructed category and particular groups of ‘women’ who bring to law a common concern such as protection from spousal abuse or improved access to the labour market” (Conaghan, 2000: 368). The legal subject “Woman” is only a creation of law, a legal invention comprising a configuration of legal norms designed to enable someone or something to be, and to act in law; it can be separated from “women” situated and embedded in their own particular social context.

With this distinction in mind, it is important to recognise that to study the construction of the legal person (as in the legal subject “Woman”) is to study the formal denial of women’s subjectivity. According to Naffine (2002a), this might involve the provision of a critical analysis geared to unearthing law’s gendered assumptions about the ideal-typical legal subject, interpreting law as “sexed” and revealing the “violent” exclusion of the (feminine) subject. This corresponds to feminist observations that the very form of the legal subject is male in that the legal person is always perceived as unitary, never multiple. It is thus unlikely that women would want to assume such an unattractive personality, with so little life in it.

Furthermore, if we observe the situation from the viewpoint of women, we can see that women are constituted and positioned in law to perform a vital function of propping up the legal person; from this position, they cannot be persons themselves (Naffine, 2002a: 87). According to Naffine, the legal person has not led to

the free negotiation of identity in law; in fact, in many respects it has served to conceal the different ways the state continues to impose forms of human being (2002a: 87). Thus, the failure of law to see women as they are has disabled them from negotiating and renegotiating their identities.

In order to solve this problem of the legal person's negation and exclusion of women, Naffine (1995) proposed a project that would aim, first, to recognize the social and legal limitation of women's lives, and, secondly, to move beyond those trappings and imagine how women might live substantially different lives (under the law). Naffine (2002b) then further reconsiders the legal subject "Woman" as an agency struggling against gender inequality, and negotiating women's social relations and identities. She sees the key contribution of legal feminism as the introduction of terms that have renamed and redefined women's injuries and interests that have revealed "the precise ways in which socio-economic and legal power determine what can be said" (2002b: 74-75) in the "communities of legal meaning" (2002b: 75). In her view, to study law is to study a form of life, and feminist engagement in law is a competition of different life forms, languages, and social powers:

The agency of women may be said to reside in their continuing capacity to make sense of these competing demands and find some internal coherence in their lives. Thus conceived, agency is a capacity or ability to make meaning within a given set of cultural practices which fail to offer a clear and consistent formula for life, but are instead marked by contradictions. Not surprisingly, these contradictions tend to be most apparent to those who bear the full force of them and who benefit from them least. Agency, then, is to be found in the ability to weave together the different parts of one's inherently communal life into a coherent and consistent story, the story of oneself. It is the ability to constitute ourselves "through a certain conception of our own history." Agency or autonomy is not the legally preserved freedom to live outside our cultural practices, which is a thing without meaning. Agency is the ongoing endeavour to make sense

of these often-contradictory practices, to render them coherent without going mad, and without being struck dumb. (Naffine, 2002b: 86)

Braidotti (1992; 1994) uses the image of the nomad who is both situated in, and possesses, a critical consciousness resisting incorporation. This metaphor suggests a way in which theory can emphasize the fragmentary nature of identity while retaining the insights of postmodernism. Such theorizing permits feminist work to frame discussions while recognizing that only partial knowledge is possible. Thus, in feminist legal theory, “the legal subject is posited, not as the abstract, ungendered creature of the traditional legal imagination but as an ideological construct, endowed with attributes that vary according to context, and compel particular (gendered) perceptions of the social world” (Conaghan, 2000: 361). As Nancy Fraser argues:

the fact that subjects are culturally formed does not mean that they are without critical capacities; what it does mean, however, is that critique can only be socially situated, precluding the possibility of foundationalist or universal knowledge but not the possibility of critical and self-reflexive knowledge which advances understanding and, therefore, emancipatory ideals. (cited in Conaghan, 2000: 381)

C. Can Law Fully Express Women’s Experiences?

In order to answer the question, “can law fully express women’s experiences?” one would have to face the problem of essentialism in terms of whether “there are any universal women’s experiences that we can put into law?” The debates on whether there are authentic women’s experiences usually weaken the legitimacy of the feminist project on law, for there are different women’s experiences before the law in terms of race, class, and the like. When feminists ask for a reconstruction of women’s experiences in law, there are always criticisms regarding their

universal claims of women's experiences. The feminist response to this issue leads us to the distinction between the legal subject "Woman" and women in society, with the hope that this distinction can release the tension inherent in the problem of essentialism. The focus thus becomes an exploration of the legal person presumed in law and of different perceptions of the male and the female subject in law. If the legal subject "Woman" cannot express women's experiences fully, what are the consequences of this, and why do we want women to express their experiences in law? If women can express their experiences fully in law, does that mean that women can have justice in law and in society?

These questions are associated with contesting theoretical perceptions on law and justice, so that the feminist political project on law should take the issue seriously and reflect on it. Basically, the legal positivist tradition is based on an understanding of law as a neutral and independent structure that is supposedly uninvolved as an institution in the construction of gender or the repression of women. The direct result of this approach is that women's problems with the law are thus only seen as problems with particular legal rules or areas of law. Sometimes even the feminist perspective on law is likely to become almost synonymous with changing the content of particular rules or areas of the law. This positivist view of law constrains the feminist political project in law within the field of reframing particular legal rules by emphasizing women's experiences. Thus, the objective of expressing women's experiences in law would be to focus on the change of particular legal rules, and would not include the consideration of any political aspect of feminist intention to improve women's lives.

Thus, to ask the question, "can law fully express women's experiences?" with the intention of supporting a feminist project must recognize and transcend the positivist view of law in order to develop a politically meaningful line of enquiry into the relationship between law and the actual subordination of women. The feminist analysis of law must address the significance of the form of law in relation to women's subordinated status in society,

and must see how law functions in a social structure that supports and reinforces women's oppression. Legal feminists should predicate their strategies on an understanding of law as praxis, a form of "practice" through which the social order is defined (Stubbs, 1986). It is in this framework that the legal subject "Woman" should be seen to operate as an agency that may change the gendered structure and move towards a different structure favouring women. The next section explores further the role of law in gender structure and in improving women's status.

II. The Effect of Women's Rights in Improving Women's Lives

A. Debates on the Effects of Law Reform

Socio-legal studies have an interest in law as a social phenomenon and tend to challenge the notion of law as a social practice that is discrete and isolated from the rest of society. Within socio-legal theory, much has been written about the "politics of rights," lining up to either defend or attack the struggle for rights in liberal democracies. The main point of contention is between those who characterize "rights" as abstract, individualistic, disempowering and obfuscatory, and those who agree that rights struggles may be justifiably characterized as having such qualities, but argue that they can also be, simultaneously, empowering, necessary, and bringing together energy and foci for resistance.

The politics of rights in feminist analysis is argued to be more positive than in other analysis, since critical feminist theory seeks to expose and alter law's disadvantageous impact on women in order to achieve particular feminist goals—namely, transformative social and political change (Barnett, 1998: 200-207). However, while the women's movement mainly identifies legal reform as the prime objective, some feminist academics question whether the concept of rights, and the struggle for the achievement of equal legal rights for women in society, should play a central role in the quest for gender equality (Olsen, 1984; Sevenhuijsen, 1986; Smart,

1989). The problem is that their theoretical bases (and the latter's perceived centre) have been at odds with the basic foundation of the women's political movement (Brunt, 1983; Evans, 1983; Sheridan 1990). For example, Smart argues that rights rhetoric can simplify complex power relations but it fails to challenge and overcome existing structural inequalities which are woven into women's daily lives; indeed, it might have the perverse result of reinforcing the most privileged groups in society. Smart (1989: 138-144) even concludes that the use of rights discourse to achieve equality has been counterproductive, since it has led to false hopes and has perhaps even been detrimental to women's claims.

On the other hand, there are persuasive arguments which suggest that women should cautiously support a formal declaration of rights. Palmer (2002: 97-98) provides five reasons why feminists should hold a positive attitude toward the utility of women's rights. They are: the law's potential to be a power for change, to generate political debates for change, to include feminist insights into law, to define and structure relationships of power, and to be a symbolic power for change.

Drakopoulou (2000) identifies four different approaches in feminist theory. The first is an equality and civil rights approach which explores the negative consequences law has upon women's lives. This is the only approach that maps out the same terrain as the women's movement. The second approach questions law's methods and reasoning, and argues that the legal subject "seemed incapable of encompassing the complexity of women's lives, and consequently, powerless in curing the malady the centrality of difference had caused" (2000: 213). The third approach focuses on law's gendering power as based on "questioning the very possibility of a feminist subject able to articulate true and objective knowledge claims about the category 'woman'" (2000: 214). The fourth approach states that there is no longer any need to address the subject before the law, for the ideas emerging from feminism are "productive of an 'uncaring' legal system" (2000: 215).

Except for the first position, we can see that feminist legal

thought can no longer identify appropriate norms to identify a legal subject fitting women's experiences, and the subject that feminist legal theory captures is more and more remote from the women's movement. Though feminist theoretical aspirations attempt to suspect the utility of law, from the perspective of the women's movement the gaining of legal rights has always played a central role in their political agenda. Conaghan (2000) points out that feminist academics and politics are situated within different validity frameworks, so they are differently received and perceived. As Naffine states, this is a near-death experience of the female subject:

Legal feminists have therefore been well able to identify law's failings in relation to women: they are good at saying what is wrong with law. But perhaps they have been less effective at conceptualising legal change: at saying what law should do instead. (Naffine, 2002b: 94)

However, feminists will continue to pursue "justice" within the parameters of the politics of rights, its advantages and disadvantages, for they are attempting to employ such a tactic embedded within a deliberately obtuse masculinist culture. A feminist strategy in law cannot exist without accepting some aspects of liberalism even though feminists have demonstrated that law's liberalism is premised on women's inequality. The following section will map a strategic view containing the insights needed to view law's potential role in advancing the feminist political project and the possibility of working on law to improve women's lives.

B. Mapping Law as a Gendering Practice

In the domain of the relationship between law and people's life, two views of law can be identified. One sees law as an instrument existing "out there" to function and intrude into people's lives by identifying tensions and providing certain solutions. From this view, law becomes an object outside that is

largely irrelevant to us, entering our world with its external principles and power to judge right or wrong, wield certain rights, and assume certain responsibilities. The present study is *not* going to take this instrumentalist view of law.

The other view, influenced by post-modern thought, sees law as a subtle form of power exercised upon people's lives at specific times and in specific contexts in producing discursive constructions of historical actors. Such constructions may have the power, in their effect upon people's lives, to compete with other dominant discourses that are identified by feminists as the source of women's subordinated status in society. Yet, at the same time, they may reproduce the material and ideological conditions under which patriarchal relations survive. This latter view encourages us, in this thesis, to shift the discussion from how law fails to reconcile conflicts and provide women with a better life (the effect of rights approach) to a focus on the legal discourses and their discursive construction in relation to transformations for women. In other words, law is understood as a discourse and a code defining its subject with its power and, yet at the same time, including dimensions where power is subverted towards the creation of an alternative way of life.

We will seek to explain how law can possibly have the inter-reactionary effect on women's lives based on the analytical concept of *the discursive construction* and the legal subject "Woman." Our position is to view law as a site of struggle, as one practice amongst many, whose power rests in its ability to create gendered subject positions—a process Smart (1992) calls the "gendering strategy of law" and Chunn and Lacombe (2000) call the "gendering practice of law."

To begin with, we can take on board the sort of argument made by Naffine and Owens (1997), which seeks to define the legal subject through its character of being constituted in a certain, pre-existed way:

Law has always assumed and constituted a subject who is deemed to act in certain ways, to wield certain rights and

to assume certain responsibilities. And law has engaged in this act of creation quite self-consciously, fully aware that it is constituting a subject.... The legal person, or legal subject, plays an absolutely critical role in law. The attributes accorded by law to its subject serve to justify and rationalise law's very forms and priorities. If feminists are to change law, then it is vital that they deal with the implicit as well as explicit sexing of the legal person. (1997: 7)

Smart (1992) takes the view that Woman is a gendered subject position which legal discourses bring into being. She reminds us that "the women that feminism(s) invoke(s) are perhaps the Woman of/constructed by feminist discourse(s) rather than an unmediated reality simply brought to light" (1992: 35). She draws a distinction between the discursive construction of a type of Woman (the female criminal, the prostitute, the unmarried mother and so on) and the discursive construction of Woman in contradistinction to Man. The discursive construction of a type of Woman may serve to express the subordinated situations of women in a particular social-historical context, and the discursive construction of Woman opposed to Man may serve to point out the gender construction in legal discourses. Law here is seen as bringing into being both gendered subject positions as well as subjectivities of identities to which the individual becomes tied or associated (Smart, 1992). In other words, the legal subject Woman is engaged in being constitutive of the reality, part of the process of social relation and gender identity formation.

According to Chunn and Lacombe (2000), law with its construction of the legal subject is a hegemonic process that actively contributes to the legitimacy of a social order, but also has the potential to constrain and enable women's transformations. Seeing law as a hegemonic process is to see law as an ensemble of practices that people can mobilize to reproduce or transform the conditions under which they live. It is through this sense of the practices in and through law that we understand law as a site of struggle (Smart, 1989; 1992; 1995), rather than only as a tool of

struggle, for mobilizing or refashioning whatever institutional arrangements exist at a particular time. In Chunn and Lacombe's (2000: 13) words:

law clearly cannot be perceived as a homogeneous force that coerces or determines human activity or subjectivity. Rather, law becomes a practice that both constrains and enables agency.

Dossa (2000) analyses the practice of the legal subject Woman as a hegemonic moment that is a practice of power-knowledge complex and a practice of resistance. In this practice, the subject negotiates its social relations and its new identity; at the same time the practice constrains and enables. Thus, Smart (1992: 40) urges us to see the power of law as more than a negative sanction of a technology of gender that holds women down, but rather as a product of gender difference and identity. Foucault's view is quite useful here to deepen the argument on the effects of legal discourses in the place of identities: for him, there is no fixed and definitive structuring of either social (or personal) identity or practices, as there is in a socially determined view in which the subject is completely socialized. Chunn and Lacombe (2000: 17) put it this way:

A woman's identity, then, is fluid and dynamic, never fixed and stable. Woman is always in a process of becoming. Her identity corresponds to the different subject positions she acquires as she finds herself in a variety of social relations. We do act differently in different contexts depending on the power relations involved, the possibilities to manoeuvre, the expectations we or others have of the situation, and so on. Our ability to act and express ourselves—our agency—does not come naturally. On the contrary, it is shaped by historically specific forces that constrain and enable our interpretations of any situation.

With this approach, we have a base to investigate the gendered implications of legal discourses, and to try to understand

what is generally meant by the statement that “the laws are constructed around a masculine subject and an associated set of masculine characteristics, and that these characteristics associated with masculinity are valued by law” (Davies, 1997: 28). Discourse analysis creates the possibility of remaining detached in order to analyse the theoretical and practical context with which it has been associated. Categorized in terms of any statements referring to legal rights, this certain order of the “Woman of legal discourse” produces permissible modes of being and thinking while disqualifying and even making others impossible. It gives us the possibility of singling out the “Woman of legal discourse” as encompassing cultural space and at the same time of separating ourselves from it by perceiving it in a totally new form.

In the case of each legal subject “Woman” within each context, the “Woman of legal discourse” defines the issue in a certain area by naming statements about it and authorizing views of it. This thus makes it possible to remove all problems from the political and cultural realms and to recast them in terms of the apparently more neutral realms of professions and administrations. Professional discourses provide the categories with which “facts” can be named and analysed. At the same time, the “Woman of legal discourse” has crafted a space of resistance in and through law for women to negotiate their social relations and identities and allow them to convey what an alternative form of life would be like for them and perhaps others. In the area of other discourses, the “Woman of legal discourse” is not merely an “ideology” that has little to do with the “real world;” nor is it an apparatus produced by those in power in order to hide the unequal power relationship. It has crystallised in practices that contribute to regulating the everyday comings and goings of people. Drakopoulou (2000) has suggested that we take two starting points, women’s own experiences and female legal subjectivity, and trace the process through which they relate to each other:

Thus we might trace the links between our social and political system based on an absence or distortion of

women and their experience, and the legal discourse which legitimates it; we could re-explore the modes in which female legal subjectivity (unitary, fragmented or constructed) relates to real women; or, we might re-think the subjectification processes of law and the political necessity of asserting female agency and subjectivity. Alternatively, we could try turning away from issues of representation of women in the legal norm and searches for truths about women's oppression by law. Here, we could opt for a reading of law in terms of sexual difference, and develop ruses and tactics for disturbing the meaning of the legal text to reveal its patriarchal ancestry—the sex/gender system upon which law is founded. This would open a discursive space which allows for the process of re-considering the feminist engagement in law, its objectives and its ethical and political validity. (2000: 221)

C. Can Law Improve Women's Lives?

In order to answer the question as to whether law can improve women's lives, we have to scrutinize not merely the legal articulation of the relevant rules and processes but the meaning and effects of those rules and processes as interpreted and enforced, and as experienced by their subject. We describe roughly the critique of existing legal arrangements concerning women's issues (women's rights) and the defending position on the usefulness of women's rights. We then turn our attention to more normative and ethical questions in order to explore the impact of law and the meaning of its existence and enforcement or non-enforcement for their subject (Lacey, 1998: 221-249). We wish to locate these questions within the broad understandings of the sociology of law and social theory, attempting to formulate an analytical framework to understand the complex social networks of power of which law is only one expression. The position we are proposing is that law is a gendering practice which not only concerns the exclusions and injustices implicit in legal practices, but also concerns the meaning of those practices for subjects. This posits a fundamentally different

notion of law and justice in terms of a standpoint of resistance and a means for women's transformation.

So, concerning the question "can law improve women's lives?" we have to accept a more uncertain but well-acknowledged and theoretically-supported answer: law can be an empowering as well as constraining practice. As Chunn and Lacombe (2000: 18) put it:

In the spirit of feminists who have struggled to eliminate essentialism and reification from their theorizing about law, the authors of the empirical investigations that follow all attempt to conceive law as a hegemonic process—a strategy involving a multiplicity of agents who, drawing on a variety of knowledge(s), experiences, and resources, struggle to institutionalize their specific goals. Yet, because those goals are diverse, contradictory, and open for interpretation, once they are written in law they can be mobilized to undermine, support, or refashion whatever institutional arrangements exist at a particular time.

In the position of treating law as a gendering practice, our purpose has been to go beyond the notion of law as at once hegemonic and as a discursive practice of domination and resistance. We have tried to point toward the dimension where law can be translated into justice, which draws attention to the legal subject and to legal discourse within different sets of historical and social circumstances. Accordingly, we will proceed in the next section to address the conceptual framework of the literature on the women's movement, the state and law in the post-colonial context.

. Feminist Legal Strategy in the Post-colonial Context

We have sought to make a clear distinction between the "legal subject Woman" and "women" in order to open up the possibility of utilizing 'Woman' strategically. I have also, in the second section of this paper, developed a conceptual framework to target law as a gendering practice and thus to treat the legal subject "Woman" as

only ever tentative, temporal, situated and always subject to revision.

With these two conceptual frameworks in mind, we are then able to assert the importance of paying close attention to the material lives of women in relation to law as a necessary task of any radical political project in law and an important dimension of the intellectual goal of furthering our knowledge and enhancing our understanding of the world in which we live. This leads us to a project beyond the normative engagement of law, and to the search for a feminist legal project to consider the issues of law's role in social transformation and the issue of feminist politics in gender and political economy. The discussion will be divided into two parts: the first will involve an inquiry about the role of law in the post-colonial state and its active meaning for social transformation in gender issues; the second will involve an exploration of the civil rights approach and its gendered features in relation to women's inclusion in, and exclusion from, the process and the possibility of change within the framework of structure and agency.

A. The Role of Law in the Post-colonial Context

(A) The Role of Law in Political Restructuring and State-building

In the last four decades, interest in law and development has produced a new field of study covering issues of law and governance in the post-colonial context. Based on the assumption that the historical heritage of colonialism had a profound effect on the legal systems of colonized societies (the legal system was an imposed product transplanted by colonizers in the colonized societies), many studies have focused on the role of legal technical assistance in economic and political development within the international frameworks of development and globalization (Faundez, 1997b; Faundez, Footer, & Norton, 2000).

This issue of a framework imposed as a postcolonial legacy has led to efforts to more clearly understand the contribution of law to

state-level capacity building and to international economic and political restructuring. For example, Ghai (1993) analyzes African constitutions as a combination of two models: the model of liberal democratic constitutions provided as the only right way for an emerging nation-state and the model of socialist constitutions as a basis for building up a strong state in the post-colonial context. Ghai's analysis of African states highlights the instrumental features of law's role, unmediated by processes and procedures. Law, in this context, continues to be an instrument of control and oppression and thus requires the rehabilitation of the very concept of law itself.

Apart from the above analysis on the contribution of law in state structuring, the emphasis in the literature has been on the change of law's role in political restructuring and state-building during the transition from authoritarianism to liberal democracy. The authoritarian regime took its legitimacy from the consolidation of political and economic progress; it focused on a greater degree of institutionalization and law as an instrument to assist in this process. By contrast, a liberal-democratic constitution bases its legitimacy on values such as civil and political rights internal to itself; law therefore becomes a major legitimizing device for state and society.

Many have pointed out that ethnic identities in this context have been constantly interacted, transformed, reinforced or even constructed by the process of modernity that is represented as nothing more than the model of the European nation-state. There has been a particular emphasis on the enforcement of rights and the strengthening of the "rule of law" with special reference to democratization processes and governance programmes (Stewart, 2000). This group of ideas perceives the enforcement of rights and the strengthening of the "rule of law" as associated with liberal legality, which sees law as a mechanism to curb the arbitrary powers of the government and as an instrument to achieve social and economic objectives.

There is little doubt that a liberal-democratic constitution is a

powerful means to enhance the state's legitimacy, since it gives the impression of a competitive political system responsive to new interests and change and emphasizes the primacy of state representative and judicial institutions, mitigating the appeal of radical politics. However, this liberal legality is criticized as an instrument of class oppression and domination, as the legal forms hide the reality of economic and political power behind the illusion of equality both in economic and political spheres. This instrumentalist approach to law is criticized for failing to acknowledge that a more effective system of law would not necessarily bring about social development (Trubek & Marc, 1974). Indeed, in some circumstances, law has no effect on social and economic conditions, or, worse yet, it often makes matters worse, as it reinforces existing inequalities (Faundez, 1997a: 11). Based on this understanding, the following section will explore the gender aspect of the inquiry on the role of law and social transformation.

(B) Feminist Legal Analysis: On Gender and Legal Discourse

Many studies in the Third World have offered their perspective on the critique of the imposition of liberal legality and have suggested the idea of legal pluralism. Feminists have made a significant contribution to these debates. A common theme from all perspectives is the way in which liberal legality limits the ability to comprehend gender issues and lacks legitimacy for many (Stewart, 2000). Another common theme is the way customary and personal law systems interact with state liberal legality causing controversies and dangers associated with attempts at change.

For example, Stewart (1996) discusses the legal status of women in Kenya, Tanzania, Zimbabwe and Botswana, showing the way in which women are located within the discourses of liberal legality and the interaction with customary law. She argues that gender issues are falsely tackled by the construction of illusory dichotomies between westernized women and "other" women—poor and rural women. Ali's (2000) work, *Gender and human rights in Islam and international law*, is another example

which offers a specific examination of the nature of women's rights in Islamic tradition by setting Pakistan as an example. Ali (2000: 6) aims to dispel "the notions held by many 'Western' feminists regarding the oppressive conditions of Muslim women world-wide and their supposed inability to negotiate gender inequalities in their respective societies," calling attention to the skills of Muslim women in negotiating existing inequalities and gender hierarchies within their culture.

Thus, armed with the insight from works on the discursive construction of third world women (Kapur, 1999; Mohanty, 1991), legal feminists have developed frameworks with which to analyse law's construction of Woman in legal pluralism and the role of this construction in making contradictions and conflicts invisible and in turning them into the binary opposition of modernity and tradition. These conceptual frameworks lead to the posing of a non-essentialist alternative that provides a better tool for purposes of research into and the analysis of, the relationship between law and society. As Stewart (2000: 11) notes:

Feminist researchers working in the complex world of postcolonial societies have moved this debate away from the confines of the recognition of customary laws by the state (formal legal pluralism) and into a far wider discussion of the extent of the reach of state law. Here the limit of state legitimacy is questioned when set against the other, often more powerful social fields or regulatory regimes such as religious or customary norms which affect women. [...] gender relations are structured by a range of these social fields.

In this context, with the emphasis on law's role in the construction of gender relations, Griffith's (1997) research, *In the Shadow of Marriage*, focuses on the reality of women's lives and how they negotiate their social relations through the law. The author sets out the materials—the narratives and life-histories on marriage, kinship relations and property rights in Botswana—to explore women's encounters with law, as represented by both

official and customary institutions and practices. Her work points to the way in which individuals are situated in relation to the networks which shape their world and channel their access to resources and the way in which individuals construct their social relations within the networks. Similarly, Hirsh (1998) highlights how Muslim women actively use legal processes to transform the religious and local norms that underlie their disadvantaged position in the Swahili community in post-colonial Kenya. She convincingly demonstrates that it is not merely the vehicle through which legal power operates, but also constitutes legal power itself, being at once the cause and effect of linguistic interactions taking place on a daily basis in Kadhi's courts. Besides, Shehada (2004) highlights the ways in which Palestinian women operate within the parameters of their culture. She gives an insight into the struggle of everyday life, and the way through which the unique situation of violence of today's Palestine silences knowledge of gender struggles.

We conclude that much more work needs to be done in tracing how women are located and situated in relation to law and how they have resisted and negotiated constructions of gender. This will avoid the trap of slipping into a new form of determinism, constructed and produced by power, of which women are in some ways seen to be predetermined, calculated and powerless. A further question would be how this kind of research can assist women in their situations or can enhance feminist activists in pursuing their project on law and society.

(C) Inquiry and Activism in Law and Society

As explained earlier in this paper, legal scholars have provided a great deal of evidence of law's failure to meet the high ideals that law should stand for equality and justice. A further study on law and social transformation may be able to assist activists by providing an interpretation that connects the local context to social change within a larger political and social institution. This may also suggest unseen potentialities within our own communities and

institutions. In order to achieve this, Munger (2001: 10) suggests that close attention needs to be paid to the subjects of the research:

Our scholarship required respect for the subjects of our research—not only for the meaning that their lives had for them but for the ends they valued. Without acquiring this understanding from our research subjects, we could hardly know what is important in the world, what equality or justice might mean, or which changes might matter and which would not. This face of activism—engagement with subjects—requires humility about our understanding of the needs and the goals of action.

Along with this line of thinking, Baxi (1987; 1998; 2000a; 2000b) examines people's activities in relation to law and concludes that social action litigation in India not only validated many moral claims, but also had the surprising consequence of increasing the legitimacy of the court and the Constitution itself. It thus had the power of incorporating social movements and created a charter between the people and the government. Based on this kind of insightful analysis, he builds up a theory of the reconstruction of human rights grounded in the experience of suffering. He praises the concrete identities created by the experience of oppression and thus rejects post-modern theory with its stress on the fractured and decentred subject. He also rejects technocratic and statist views of human rights which ignore the claims of the oppressed, based on their experience of suffering. Baxi's work gives us a hope that the law has the power to invite and give effect to new visions of society in the right conditions.

Esteva and Prakash's (1998) book, *Grassroots Post-modernism*, sketches local struggles and endeavours in challenging the very nature and foundation of the modern power that resides in the individual self and the human rights and development discourse. Setting out to enhance people's power, the authors consider the idea of a collective mobilizing power to regenerate people's space for opening possibilities to construct identities and negotiate social relations. This space is perceived as having the potential to

rediscover “the commons” and to look for new ground, but not in terms of the so-called participatory or emancipating theories, which have overtones of submission and subordination. The making and remaking of this space are expressions of people’s creativity in critically challenging relations between “the people,” whose struggles always involve resisting the law and “the law,” which rule people’s lives and interactions.

Santos (2002; 2003) looks at the counter-hegemonic globalization and deals with the “law of the oppressed” to unfold the signs of the reconstruction of tension between social regulation and social emancipation. He argues that the possibility of using law for social emancipation should be examined by integrating legal tools into broader struggles that take them out of the hegemonic mode. He defines legal strategies as “subaltern cosmopolitan legality” that, though having both sites of social exclusion and inclusion, is able to increase the degree and quality of liberation or social inclusion it carries.

In short, in order to link research with activism, legal scholars are in a position to consider the interrelationship between law and people and what that means for a society’s efforts to achieve a better quality of life. In order to understand the role of law and to make meaningful recommendations about its reform, it is necessary to understand the political and social context in which it operates and it is important to relate this to the wider global context in which the political economy of development operates. This is precisely the reason why we move, in the next part of this paper, to investigate the law’s role in gender and the political economy of development, especially in post-colonial society.

B. Mapping Law as a Form of Political Participation for Women

(A) The Gendered Arena of the Political Economy of Nationalism

In the post-colonial context, many studies have identified the

way in which nationalism has provided new spaces in which women could mobilize for struggle (Heng, 1997). Within the struggle of nationalism for development, feminism used and endorsed the universal construction of “the citizen” through the use of rhetoric and language in particular ways. It is argued that the nations established in the post-colonial context were subject to the imposition of a liberal political model in which women and men continued to be individualized as citizens of the new nation. Thus, the identities of women as patriots, nationalists and citizens are very important for us in seeking to understand their position in the new emerging public space. However, the space created by the struggle of nationalism has largely excluded women (Rai, 2002). This means that women and men are positioned differently in nationalism, have varied resources available to them and struggle through very different contexts of power. The arena of the political economy of development is a gendered one.

In the struggle to put a gender perspective into the analysis of the post-colonial context, Rai (2002: Chapter 1) argues that, in the context of colonialism and nationalism, history was recast—not only the nation was invented but also the meaning of “woman” was constructed. She points out that, “masculine pride and humiliation in the context of colonialism had fashioned ‘(colonized) woman’ as a victim to be rescued—first by the colonizers and then by the colonized male elites—and as the centre of the household to be protected and cherished” (2002: 227). Furthermore, this construction of “woman” and “womanhood” is very much embedded in and inseparable from, the nationalist discourse and development. As Papanek points out, “certain ideals of womanhood are propagated as indispensable to the attainment of an ideal society. These ideals apply to women’s personal behaviour, dress, sexual activity, choice of partner and the reproductive options... [W]omen [are] the “carriers of tradition” or “the centre of the family” especially during periods of rapid social change (cited in Rai, 2002: 28).

Thus, the meaning of “woman” becomes contested and needs

reframing and reshaping. Narayan (1997a: 24) argues that “in many colonial and postcolonial contexts, it is difficult to clearly distinguish between the facts of change over time and changes due to Western influence, since many of these changes involve complex complicities and resistance between aspects of Western culture and Third-World institutions, agents, and political agendas.” What is important is that the images of women existing in universal a-historical form actually exercise a specific power in defining, coding and maintaining existing gender power relations (Mohanty, 1991).

This can be linked to the discussions of how women are located within the process of nation-building as it is shaped by the discourse between tradition and modernity in a postcolonial state. In other words, the “modern” postcolonial states use the rhetoric of the “rule of law” in order to acquire legitimacy but their implementation of it often causes dangers of reinforcing the dichotomy between tradition and modernity. Stewart (1996) explains the reasons why a strategy for empowerment based on legal concepts of equality is of limited value and concludes that it is because the dominant sources of legitimacy in society lie elsewhere.

In short, in the agendas of development and nationalism, women are largely excluded from the negotiations of nationalism but they are positioned in a certain place that the existing gender power relations still sustain. We would suggest that the political struggle to get out of this situation and to create the potential for women’s participation lies in the negotiations around and challenges to, these agendas by the various women’s movements. The next section goes on to explore the problems and difficulties for women’s movements in crafting women’s participation within the new constitution of nation and society and within the discourse of universal citizenship.

(B) Reflecting upon the Differences among Women: The Inclusion and Exclusion of Women

In the post-colonial context, women’s movements in the

post-colonial context have to encounter a two-sided task: on the one hand, to craft the movement into the new state formation and, on the other hand, to fully reflect the needs and interests of women as a representation in civil society within the process of democratization. In order to achieve this two-sided task, feminist activists make use of the discourse of universal citizenship to make a claim for women's position in the politics of the nation-formation process. At the same time, women's citizenship, presented through civil rights and other rights-based claims, is regarded as the representation of women's needs and interests. Law, in this context, functions as a state institution as well as a civil society institution. This section explores the problems and limitations of law's function in these two respects, with the aim of renewing the understanding of law's role in the process of state crafting and civil society formation.

Feminism as a social movement seeks to reconfigure political discourse and create new identities figures prominently in a theory that is concerned with the emergence of a "public sphere," in relation to the separation of state and civil society in modernity. This "public sphere" may provide space for the formation and contestation of identities (Arato & Cohen, 1992; Fraser, 1989a, 1989b; Keane, 1984). Here Arato and Cohen's (1992) model is used as a basis for discussing the issue of women's inclusion in and exclusion from, in political life. In their book, *Civil Society and Political Theory* (1992), Arato and Cohen define civil society as a space that institutionalizes democratic communication in a multiplicity of publics to include the category of actors. Women, as one category of actors, can participate in the process of "communicative consensus formation" to defend the conditions of individual autonomy. This process may have the capability to liberate the intimate sphere from all traditional and modern forms of inequality and bondage.

From this viewpoint, law as a tool acts not only as a carrier to convey women's voices, but also as a starting point that sets the framework for the women's movement to communicate with the

majority. This communication functions in two effective ways: one is the consciousness-awakening of women without any threat to the state and the other is the structural adjustment for women within a democratic transition. In light of this thinking, the process of democratization in the post-colonial context has been the framework that has supported the role of law as a tool of the women's movement as a minority who engages in conveying community consensus to the state and to the majority.

Here, Parashar's (1995) critique of the above model is very useful, since it stresses that the model does not explain the mechanisms by which such institutionalization of democratic communication will become possible. She proposes a framework to analyze rights-based claims designed as an institutionalization of such democratic communication. She challenges this rights-based citizenship by asking "who takes part in such public discourse, whose voices are heard, and what issues are defined as the proper issues for debate in civil society" (1995: 226)? That is to say, that among women who are massively excluded from politics, there is a distinction between the intellectual, academic women who are employed as professionals, such as lawyers and professors and the others, like rural subsistence farmers or women who work as prostitutes, in terms of ideas and thoughts. Because the former group is much closer to information at the international and global level, it always has the power to win the debates.

Parashar (1995) argues that which opposing interpretations will become accepted is partly dependent on the effectiveness of the groups in convincing others of their views. Moreover, legal rights as one important form of institutional design implies a triumph of one group over the other by its acceptance of the state as giving an authoritative interpretation: "why the state chooses one interpretation over the other is partly dependent upon the influence of the key actors of civil society, but is also, to a large extent, dependent upon the goals and objectives the state wishes to pursue" (1995: 231).

In short, it is argued that, in a transitional society, rights-based

citizenship has been used in struggles to secure greater standing within the national political arena, but at the same time it has also functioned to justify the exclusion of other members of the national community (Rai, 2002). Thus, rights-based citizenship has functioned to limit the political space in which to acknowledge collective thinking on social transformation—or, in other words, it frames the very definition of politics and what, by default, does not constitute politics. Law, in this sense, can be seen as a tool that is counted as a gain achieved through struggle, but, even though it can be categorized as a process of democratization, it is definitely a partial one. The next section explores further the way in which this understanding of law in society and the incompleteness of these gains, can enlighten us about the relationship between structure and agency and lead us to new feminist political agendas.

(C) Feminist Politics: Exploring the Relationship between Structure and Agency

It has been argued that liberal-democratic theory is inherently gendered in ways which, at times, perpetuate patterns of patriarchy and ignore gender subordination in both polity and society (Rai & Lievesley, 1996). In practice, identity-based politics such as that represented by the women's movement may become a powerful challenge to the liberal tradition, since it stands for a category of group instead of universal claims (Kymlicka, 1995; Young, 1990). However, we are now witnessing the decline of feminism as a political movement. Phillips (2002) asks why this is happening and attributes it to the threat of the politics of difference, which obscures women by representing sexual difference as just one axis of variation alongside others. She emphasizes that the movement can encourage an over-individualized understanding of political agency that attaches too little weight to structural differences between women and men. She suggests that there is therefore a need to theorize more effectively the complex relationship between the individual and the group.

In this respect, we would highlight two problems that often

seem to become conflated in discussions of citizenship and social participation. The first problem is that of identifying the voices of women's groups that are themselves internally heterogeneous with respect to identities, interests and political perspectives. This is related to the analysis in the previous section about the social inclusion and exclusion of women in/from political participation. On this issue, Narayan (1997b) suggests the need to focus not only on promoting women's political participation and representation, but also on their access to and voice within, a variety of public institutions within which interests are articulated and promoted. In this respect, Bell and Binnie (2002), thinking in terms of radical democracy, further focus on "the political agency of dissidents" as the key agency of change and broaden our understanding of where political participation takes place.

The second problem is that of producing women's voices that might be subjected to their historical legacy and social conditions in the post-colonial context. As Mumtaz and Shaheed (1987) advocate, for instance, that the role and status of women are not isolated social phenomena and women's struggles do not take place in a vacuum. Both are determined, enhanced, or impeded by the social, political and economic development of a people's history. This is related to our earlier discussions on the gendered arena of the political economy and the role of law within it as well as for emancipating purpose. At a more abstract level, Spivak (1988) advocates the different knowledge system of the colonized society compared with "objective" western feminism. As she points out, many of us were obliged to understand the feminist project as Culler now describes it when we were still agitating as US academics. It was certainly a necessary stage in my own education in unlearning and has consolidated the belief that the mainstream project of Western feminism both continues and displaces the battle over the right to individualism between women and men in situations of upward class mobility."

With the intention of dealing with these two problems and understanding feminist politics in terms of the force of political

transition, the nature of agenda-setting and the space for civil society organizations, Rai (2002) calls for the need to focus on the relationship between structure and agency. As she points out:

Thus we need to focus on the relationship between structures and agency, of challenge and transformation which transcend the bounds of “discursive normality”... It also allows us to incorporate notions of power that recognize the importance of individual consciousness/ understanding (power within) and its importance for collective action (power with) that can organize and exert power to challenge gender hierarchies and improve women’s lives. (Parpart et al., cited by Rai, 2002: 196-197)

In line with the inquiry into the relationship between structure and agency, we would suggest that we must perceive law as a form of social participation through which feminists’ efforts can broaden the parameters of debate and thus transform the agenda, can expand political space for women and thus create new possibilities for change and can communicate with other global discourses and thus strengthen their internal and external legitimacy and efficiency. There are four elements in mapping law as a form of social participation moving toward social transformation for women within the context of post-colonial society.

First of all, we ought to increase the possibility of communicative dialogue through the participation of different groups in society. Rai (2002: 188-197) calls this a “rooting and shifting” process, containing the recognition of structural limits and possibilities of change and the claim for a process/ outcome-based politics that considers situated deliberation leading to democratic outcomes as particularly suited to the way women do politics. This means that we should shift from the debate on “rights-based citizenship”—which focuses on law’s effect to achieve the individual’s end, to “participation-based citizenship”—which emphasizes law’s rationality as a process of democratization or as an avenue for greater self-realisation and self-development of

individual capacities through participation in the social life of the community (Bystydzienski & Sekhon, 1999: 5). Also, equal participation for men and women and among women, can justify feminist claims for it is an inherent and essential feature of a democracy (Malleon, 2003).

Secondly, we should give up the liberal view of the state as a neutral arbiter and law as an impartial instrument for the redress of sex inequality, for this ignores law's historic role in producing and maintaining power differentials in society and law's historic role functions as a tool for nationalism in development. Rai (2002: 204-205) suggests that "the state thus cannot be regarded as and engaged with as a unified entity" and "it remains a fractured terrain that women's groups and struggles need to respond to in complex ways." She takes the position of "in and against the state" (1996: 5-22) and reminds us that this feature of the state results in contradiction between different fractions of the state, which allows further possibilities for negotiation and struggle by and in the interests of women (2002: 204-207).

Thirdly, we should be aware of the global impact on feminist politics by acknowledging the differences that are emerging among women as a result of their mobilization in globalization as well as the growing solidarity among them (Rai, 2002: Chapters 3-4). In each dimension of globalization (flows of people, flows of culture, economic globalization and international/trans-national institutions), we should pay cautious attention to prevent feminist politics from engaging in gaining access to already established structures of power (in the global context there is a dominance of neo-liberal structure) rather than in challenging and overthrowing these (Afshar & Barrientos, 1999).

Fourth, we should take a dynamic meaning of feminist politics. This means that the most satisfying research reshapes our understanding of the relationship between structure and agency in ways that open new paths for feminist activism. For example, Marle (2003) has developed an approach, based on the idea of Cornell and Yong, that stands critical of liberalism and focuses on

the sublimity, dignity and asymmetrical reciprocity in South African context. On the other hand, research always presents a contingent vision of reconstruction when this understanding enables feminist activism to change and this calls for research to renew its vision. In turn, feminist activism can work in a strategic position within a particular relationship between structure and agency in ways to gain more power. But the feminist position can be contingent, for research may point out the contradictions and conflicts that require feminist activism to reflect its direction toward the future.

C. Can Feminist Law Reform Help Advance the Feminist Project in Post-colonial Society?

Can feminist law reform help advance the feminist project in the post-colonial society? In order to answer this question, we need to investigate the role of law in social transformation, in general and in women's issues, in particular. This investigation leads us to shift our analytical view and focus from women (women's needs and interests in law) to gender (the gender construction in law). The analysis of this gender construction of law requires us to pay close attention to the way in which gender constructs law and law constructs gender on a daily basis. With this understanding in mind, we should be aware of the relationship between inquiry and activism in law and society in order to reach a vision that can benefit activism and to advance a practical project that can reframe the understanding of the possibilities for change.

On the other hand, the relationship between inquiry and activism in law and society is doomed to be varied in terms of different historical and social contexts. Thus, it is important to investigate the post-colonial social and historical context through which the struggle for gender inequality takes place. This investigation leads us to a clearer understanding of the gendered aspect of the political economy of development and women's inclusion in and exclusion from, changing political space. Based on

this understanding, we acknowledge the conflicts and limitations of rights-based citizenship and call for participation-based citizenship as a replacement. We are then able to map law as a form of social participation moving towards social transformation within local, national and global contexts.

Thus, can feminist law reform help advance the feminist project in the post-colonial context? The answer to this question is possibly *yes*, that is if we formulate our answer based on the above understanding of law as a form of social participation moving toward a social transformation. But we must remind ourselves that the answer is always contingent on the changing historical and social context, locally, nationally and globally.

IV. Concluding Remarks

This paper has tackled the issue of adding women's experiences into law, with the concern of both its academic development and political ground. Three related questions have been asked and responded to: Can law fully express women's experiences? Can law improve women's lives? Can feminist law reform help advance the feminist project in the post-colonial context? An analytical framework has been developed to reconsider the vision of law as a social construction, as a gendering practice and as a form of political participation moving toward social transformation for women. With this analytical framework, we are able to explore the scope and limitation that legal feminism is engaged in and is able to reach at both theoretical and practical levels.

Turning to the first question, we first examined the way in which women's experiences are included in law. We analyzed this as a process of translation from women's lives to law's construction represented by the legal subject Woman. There is always then a problem of essentialism in the question of whether we can ever have "authentic" knowledge about women. In order to alleviate the tensions caused by the problem of essentialism, we posed the

distinction between women in reality and the legal subject, Woman, as constructed through legal discourses. In this line of thinking, feminist legal scholarship has moved between the concept of women's experiences and female legal subjectivity with the aim of understanding its own possibilities and limitations and has now sought to explore "how law works on gender" and "how gender works on law."

The inquiry into law and gender deepens our understanding of the second question as to the ways in which law can improve women's lives. Through a discussion of positive as well as negative attitudes toward the effects of women's rights, we encounter a parameter that threatens the use of law to improve women's lives. In order to escape this parameter, we adopt a position that holds law as a gendering practice. In this view, law is seen as a discursive practice that constitutes the formation of social relations and gender identities. In our examination of this issue, we analyzed the effect of law as a hegemonic moment in which women can negotiate a new identity that underlies the Janus-faced nature of law's effect: it both constrains and empowers the subject.

In order to consider how law can constrain and empower women, we proceeded in our discussion to the third question about the way in which the women's movement can use law to advance the feminist project. This opened up an enquiry into the role of law in social transformation in terms of women's inclusion in and exclusion from, the emerging political space in the transitional society. The main proposition is that feminists' intention to achieve gender equality gained legitimacy through the acceptance of women's rights by the state, in the process of transforming its forms and implications and at the same time left many other voices silent, as in civil society. In this context, it is necessary to study how we can ensure that these other voices are heard and institutionalized. We thus propose a vision of feminist politics to see law as a form of social participation that recognizes the gendered aspect of the political economy of development, reflects upon the differences among women and works to negotiate

between structure and agency.

In conclusion, we have sought to make a clear distinction between the “legal subject Woman” and “women” in order to open up the possibility of utilizing “Woman” strategically. I have also, in the second section of this paper, developed a conceptual framework to target law as a gendering practice and thus to treat the legal subject “Woman” as only ever tentative, temporal, situated and always subject to revision. If feminist engagement in law as a form of political and social participation is not equally available to everyone in civil society, we have to work for a new formation of the legal subject “Woman” as a gendering practice and in its interrelation with social being—women. In the case of Taiwan, many feminist law reforms can be understood as a feminist deployment of law in analytical categories that were created as a response to the power relations of different groups in civil society. The major problem with such a distinction between intellectual women and women in reality is that it locks all revolutionary struggles into binary structures—being more like a modern new woman. Thus, it is crucial to treat law as a site for women’s struggle, not only in terms of rights but also more in terms of bringing two worlds together. Then we shall be able to tackle women’s issues more precisely and efficiently. However, before we think of “giving up” using law to challenge the gender structure while facing the crisis of subjectivity, as in western societies, we need to appreciate that the impact of globalization has dramatically changed civil society in Taiwan, with some changes being both empowering and disempowering for women and providing women with new challenges and opportunities (Afshar & Barrientos, 1999). In this respect, undoubtedly law will continue to play a central role.

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英美女性主義法學之回顧與展望 ——性別、法律與社會變遷

王曉丹

摘 要

英美女性主義思潮對法律專門領域的挑戰，已經從個別法律的不公正，發展到法理學以及法理論的批判，本文試圖對此作一個整體性的整理與分析。大體而言，女性主義法學在法理論中有其獨特的個性：女性主義法學具有強烈的分析性格，先驗式地將性別當成一種社會結構，分析其與法律之間的相互作用；同時，女性主義法學具備濃厚的倫理性與政治性的訴求，希望藉此在女性主義的實踐上產生意義。因此，本文除了探討女性主義法學中一個最為重要的課題——女性經驗到底能不能在法律中被完整呈現？更進一步追問女性經驗在法律中之呈現與性別正義的理論與實踐之間的關聯性。

關鍵詞：女性主義法學、女性法律主體、婦女運動、婦女的政治參與