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Thayyil Kamaluddin LLM, N.

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# Feminist Jurisprudence and Navel Gazings: Some Reflections

*Naveen Thayyil\**

**Abstract** – This paper begins by looking at the question ‘how does one theorise about doing jurisprudence?’ It seeks to examine the impact of feminist legal scholarship in the answer ultimately given. The thrust of this paper lies in the relationship shared between ‘analytical’ and ‘feminist’ jurisprudences. I argue for the necessity of interaction between feminist legal scholarship and a framework that suggests gender neutrality and autonomy, i.e. that of ‘analytical’ jurisprudence. If analytical jurisprudence can ‘lend’ its trends and patterns to feminist legal thought, without engaging in a conflict of values, then a fuller understanding of concepts like ‘justice’ would be possible. This would also give a more complete answer to the question initially set in this paper.

## Section I

*To a growing extent, a jurisprudence with very little to add about the concerns and innovations of feminism will not have very much interesting to add, period.*<sup>1</sup>

Coming from a critic who does not identify himself as a feminist (albeit termed *sympathetic* by commentators<sup>2</sup>), this assertion amply demonstrates the deep impact of feminist legal scholarship<sup>3</sup> on the manner in which law

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\* The paper substantially benefited from discussions with Ms. Alison Diduck, Prof. Denis Paterson and my partner Ms Shireen Mirza.

<sup>1</sup> M H Kramer, *Critical Legal Theory and the Challenge of Feminism* (Rowman & Littlefield, 1995) 265.

<sup>2</sup> B Bix, *Jurisprudence: Theory and Context*, (4<sup>th</sup>. Ed., Sweet and Maxwell, 2006) 223; N E. Dowd and M S Jacobs (eds), *Feminist Legal Theory: An Anti-essentialist Reader* (New York University Press, 2003); J Richardson and R Sandland, *Feminist Perspectives on Law and Theory* (Cavendish Publishing, 2000) and H Barnett, *Source Book on Feminist Jurisprudence* (Cavendish Publishing, 1997).

<sup>3</sup> The convenient technique of generalisation of feminist legal thought as a genre is, of course, strongly contested. Notwithstanding loose categorisations into liberal feminist legal scholarship, radical feminist legal scholarship, Marxist and socialist feminist legal scholarship as well as difference and postmodern feminist legal scholarship these collectivities of thought are united by the belief that gender continues to be a significant trope of social and legal organisation. Jackson and Lacey differentiate these collectivities of legal thought through three axes viz., their different *methodologies and written styles*, underlying *theories of sexual difference* as well as their respective *substantive/*

and legal processes are theorised. The matter of methodology in doing jurisprudence is a very important theoretical concern, and the decibel levels in the methodological debate in analytical jurisprudence have recently reached unprecedented heights. Oberdiek and Patterson characterise this quest as an *increasing* attentiveness in recent years to its methodology, where ‘traditional first order questions revolving around the varieties, commitments, and defensibility of legal positivisms, *the* discipline of jurisprudence has turned inward asking the second order question of how should one do jurisprudence?’<sup>4</sup> (emphasis added).

This paper starts with an assumption that it is important to ask the question: ‘How does one do jurisprudence?’ This would, at one level, be akin to seeking to understand the relevance of theorising a practice. Purportedly, such theorisation sheds fresh light on the practice, and helps us to understand the practice better. However, ‘methodological jurisprudence’ would appear to take it a step further. It seemingly purports to ask the question of how does one theorise the *doing* of theory, in other words seeking appropriate theoretical concerns in the practice of theorisation.

Is this attentiveness in jurisprudence, noted as *the* methodological jurisprudential debate, a preserve of analytical jurisprudence? Or have feminist theorists attempted /ought to attempt such navel gazing? This paper seeks to find answers for this question. How important is it for legal feminisms to undertake such exercises? This is important not merely for historicizing feminist legal thought but - since such introspective exercises

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*methodological continuities with other legal and social theories*, before accounting for these pluralities in an inclusive manner. See J Penner, D Schiff and R Nobles (eds), *Introduction to Jurisprudence and Legal Theory: Commentary and Materials* (Oxford University Press, 2005) 788.

<sup>4</sup> J Oberdiek and D Patterson, ‘Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology’, forthcoming in R Harrison and M Freeman (eds), *Current Legal Issues: Law and Philosophy*, (Oxford University Press, 2007). The authors cite a number of recent works to illustrate this including L Green, ‘General Jurisprudence: A 25<sup>th</sup> Anniversary Essay’ (2005) 25 OJLS 4 575; J Dickson, ‘Methodology in Jurisprudence: A Critical Survey’ (2004) 10 Legal Theory 117, 117-56; J Dickson, *Evaluation in Legal Theory* (Oxford University Press, 2001); as well as J Coleman, ‘Methodology’ in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 311-51. See also: A J Rappaport, ‘Justifying Jurisprudence: Reflections on the Purpose and Method of Legal Theory’, (2004) 73 Miss. L.J. 559; B Leiter, ‘Beyond the Hart / Dworkin Debate: The Methodology Problem in Jurisprudence’ (2003) 48 Am. J. Juris. 17; O Raban, ‘Dworkin’s “Best Light” Requirement and the Proper Methodology of Legal Theory’ (2003) 23 Oxford J. Legal Studies 243.

usually spark fresh theoretical debates - it also has consequences as to the nature, relevance and impact of the immediate future of legal feminisms. This paper seeks to engage with these specific concerns.

## Section II

Kathleen Lahey examined the unique methodologies and processes that feminist legal scholars were struggling to develop at a time when feminist legal scholarship was ‘an as yet largely unrecognized field’.<sup>5</sup> Seeking putative answers to the question of what feminist legal scholarship is, she felt that depending on who is asking the question and answering himself/herself, it could be any of the following: (a) feminist legal scholarship is just sour grapes; feminists cannot do authentic legal scholarship (b) feminist legal scholarship is really just a variant of radical socialism, or liberalism, or anarchism, or existentialism.... (c) Feminist legal scholarship is too trivial to be taken seriously. Further, feminist scholars themselves sometimes.... fear (d) that it is futile for committed feminists to try to participate in male-dominated academic and professional organizations or (e) that women who operate within those institutions must inevitably begin to speak in the gender-neutral, classless and universalist voices of (male) scholars or professionals.<sup>6</sup>

An important facet of feminist legal scholarship has been its explicit political project towards attaining what could be crudely called gender justice, to *exile* the marginalisation and subjugation of women in and through law. Such an emphasis, aptly encapsulated in the slogan ‘the personal is political’, has had a powerful methodological impact on feminist legal scholarship. Further feminist legal scholarship, by and large, has categorized its endeavour as part of a wider political struggle for feminist impact in the production of knowledge.<sup>7</sup> While mainstream academia had sought to criticize feminist scholarship for this overt aim to meet political ends, such criticism has been met with legitimate counter attacks vis-à-vis

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<sup>5</sup> K Lahey, ‘...Until women themselves have told all that they have to tell’ (1985) 23(3) Osgoode Hall Law Journal, 519, 522.

<sup>6</sup> Lahey (n 5) 522.

<sup>7</sup> Jill Vickers’ characterisation of ‘subversive methodological rebellions’ in feminist scholarship - refusal of Aristotelian opposition (political - objective), rejection of de-contextualisation, restoration of agency, rejection of linearity, inevitability or laws implying a recognition of the falsities of unities of knowledge, linearities of progress, predictabilities, and non-particularities. Compare with Lahey (n 6).

the validity of representation of scholarship as a non-ideological activity, and its claim to objectivity, neutrality and universality.<sup>8</sup>

Margrit Eichler responded to this mainstream criticism (that for a non-feminist, 'the adjective feminist has the connotation of an ideology, of a previously established value commitment...which works to the detriment of other more traditional value commitments and is hence seen as being liable to distort reality by a biased emphasis') by turning the argument on its head. 'For a feminist, non-feminist scholarship has exactly these connotations, because feminist scholarship is a concept that makes sense only in the context of an overwhelmingly sexist science.'<sup>9</sup> Kathleen Lahey aptly sums up this counter-question of the possibility of objectivity: 'when *they* know from their own experience that objectivity is possible only if one denies the subjective experience of sexism.'<sup>10</sup>

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<sup>8</sup> Lahey emphasizes the tectonic tension of this counter-assertion by quoting her correspondence with Mary Jane Mossman [and also referring to C Mackinnon, 'Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence' (1983) 8 Signs 635, 638-39]: since the idea of neutrality and universality is 'so fundamental to laws authority, and it is if not the means to achieve fairness or justice, justice itself. And more so in law, than fundamental science since law is entirely a social construct, without any external (objective) reality, where law legitimates decisions by some people about others and is therefore, more about power than anything else. Then it becomes a threat to not only power and vested interests, but also those for whom the idea of standards is essential even if the standards are implicitly understood, as ones that need change'. (n 6). See also M J Matsuda, 'Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice' (1986) 16 New Mexico Law Review 613, 629.

<sup>9</sup> M Eichler, *The Double Standard: A Feminist Critique of Feminist Social Science* (Croom Helm, 1980) 118. For Eichler sexism shows up in at least five aspects of scholarship: language, concepts, androcentric focus, research design, and interpretation of results.

<sup>10</sup> *Lahey* (n 6) 525. She also makes a 'subtle' (since, according to her, this is missed by non-feminist observation) taxonomy of the feminist problem with the male point of view becoming a universal point of view, and classifies feminist legal thought on the possibilities of reconstructing objectivity in a non-sexist form, as *corrected* scholarship and *transformed* scholarship. She quotes Margrit Eichlers' work as amply demonstrative of 'corrected scholarship'- if the mask of objectivity etc. of sexism is exposed, it then becomes possible to do research and scholarship that are truly neutral and non-judgmental because they have been 'corrected' for sexism. While the *transformed* school argues that science is so implicitly and fundamentally masculine, in its garb of being universal, that any genuine transformation to be inclusive of feminist insight will render it as non- science or that 'it will be difficult to think of the resulting endeavour as science.' For instance, E Fox Keller, *A Feeling for the Organism: The Life and Work of Barbara McClintock* (W.H. Freeman, 1984), purportedly argues for an 'integrative vision of

### Section III

This explicit commitment to a wider political project has led to internal debates among feminist legal scholars as to whether the feminist movement needs to build a cogent and coherent feminist legal theory. This exercise of the 1980s considered the political and strategic use / detriment of building a feminist jurisprudence for the feminist movement. This exercise, probably, was the first step towards a self-reflexivity in legal theorisation among feminist legal scholarship which invariably involved methodological questions on the role of the discipline of jurisprudence for gender justice.

Earlier, one of the reasons why feminist legal studies did not consciously seek to engage with jurisprudence was the orthodoxy of, say, traditional analytical jurisprudence, a school which has occupied the core of the Anglo-American jurisprudential academic establishment.<sup>11</sup> Their emphasis on the idea of autonomy of law is in direct confrontation to the feminist critique regarding the normative claims of objectivity and neutrality of *the* law.<sup>12</sup>

This reluctance of the earliest feminist legal scholars to embrace an explicit pursuit of theorisation of law is very discernable, for instance, in the works of Carol Smart. She notes the attraction of the idea of feminist jurisprudence as tantalizing in that it:

... appears to hold out the promise of a fully integrated theoretical framework and political practice which will be transformative, unlike the partial or liberal measures of the past ... it promises a general theory of law which has practical applications. Because it appears to offer the combination of

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science, a science that respects... difference instead of one that strives for universality', her obvious assumption being that a conceptualization of science bereft of universality was (and indeed in most cases is) beyond contemporaneous imagination.

<sup>11</sup> Cain refers to an account of Ann Scales as a moderator of a panel of feminist lawyers, legal educators and judges, in a conference in 1978 in Harvard Law School, where the question for debate was whether there was in fact, or should be, such a thing as a feminist jurisprudence. Reportedly, the consensus was that there should not be such a thing. The first recorded use of the phrase feminist jurisprudence, also reportedly occurred in this conference. See P A Cain, 'Feminist Jurisprudence; Grounding the Theories' (1989) 4 Berkeley Women's Law Journal 191.

<sup>12</sup> Jackson and Lacey characterise this as a particularly intimate linkage between theory and practice: 'with both a rejection of any strong division between the two (which sometimes in fact implies a certain skepticism about theory), and an impulse to have effects beyond the academy'. (n 3).

theory and practice, and because it will be grounded in women's experience, the ideal of a feminist jurisprudence appears to be a way out of the impasse of liberal feminist theories of law reform.<sup>13</sup>

However, Smart is ambivalent in her rejection of the idea, apparent through the manner in which she characterises the resultant putative harms:

...we should...consider whether the quest for a feminist jurisprudence is not falling into the trap of...the 'androcentric standard' whereby feminists find they enter into a game whose rules are predetermined by masculine requirements and a positivistic tradition...we need also to consider whether implicit in this quest is the tendency to place law far too much into the centre of our thinking.<sup>14</sup>

Contemporaneous to this ambivalent rejection there existed other claims that a nascent feminist jurisprudence already subsisted. For instance, the assertion of Mari Matsuda makes a powerful and compelling response to the Rawlsian theory of justice<sup>15</sup> and his notions of the veil of ignorance and the original position.<sup>16</sup> She characterises her essay as 'an attempt to engage in

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<sup>13</sup> C Smart, *Feminism and the Power of Law* (Routledge, 1989) 67.

<sup>14</sup> Smart (n 13) 68. Lacey maintains that Smart borrowed this idea of the androcentric standard from Margaret Thornton, 'Feminist Jurisprudence: Illusion or Reality' (1986) 3 Australian Journal of Law and Society 5. Smart's attack on *liberal* feminist law reforms appears to be towards the *radical* feminist works of Catherine Mackinnon and of Carol Gilligan. Specifically, C Mackinnon, *Feminism Unmodified* (Harvard University Press, 1987) and *Towards a Feminist Theory of the State* (Harvard University Press, 1989); C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982). See also N Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Hart Publishing, 1998), 171, (n 7) and (n 9).

<sup>15</sup> J Rawls, *A Theory of Justice* (Harvard University Press, 1971).

<sup>16</sup> Matsuda (n 8). She cites the works of MacKinnon (n 8) and A Scales, 'Towards a Feminist Jurisprudence' (1980-81) 56 Ind. L. Rev. 375 as demonstrative of this nascent jurisprudence. She identifies some basic tenets of feminist theory including *firstly* the charge of andro-centrism in mainstream scholarship, which largely ignores the lives and voices of women; for instance the criticism of mainstream historiography, which omits women's experiences, and boyishly (my words) emphasises on war, business, and politics. Secondly, there is a questioning of dualist assumptions, that men are rational, logical, scientific etc., and women are intuitive, emotional etc., and a questioning of the implicit hierarchy in these assumptions. She derives two insights from them which are relevant for feminist scholarship viz. personal is political (which she feels is the

traditional jurisprudence with a female voice’, where ‘unlike the fields of history and literary criticism, mainstream jurisprudence has not yet experienced the nudge of feminism’; and that ‘feminist jurisprudence remains nascent’.

The nature of Matsuda’s theorisation of law and legal processes is unclear, since she seems to articulate a fundamental critique of the technique of abstraction. After making a particular critique of the method of abstraction in Rawls’ theory of Justice,<sup>17</sup> she concludes ‘what we really need to do is to move forward through Rawls’ veil of ignorance, losing knowledge of existing abstractions. We need to return to concrete realities, to look at our world, rethink possibilities, and fight it out on this side of the veil, however indelicate that may be.’<sup>18</sup>

From this specific rejection of use of the technique of abstraction in a particular context, she moves on to a generalised rejection of:

...existing abstractions that constrain *our* vision.... Abstraction as a methodology is criticized because abstraction is the first step down the road of androcentric ignorance. The refusal to acknowledge context- to acknowledge the actual lives of human beings affected by a particular abstract principle- has meant time and again that women’s well-grounded, experiential knowledge is subordinated to someone else’s false abstract presumptions.<sup>19</sup>

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restatement of the de-contextualisation critique), and of consciousness raising – the collective focus on the particularities of real life experience as an essential exercise to truth seeking. Emphasis added.

<sup>17</sup> *Matsuda* (n 8) 617: ‘Rawls suggests that without an agreed starting place, without a common way of looking at the world, we could never conclude that one theory of justice is preferable to another. Thus he abstracts out as much possible, ostensibly to avoid skewing...there is really only one person on the abstract side of the veil of ignorance, because everyone there has the same limited information. My objection is that unavoidably the person behind the veil is John Rawls. Abstraction never really achieves the quality of vision Rawls promises’.

<sup>18</sup> *Matsuda* (n 8) 624.

<sup>19</sup> She adds that apart from this methodological critique, feminism suggests an alternative theory of justice...characterises feminism as a work in progress, collectively formed, and ‘it would be unfeminist for one woman to write a book called ‘The Feminist Theory of Justice’...in response she considers a few worthy feminist alternatives – a methodology of consciousness raising, for derivation of first principles - ‘through the shared experience of women’s lives and through concrete struggle against patriarchy - including, historically, the struggle for formal equality, for reproductive freedom, and against violence against

It is unclear whether her rejection is only of those abstractions that are not representative of *women's* experiential knowledge, or whether it is a general and fundamental critique of all abstractions being negations of experience. However, it would appear that her critique leans more towards the second and more fundamental critique: that any abstraction subordinates experience and experiential knowledge of marginal groups, and is hence not useful. From this perspective it could lead to a tentative conclusion that she may not find legal theorisation or jurisprudence politically desirable, given the assumption that theorisation would often involve great levels of abstraction.<sup>20</sup> If that is the case, how could it be consistent with her claim of being part of a nascent feminist jurisprudence? Perhaps, when Matsuda characterised her work as part of nascent jurisprudence, she meant it in a limited sense of feminist examination, critique and unmasking of the phallogocentricity of law.<sup>21</sup>

Robin West is less ambiguous about the existence and nature of feminist jurisprudence.<sup>22</sup> Contemporaneous to Matsuda and Smart, she asserted that 'what is now inaccurately called feminist jurisprudence' consisted of two discrete projects. First of these is the unmasking of *patriarchal jurisprudence* from the cover of neutral and ungendered law and legal theory. The second, and I would submit more important, project is of a *reconstructive jurisprudence*, an activity to identify and construct normative and descriptive frameworks, to include substantial feminist law reform projects that succeeded in the previous twenty years, 'in the areas of rape,

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women - feminists are deriving a conception of the good. Within feminist theory the conception of the good are the subject of lively debate, while the general is becoming a matter of consensus', *Matsuda* (n 8) 622.

<sup>20</sup> See Bartlett's take on abstraction '...feminist methods require the process of abstraction, that is the separation of the significant from the insignificant. Concrete facts are significant only if they represent some generalisable aspect of the case. Generalisations identify what matters and draw connections to other cases. I abstract whenever I fail... to identify every fact, which of course, I do always'. In K T Bartlett, 'Feminist Legal Methods' (1990) 103 *Harv. L. R.* 829, 833.

<sup>21</sup> Given the nature of Mary Matsuda's subsequent work this remains highly probable. See some of her later works, for instance 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method' (1989) 11 *Womens Rts. L. Rep.* 7; 'Voices of America: Accent, Anti-discrimination Law, and a Jurisprudence for the Last Reconstruction' (1991) 100 *Yale L.J.* 1329 and 'Beside My Sister, Facing the Enemy', in N E Dowd and M S Jacobs (ed.), *Feminist Legal Theory: An Anti-Essentialist Reader* (New York University Press, 2003).

<sup>22</sup> R West, 'Jurisprudence and Gender' (1988) 55 *Univ. of Chicago Law Review* 1.

sexual harassment, reproductive freedom and pregnancy rights in the workplace'.<sup>23</sup> Using the dangers of mandatory pregnancy for the safety for mothers' body and life, she constructs the task of reconstructive feminist jurisprudence to explain/reconstruct 'the reforms necessary to the safety and improvement of women's lives in direct language that is true to *our* own experience and *our* own subjective lives'.<sup>24</sup>

She hopes that such a reconstructive jurisprudence (preceded by the first project of unmasking of patriarchal jurisprudence) will change existing jurisprudential constructs - of liberalism and critical theory - to account for true descriptions of women's subjectivity.<sup>25</sup> Though she furthers a narrow essentialist concern of setting the task to rearticulate these new rights in such a way as to reveal, rather than conceal, their origin in women's *distinctive* existential and material state of being,<sup>26</sup> her notion of reconstructive jurisprudence also gels well with a wider project- of constructing jurisprudential categories that shall serve the political aims of the feminist movement.

Thus, by the end of the eighties and early nineties we witness a serious divergence of opinion, not only regarding the political necessity and desirability of a feminist jurisprudence to the feminist movement, but also with the description of the existence and nature of such jurisprudence. A first approach, illustrated by Matsuda, claims that there is a nascent feminist jurisprudence, of which she is part. The fundamental problems with the technique of abstraction *per se* from this quarter give a glimpse of the methodological premises and preferences. A second approach, approximated by West, articulated the need and utility for feminist jurisprudence. This was not only in terms of unmasking the patriarchal nature of contemporaneous

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<sup>23</sup> My characterization of West is diametrically in opposition to Cain's reading of West. She states that West has claimed that feminist jurisprudence cannot exist until patriarchy is abolished, (n 11). Cain was of the opinion that there was no feminist jurisprudence, and what existed was only feminist legal theory; by which she meant 'feminist critique of existing (masculine) jurisprudence'. While there exist differences between legal theory and jurisprudence, which are not trifling, the purpose and context of this paper makes the distinction not very relevant. See R Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (2<sup>nd</sup> Ed. Lexis Nexis, 2003) 1-5, for a succinct articulation of the subtle distinctions between jurisprudence, legal theory and legal philosophy.

<sup>24</sup> West (n 23) 70.

<sup>25</sup> West (n 23) 71.

<sup>26</sup> In her own words, she asserts the aim of reconstructive feminist jurisprudence, here, is to make feminist law reform rational.

law and jurisprudence, but also in the construction of jurisprudential frameworks to make the subsisting feminist advances in legal reforms rational and part of a legal imagination. The third approach, illustrative in Carol Smart's writings, although recognising the advantages of a feminist jurisprudence is deeply skeptical of giving birth to it.

This divergence of opinion on a fundamental question of the need and efficacy of a feminist jurisprudence within various sections of legal feminisms, as is evident from this section, provided a rich matrix towards debating methodologies for jurisprudences.

#### **Section IV**

It would appear that by the turn of the Christian millennium, opinion within legal feminisms has moved towards an uneasy consensus that an emerging feminist jurisprudence is an important part of legal feminisms, and can (reservations notwithstanding)<sup>27</sup> positively contribute towards various goals of political feminism. A host of important intellectual endeavors from various sources are ample testimony to this position, including Hilaire Barnett's introduction to feminist jurisprudence,<sup>28</sup> various specific source books<sup>29</sup> and academic interventions in general resource books by feminist legal scholars.<sup>30</sup>

Nicola Lacey lucidly discusses this position. After recognising how the very possibility of feminist jurisprudence has been contested by not just anti-feminists, 'but also, and most powerfully, feminist scholars themselves' she aptly sums the aforementioned debate of the late eighties and early nineties:

...if we were to think of law and theories of law as a species of game of whose structure and substance we are critical, we could

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<sup>27</sup> See, for instance, the qualified reservations expressed by J Conaghan in 'Reassessing the Feminist Theoretical Project in Law' (2000) 27 *Journal of Law and Society* 351.

<sup>28</sup> H Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing, 1998).

<sup>29</sup> N E Dowd and M S Jacobs (eds), *Feminist Legal Theory: An Anti-Essentialist reader* (New York University Press, 2003); J Richardson and R Sandland, *Feminist Perspectives on Law and Theory* (Cavendish Publishing, 2000); and H Barnett, *Source Book on Feminist Jurisprudence* (Cavendish Publishing, 1997).

<sup>30</sup> N Lacey's chapter on feminist legal theory and the law and society scholarship in A Sarat (ed), *The Blackwell Companion to Law and Society*, (Blackwell, 2004) 471-486; Emily Jackson's effort in *Introducing Feminist Legal Theory* (n 3) 779-854; and M Fineman, 'Gender and Law: Feminist Legal Theory's Role in New Legal Realism' (2005) 405 *Wis. L. Rev.* are instances of this.

think about the debate about feminist jurisprudence as torn between the options of trying to get into the team to have a better chance of changing the structure of the game or of engaging in strategic rule breaking; of simply withdrawing to create and play a different game altogether; of watching on the sidelines and allowing ourselves the luxury of throwing the occasional rotten tomato from a safe distance; or of some combination of these three...<sup>31</sup>

This theoretical and political dilemma of whether feminisms should aspire to replace or reconstruct the framework of modern legal thought or should it resist the desire for foundations in favour of a more resolutely critical stance,<sup>32</sup> brings forth the differences between the substantive/methodological continuities among various schools of feminisms with other legal and social theories.<sup>33</sup> The argument hence is political and methodological at once, where feminist legal scholarship has had a methodological commitment to strategically use spaces for the political success of various feminist agendas.

I agree with Lacey's conclusion, as well as her reasoning that given the contemporary structures of the academy it is a better strategy not to abandon the concept of jurisprudence to orthodoxy, but 'claim it for our own

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<sup>31</sup> Lacey (n 14) 185.

<sup>32</sup> This ambivalence is so well articulated by Sandra Harding while laying out the problem for wider feminist theorizing: 'when we sometimes claim that theorizing itself is suspiciously patriarchal...How then are we to construct adequate feminist theory...there are two ways...On the one hand, we can use the liberal powers of reason and the will, shaped by the insights gained through engaging in continuing political struggles, to piece what we see before our eyes in contemporary social life and history into a clear and coherent conceptual form, borrowing from one andro-centric discourse here, another one there, patching in between innovative and often illuminating ways, and revising our theoretical frameworks week by week as we continue to detect yet further andro-centricism in the concepts and categories we are using. On the other hand, we can learn how to embrace the instability of the analytical categories; to find in the instability itself the desired theoretical reflection of certain aspects of the political reality in which we live and think; to use these instabilities as a resource for our thinking and practices...I recommend we take the second course...' - 'The Instability of Analytical Categories of Feminist Theory' in H Crowley and S Himmelweit (eds), *Knowing Women: Feminism and Knowledge* (The Open University, 1992) 340-41. See also S Harding, *Whose Science? Whose Knowledge?: Thinking from Women's Lives* (Cornell University Press, 1991) and her later work *Is Science Multicultural?: Post Colonialisms, Feminisms and Epistemologies* (Indiana University Press, 1998).

<sup>33</sup> This latter point resonates with Lahey's characterisation (b). *Lahey* (n 6).

as part of a transformative feminist practice'.<sup>34</sup> This would, in part, involve building substantial bridges with analytical jurisprudence and asking questions generally regarded as controversial to feminisms about the definition and the nature of law, albeit in a manner which would be relevant to women's experiences. This would need to be done *notwithstanding* non-liberal feminisms that develop more radical critique, generally rejecting the very enterprises of *objective* analysis and normative jurisprudence that claim to reflect the *ethical view from nowhere*, as theoretically flawed.

Feminist discourses have become more powerful because they have avoided the trap of a conversation of exclusion; for the feminist objective to succeed it must become even more encompassing. This is well illustrated in how dominant thought has evolved in feminist legal scholarship vis-à-vis the involvement of men in its endeavour, and how the inclusive conversation has only strengthened the discourse. Earlier exclusivist positions of specific disavowal of the possibility of men embracing feminist objectives, like that of Littleton,<sup>35</sup> and Sherry,<sup>36</sup> were appropriately replaced in the 1990s by more welcoming and cautiously optimistic positions on men's role in legal feminisms.<sup>37</sup> This paper seeks to further the aforementioned concern about building bridges in the last section.

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<sup>34</sup> The early nineties, deeply rooted in pragmatism, arrived at a different conclusion. However, the debate is interesting- see J Stick, 'Can Nihilism Be Pragmatic?' (1986) 100 Harv. L.R. 332, 399 arguing that scholars should stop focusing on questions of methodology and, instead, address questions of social change and social justice directly; L A Baker, 'Just Do It: Pragmatism and Progressive Social Change' (1992) 78 Va. L. R. 697 arguing pragmatism is of little use for achieving progressive social change; M Matsuda, 'Pragmatism Modified and the False Consciousness Problem' (1990) 63 Cal. L. Rev. 1763 arguing that pragmatism has the potential to empower the least powerful social groups and M J Radin, 'The Pragmatist and The Feminist' (1990) 63 S. Cal. L. R. 1699, 1699-1700 suggesting that pragmatism, rather than being a general theory, provides the only solution for feminists in a world of non-ideal justice.

<sup>35</sup> C A Littleton, 'Reconstructing Sexual Equality' (1987) 75 Cal. L. Rev. 1279, 1294 stating that while 'pro-feminist men play an important role in disseminating and implementing feminist ideas, they do not share women's experiences and thus cannot claim to be feminists'.

<sup>36</sup> S Sherry, 'Civic Virtue and Feminine Voice in Constitutional Adjudication' (1986) 72 Va. L. Rev. 534, 584: 'Professor Kenneth Karst is correct to disclaim the ability of a male to explore a feminine paradigm...'

<sup>37</sup> See *inter alia* K T Bartlett, 'Feminist Legal Methods' (1990) 103 Harv. L. R. 829, 833 favouring a definition of feminist 'that allows men, as well as women to make this choice'; P A Cain, 'Feminist Legal Scholarship' (1991) 77 Iowa L. Rev. 19, 39 urging feminist scholars to reach out to those who are not currently feminist, and stating 'I hope my male colleagues will listen and join the conversation'; R Colker, 'Feminist

## Section V

But then, how would this inclusive feminist jurisprudence look? Though its goals and underpinning values are apparent from the earlier sections, the workings and methods of what is acknowledged as feminist doing in law need some elaboration. Since the incipient origins of feminist jurisprudence are intricately embedded in feminist legal studies as well as the feminist critique of law's supposed universality, methods employed to unmask the claim of laws' neutrality and underlying patriarchy are also invariably important methods of feminist jurisprudence.

These feminist legal methods have been broadly categorised<sup>38</sup> as consciousness raising,<sup>39</sup> textual deconstruction,<sup>40</sup> feminist practical reasoning,<sup>41</sup> and theorizing laws' gendered nature.<sup>42</sup> All the four specific methods are also useful in the theorisation of law, while doing a feminist jurisprudence.

Thus these methods are employed in theorizing about the role of law in ignoring and perpetuating inequality in the society, as well as the existence of andro-centricity of and/or in law. Legal feminisms have substantially contributed to furthering our understanding of the nature of public/private divide created in and by law, and the important insights

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Consciousness and the State: A Basis for Cautious Optimism' (1990) 90 Colum. L. Rev. 1146, 1162 suggesting that 'men are capable of empathizing with women's situation in society if they are informed concretely about the conditions of women's lives'. See also, T Digby, (ed), *Men Doing Feminism* (Routledge, 1998).

<sup>38</sup> I have borrowed this characterisation from H Barnett's *Introduction to Feminist Jurisprudence*, 18. Similar is the characterisation in the latest edition of M.D.A. Freeman, (ed), *Lloyd's Introduction to Jurisprudence* (Sweet and Maxwell, 2001), 1135. Both of these general resource books include *K Bartlett* (n 20) 849-67.

<sup>39</sup> Consciousness raising, or story telling, is an interactive and collaborative process of knowledge creation by the articulation of one's sufferings and other experiences and making meaning of them with others who also articulate their experience *Matsuda* (n 8) and also see (n 19).

<sup>40</sup> Also called asking the woman a question, where a 'question becomes a method when it is regularly asked'. This is a process designed to identify the gender implications of rules and practices by asking questions in the nature of why law has failed to take into account the experiences, values and interests of *women*.

<sup>41</sup> A contextualised method of reasoning, highly alerted to the existence of certain forms of injustices which otherwise go unnoticed and unaddressed, so as to allow greater understanding and exposure to that injustice, while not seeking to ignore / exclude / replace traditional reasoning.

<sup>42</sup> With the obvious qualification of them being by no means mutually exclusive of each other and that they intersect each other.

emanating from the difference/essence debate. The use of the method of consciousness-raising for instance, contributed significantly to a burgeoning of the difference discourse. Hence the essentialisation of the category of woman, the central subject matter of feminisms, has been problematised, bringing on board additional discourses of marginality through race, ethnicity and sexuality (as well as class, albeit to a lesser extent) within the feminist discourse.

An important facet of legal feminisms has been the intellectual transparency and subtlety, with a penchant for internal and constructive debates, about their aims and methods.<sup>43</sup> Further, there is a qualitative difference in the methodological debates within legal feminisms, where 'thought processes are often manifest, sometimes to the point of explicit agonizing and self-recrimination; at times we may even observe feminist reproaching feminist for a perceived failure to pay sufficient regard to all the subtleties of the feminist project'.<sup>44</sup>

This, however, is in direct contrast to the recent claims of analytical jurisprudence that the 'postscript' is the starting point for the methodological debate in jurisprudence.<sup>45</sup> This latter account of methodology is replete with a certain ring of detachment, almost a status independent of the inquiry it serves; 'it promises technical, even scientific, objectivity.'<sup>46</sup> The articulations of legal feminisms on methodological issues have understandably steered well clear of such promises of objectivity. This is well within feminisms' problematisation of objectivity, and their emphasis

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<sup>43</sup> Ngairé Naffine underscores this point by pointing out to the endless turning over and inspection of the concept of the woman - subject of feminism- to the point 'that some feminists now wonder whether their most basic working term "woman" has any integrity': N Naffine, 'In Praise of Legal Feminism' (2002) 22 *Legal Studies* 71.

<sup>44</sup> Naffine (n 43).

<sup>45</sup> This, however, is not surprising for the self-referential proclivities of analytical jurisprudence. For instance see Julie Dickson: 'that the post script to the Concept of Law has moved an increasingly popular and important question in jurisprudence to the meta-theoretical level of jurisprudential methodology', seemingly oblivious of the raging methodological debates among legal feminisms. Similar is the tenor of Oberdiek and Patterson; however, the latter starts with an appropriate contextualisation of the debate that 'Analytic general jurisprudence has become increasingly attentive to *its* own methodology in recent years', before going into its own *avatar* of self-referentialism. (n 4) 1. Emphasis added.

<sup>46</sup> See, A Halpin, 'The Methodology of Jurisprudence: Thirty Years off the Point' (2006) 29(1) *Canadian Journal of Law and Jurisprudence* 61, for an excellent internal critique of the debate in analytical jurisprudence.

of political utility and efficacy. Though there appears to be no direct critique yet from legal feminisms on these claims of neutrality and supremacy of 'methodological jurisprudence', perhaps this is taken as a matter of course or even as a futile endeavour.

## Section VI

This section comes back to the earlier point viz., directions feminist jurisprudence could take and the importance of building bridges with analytical jurisprudence. The importance of the histories of inclusive conversations in feminist thought was emphasised in a particular context in Section IV. This point of broad basing is further substantiated by the manner in which queer theory in particular, and other critical theories in general, have helped reinforce theoretical premises and empirical claims of marginality in /through law, forcefully made by legal feminisms. This point of inclusion, however, is important not only vis-à-vis constituencies of marginality but also towards inclusive expansion of feminisms' constituencies of conversation; so as to cautiously broad base itself in strategic spaces for subversions and, in appropriate contexts, sincere conversations.

If this position is indeed acceptable; that a feminist jurisprudence that engages with *the* academy - in the law schools, in its undergraduate and other taught courses (while at the same time pushing the limits of our understanding of law and jurisprudence in other spaces) - is important for legal and political feminisms, given the contemporary structures of legal academia, then it would be important that it converse/engage with discourses of analytical jurisprudence. This is admittedly a controversial proposition with rough edges and ambiguities. If feminist jurisprudence as a project is to gain strength, given its commitment to wider political goals of feminisms, would not such a proposition be profane, or even be accused of lacking an understanding of the tenets/fundamentals/the very nature of feminisms? How can a framework that suggests fundamental connections between patriarchy and law be built by making bridges/conversing with a framework that is predicated on the autonomy and neutrality of the substantive positivist assumptions of analytical jurisprudence<sup>47</sup> (cutting across the *fashionable* divide between contemporary positivists and interpretivists)?<sup>48</sup> The deep

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<sup>47</sup> Powerfully put by Margot Stubs in 'Feminism and Legal Positivism' (1986) 3 Australian Journal of Law and Society 63.

<sup>48</sup> Some recognition of the artificiality of the descriptive/normative divide within analytical jurisprudence theory is discernable in certain movements in contemporary positivism. These suggest *firstly* the possibility of the incorporation of values by the rule

sources of ambivalence in feminist thought that Lacey argues renders feminist jurisprudence problematic for contemporary feminisms, poses similar fundamental theoretical questions here too - '...should feminism aspire to replace or reconstruct the framework of modern legal thought, or should it resist the desire for foundations in favour of a more resolutely critical stance?'<sup>49</sup>

The considerable contribution of feminist jurisprudence to legal theory includes the explicit feminist questions involving the exclusion of women from certain areas of law, construction of the female subject in the language of law, speculations of manners through which legal spaces be transformed to better reflect women's interests and experience. The contributions also include derived feminist theoretical projects of intersectionality well established within schools of sociological jurisprudence, as well as the analysis of laws' ideological function in the law and society scholarship. Given the commendable advances of feminist jurisprudence through /in such locations would there be a need for this direct engagement? The fear that it can dilute the transformative potential of feminism is undoubtedly real. It is important to identify the source of this fear, and revisit the *bottom line* of theoretical apprehensions in engaging with analytical jurisprudence.

Antony Anghie succinctly characterises the techniques of analytical positivism during the examination of the Euro-centricity of traditional international law, which would be of direct relevance to us in this endeavour:

The analytical school establishes a definition, adheres to it and applies it rigorously and unyieldingly. Any conflict between the realities disclosed by the historical researchers and the definition must be resolved in favour of the definition, in order to maintain its 'consistency and therefore usefulness.' Language, it would seem, cannot yield to acknowledge empirical reality where this could lead to destabilizing the concepts and categories on which the

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of recognition - the 'soft positivism' conceded by Hart in his Postscript. Alternatively this could also be through the existence of some value in a general positivist outlook, for instance of T Campbell, *The Legal Theory of Ethical Positivism* (Aldershot, 1996). See for more: L Green, 'Legal Positivism' in E Zalta, (ed), *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/archives/spr2003/entries/legal-positivism> (Spring 2003). See also: B Bix, 'Legal Positivism' in M P Golding & W A Edmundson, (eds), *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Blackwell, 2004).

<sup>49</sup> Lacey (n 14) 169.

system is based, in the final analysis, it would seem, the matter is decided by the simple assertion that whatever the commonalities between European and non-European societies, European societies are civilized and sovereign while non-European societies are not.<sup>50</sup>

The legal feminisms of the 1980s and 1990s succeeded, to a very large extent, in negating the universal assumptions of legal positivisms; and the disparate and rich literature in feminist legal theories is a product of this negation. This was done often in a peculiar fashion, in part ambiguous about their own act of theorising, in part denying the naming of its own theoretical project. However, notwithstanding substantial advances and successes of legal feminisms in legal theory, the manner, contents and focus of the jurisprudence taught in *the* academy does not appear to have changed much; but for the specific time/modules allocated for feminist/outsider jurisprudences. There also exists an increasing resurgence of conservative politics generally all over the Western world, including in environs of *the* academy.

Feminist jurisprudence at present, it would appear, needs larger audiences and more participants, more listeners and more sections to discuss, to debate, and to disagree.<sup>51</sup> In the current situation this can *primarily* be done through an engagement with analytical jurisprudence within the academy. This assertion does not necessarily mean that such a dialogue should be strictly done through terms dictated by traditional analytical jurisprudence; if so, this engagement would not only be futile but could be possibly counter productive. This engagement would, however, mean posing questions which are deemed general and universal such as what is law, what is justice and so on, and come up with general articulations relevant to feminisms as well as other related concerns of marginality and inter-sectionality; the concerns and methodology of analytic jurisprudence would also widen.

Ambiguities of philosophical issues of closure theories exist, which make this endeavour inconsistent for certain schools of feminisms, some more radical than others. However, firstly, ample room also exists for many legal feminisms to surmount these theoretical differences.<sup>52</sup> Secondly, there also exists important feminist problematisation of the construction of legal

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<sup>50</sup> A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 60.

<sup>51</sup> A point re-emphasised, if ever there was a need for it, by both *Lacey* (n 14) and *Naffine* (n 43).

<sup>52</sup> *Lacey* (n 14) 205-211.

autonomy, by conventional feminist scholarship, in a binary manner where one has to choose between interdependence and autonomy, ‘as if the two were inevitably mutually exclusive’.<sup>53</sup>

Further, analytical positivists themselves have problematised autonomy of law in significant ways, whereby conversation at this plane is possible.<sup>54</sup> Also, Brian Leiter’s intervention in the much clichéd cul-de-sac of Hart-Dworkin analytical debate invoking Quinn’s naturalism<sup>55</sup> and exhorting an empiricist turn for mainstream jurisprudence is only one among the many other theoretical opportunities that can be pried open to create political and intellectual space for legal feminisms. Thus, such creations of conversations with analytical jurisprudence can constitute a fuller feminist jurisprudence within the academy. For instance, the opening provided by Leiter could very well be a fruitful engagement to understand theories of justice and articulate a feminist understanding of justice within the concerns of feminist jurisprudence.

Finally, coming out of the narrower version of feminism that seeks to represent interests of the essentialised *woman* into a broader feminism, which is concerned with marginality of other groups and theorisations based on such marginalisation, viz., queer (LGBT), Asian/Lat crit, critical race theory and so on, *a general question of how do you examine an understanding of justice can be posed*. One answer legal feminisms offered, as part of the devastating critique of the liberal idea of justice, was that given the marginalisation of women, this does not (cannot?) exist. But how far away is this radical position from, hypothetically, becoming a narrow appropriation of law in pursuit of private dominant interests, each with their own ersatz claims of marginality? Hence, I submit that there is a necessity for a feminist jurisprudence to engage with objective ideas of justice, tempered by social differentiation.

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<sup>53</sup> E Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Hart Publishing, 2001) 3.

<sup>54</sup> See for instance B Bix, ‘Law as an Autonomous Discipline’ in P Cane & M Tushnet, (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), and A Halpin, ‘Law, Autonomy, and Reason’ (2000) 13 *Can. J. L. & Jur.* 75. See J Raz - for a critique of the attempt to maintain a more subtle perspective on the autonomy of law while conceding the non-autonomous status of legal reasoning - in ‘Postema on Law’s Autonomy and Public Practical Reasons: A Critical Comment’ (1998) 4 *Legal Theory* 1.

<sup>55</sup> See B Leiter, ‘Rethinking Legal Realism: Toward a Naturalized Jurisprudence’ (1977) 76 *Tex. L. Rev.* 267 and B Leiter, ‘Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis’, in J L Coleman (ed), *Hart’s Postscript: Essays On The Postscript To The Concept Of Law* (Oxford University Press, 2001).

The fault lines of appropriateness of this suggested engagement will probably continue to be contentious.<sup>56</sup> However, to reiterate, it is submitted that it is imperative for legal feminisms to work towards occupying spaces in mainstream legal theory and academic curriculum; and an important step in this direction would be to strengthen conversations with analytical jurisprudence. This is, admittedly, notwithstanding the latter's traditionally conservative outlook towards goals of feminisms and chiasmic theoretical differences with legal feminisms, particularly of more resolutely critical schools. If *the* political and strategic are methodological tools for feminisms,<sup>57</sup> and Ann Bottomley is correct about asserting that theory is a process and not an end,<sup>58</sup> then using certain heuristic possibilities, trends and patterns of analytical jurisprudence without getting caught in the trap of having to, in some final way believing in them, is one of the ways forward for a putative feminist jurisprudence.

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<sup>56</sup> The difficulty of engaging theoretically with a practice while radically rejecting it is surely a vexed question, and is shared by a host of other *progressive* transformative projects. See, for instance, a lucid articulation of a similar dilemma in the context of theoretical engagements in law informed by Marxism – H Collins, *Marxism and Law* (Oxford University Press, 1982).

<sup>57</sup> Jackson and Lacey (n 12).

<sup>58</sup> 'Theory is not an end: 'A Feminist Approach to the Practice of Theory' in *Richardson and Sandland* (ed) (n 29) 25-52; I have partly subverted her words for my own assertion.