



# Humanity, Freedom and Feminism

JILL MARSHALL

*Queen Mary University of London, UK*

ASHGATE

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## HUMANITY, FREEDOM AND FEMINISM

*For My Family*

*The fact that we are human beings is infinitely more important than all the peculiarities that distinguish human beings from one another.*

Simone de Beauvoir, *The Second Sex* (London: Jonathan Cape 1953; Vintage 1997) p. 737.

*Feminism has at its heart the demand that women be treated as free human beings.*

Drucilla Cornell, *At the Heart of Freedom: Feminism, Sex and Equality* (Princeton, New Jersey: Princeton University Press 1998) p. 20.

# Foreword

Jill Marshall's book is an important contribution to the revival of a sympathetic feminist engagement with liberal theory. Her argument is that liberalism contains as yet untapped potential for the articulation of an adequate feminist politics. In contrast to some postmodern and critical theories, but in common with the recent work of writers like Drucilla Cornell and Martha Nussbaum, she argues that a properly developed liberalism has two key advantages for the feminist project of realising the full humanity and improving the lives of women: its strong conception of subject-hood and agency; and its commitment to normative thinking as one precondition for social change. In the context of globalisation, liberalism's core commitment to common humanity has acquired, she argues, a new significance for the advancement of feminist values.

Drawing on an impressive range of sources, Marshall puts the case for a liberal individualism which places the social construction of personhood and autonomy at its core; for a revised conception of the public-private divide; for a conception of positive freedom, and of such freedom as founded in social as well as internal conditions of existence; and for a recognition of human interdependence. Focusing in particular on liberalism's humanism and universalism, she argues for a vision of human potential, and the freedom to develop this potential, as the core of liberalism, and further argues that such a vision is indispensable to feminism. Hence the incorporation of women as fully human subjects of liberal politics – a project of which much feminist theory over the last 30 years has been deeply sceptical – is in her view the agenda to which feminism needs to return.

In the course of setting out this agenda, Marshall also develops a challenging critique of the slippage in some political (including feminist) theory between empirical and normative arguments. And she maintains a consistent focus on social structures as a pre-condition for human freedom – a claim which is all too often ignored in political theory, feminist or otherwise, and which itself opens up a substantial research agenda. The practical upshot of her arguments is underlined by the final part of the book, in which she uses a case study which is informed by her analysis of the impact of globalisation. Taking recent developments in international human rights, humanitarian and criminal law dealing with sexual violence against women, Marshall argues that these developments are evidence of the continuing ethical and political potential of liberalism for women.

Marshall's cogent synthesis of existing arguments brings a fresh impetus to the important field of feminist legal and political theory. It deserves to find an appreciative audience.

Nicola Lacey FBA  
Professor of Criminal Law and Legal Theory, London School of Economics

## Series Editor's Preface

The objective of the Applied Legal Philosophy series is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focuses on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

The series will include studies of all the main areas of law, presented in a manner which relates to the concerns of specialist legal academics and practitioners. Each book makes an original contribution to an area of legal study while being comprehensible to those engaged in a wide variety of disciplines. Their legal content is principally Anglo-American, but a wide-ranging comparative approach is encouraged and authors are drawn from a variety of jurisdictions.

Tom D. Campbell  
Series Editor

Centre for Applied Philosophy and Public Ethics  
Charles Sturt University, Canberra



# Preface and Acknowledgements

This book originated from my thoughts, ideas and research over a three year period at Queen Mary University of London. The use of the facilities and libraries at Queen Mary and various colleges of the University of London was invaluable.

I would like to thank various people for their assistance and support at different times throughout the project including those who have reviewed the book in different guises. Michael Lobban was kind enough to comment on very early drafts of what now forms Chapters 1 and 2. Eric Heinze has always been enthusiastic about the project, and provided many helpful and insightful comments on drafts, as well as help, support and friendship throughout the process. My colleague and friend Roy Gilbar and I spent many good times together debating, amongst other things, the relationship between the community and the individual. Particular thanks go to Katherine O'Donovan for her proactive support and belief in the project from its inception as thoughts and ideas and proposal, right through to the end product. Our meetings, her ongoing constructive comments and inspiration provided a catalyst and integral part of the work. My appreciation also extends to Richard Collier and Nicola Lacey for their thoughtful analysis, comments and examination of my research and their continued supportive and warm attitudes towards this work since its early stages. I would like to additionally thank Nicola Lacey for taking the time to read a near final draft of the book and for her generous foreword. Thanks to Tom Campbell and John Irwin for commissioning the book. Valerie Saunders, Helen Harvey and all the staff at Ashgate involved in the project, including of course, my editor Pam Bertram.

Finally, thanks to all my friends and family for listening to, and discussing with me, my ideas throughout the last four years.

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# Introduction

*"What is a human being? Legal Theorists must, perforce, answer this question: jurisprudence, after all, is about human beings."* Robin West.<sup>1</sup>

In 1988, Robin West began her well-known article "Jurisprudence and Gender" by asking WHAT IS A HUMAN BEING?<sup>2</sup> She concluded that women are not human beings insofar as legal theory is concerned. Her question, and the contribution of feminist theory to the answer, forms a central theme to this work.

## Four Contentions

If the definition of a human being is central to jurisprudence, it is vital to uncover whether that definition adequately encompasses *all* human beings. Arguments are presented in this book that traditional Western conceptions of the human being have been inadequate in that they have failed to encompass all human beings. In some instances this is because of the inherent constitution of the definition, while in others, the problem arises from the way theories have been (mis)interpreted. However, it is possible to use these conceptions to form a more inclusive, universal conception of the human being or subject that can then be used to form the basic unit of philosophy, politics and law. As a fuller, more inclusive, conception of the human subject, it will lead to a better, more just, place for all to live on a global scale. With this underlying theme in mind, the book has four organising contentions.

The first relates to normative ethics and human flourishing. Work is investigated and arguments presented involving not just what people actually value now but seeking to address the normative question of what it is right or appropriate to value, and why.<sup>3</sup> Written from a feminist perspective, one of my aims is to make a contribution to the ethical question: what would be of moral importance in a post-patriarchal world; suggesting how traditional conceptions of the human subject need to change if they are to assist as guides in constructing a better place, and

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<sup>1</sup> R West "Jurisprudence and Gender" (1988) 55 *University of Chicago Law Review* 1 at p 1. It is largely recognised that one of the main issues for law resides in its very conceptions of the human being and the social order which are presented as universal but which are in fact highly contested – see N Naffine and R Owens (eds) *Sexing the Subject of Law* (London: Sweet & Maxwell 1997) at p 29.

<sup>2</sup> R West, 1988. My emphasis.

<sup>3</sup> See E Frazer, J Hornsby and S Lovibond *Ethics: A Feminist Reader* (London: Blackwell 1992) Introduction.

way, to live.<sup>4</sup> Post-patriarchy means a move away from the patriarchal system that exists as a system of hierarchical power, oppressing and devaluing women and the feminine: definitions of the human which actually mean “man” contribute to that system. The ultimate concern is with making women’s lives better. Women have been constrained and often oppressed by the hierarchical gender system that pervades all political and legal systems.<sup>5</sup> Ethics and morality must be concerned with all individuals or human beings – men and women – with their identity or subjectivity, including how that identity and consciousness is formed in this unjust and unfair system. For this reason, I concentrate on feminist critiques, insights, contributions and reconstructions of what it is to be a human being, with the aim that this will assist in leading to formulations of a better place to live.

Secondly, the position is taken that feminist theorising cannot evade the question of the normative foundations of theory and the necessity of the minimal criteria of validity. A feminist jurisprudential project should ask in what ways women’s theories of being re-map forms of human flourishing.<sup>6</sup> The argument developed is that feminism is a necessarily normative project: creating alternative interpretations, envisioning different futures and possibilities and being concerned with women transforming their own identity and becoming empowered.<sup>7</sup> I therefore question those theorists who criticise any feminists (and others) for producing normative agenda. How such issues have caused problems for feminist legal theory, particularly in recent years, is examined. Feminists are interested in

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<sup>4</sup> Patriarchy has been defined as “a system of male domination that involves the subordination of women. Patriarchy takes different forms in different societies and different historical periods. It interacts with other forms of oppression, such as class, race and sexuality, in very complex ways”. C Johnson “Does Capitalism really need Patriarchy? Some Old Issues Reconsidered” *Women’s Studies International Forum* Vol 19 No 3 1996 at 201.

<sup>5</sup> See, for example, United Nations *The World’s Women 1995: Trends and Statistics* (New York: United Nations 1995); KD Askin and DM Koenig (eds) *Women and International Human Rights Law* (Ardsley NY: Transnational Publishers Inc) Vol 1 (1999), Vol 2 (2000), Vol 3 (2001), Vol 4 (2004); KD Askin *War Crimes Against Women* (Dordrecht: Kluwer Law International 1997); J Gardam and M Jarvis *Women, Armed Conflict and International Law* (The Hague, London, Boston: Kluwer Law International 2001); H Charlesworth and C Chinkin *The Boundaries of International Law: a feminist analysis* (Manchester: Manchester University Press 2000); RJ Cook (ed) *Human Rights of Women* (Philadelphia: Pennsylvania Press 1994); S Fredman *Women and the Law* (Oxford: Clarendon Press 1997); MC Nussbaum “The Sleep of Reason...” *The Times Higher* 2 Feb 1996; Amnesty International’s website lists 857 of their own documents alone on the human rights violations of women globally: see [web.amnesty.org/library](http://web.amnesty.org/library); see generally [www.eoc.org.uk](http://www.eoc.org.uk); Human Rights Watch *The Human Rights Watch Global Report on Women’s Human Rights* (1995).

<sup>6</sup> In this respect see, for example, J E Grbich “The Body in Legal Theory” in M Fineman and N Thomadsen (eds) *At the Boundaries of Law: Feminism and Legal Theory* (New York and London: Routledge 1991).

<sup>7</sup> See A Phillips *Democracy and Difference* (Cambridge: Polity Press 1993) at p 113.

producing more just societies than those which already exist.<sup>8</sup> To produce such societies, it is my contention that the presence of *active* and *intentional* subjects is needed. The analysis in this regard involves examining aspects of the modernity-postmodernity debate. The position taken is that feminism constitutes a critique, as well as a defence, of modernity and has a great stake in this debate which is at heart about the possibility of a *subject* of social theory.<sup>9</sup> Feminists cannot embrace an unreconstructed modern subject or a postmodern rejection of the subject because women as subjects have not been accorded the coherence, autonomy, rationality or agency of the subject which forms the basis of an unreconstructed modernism and which postmodernism has deconstructed out of existence.<sup>10</sup> It is not only argued that normative foundations need to be sustained in feminist legal theory, but also that it is necessary to hold onto, and indeed strengthen, particularly for individual women, the idea of an active and intentional subject to do so.

Thirdly, although certain communitarian critiques have been useful, to some extent, in illuminating certain inconsistencies in liberal theory, it is shown that unless criteria that transcend the local are invoked, it is not possible to distinguish between *progressive* and *regressive* theories. Feminism has been described as a project redefining the relationship between the individual and society; seeking an integration of the individual and the collective in an ongoing process of authentic individualism and genuine connectedness.<sup>11</sup> Making demands for change will inevitably involve an explanation and arguments demonstrating why certain standards are used for judging existing social arrangements. Reliable theories are needed to explain the criteria used for accepting some social, political and legal practices while rejecting others.<sup>12</sup> In this context, the discourse of human rights, so prevalent in the world today, which necessarily flows from ideas of what it means to be human, and who is counted as human, provides an example of the instrumental use that can be made of certain legal concepts to assist human flourishing. In an international legal context particularly, it is essential to retain feminist politics to sustain the rights of women as humans (during war and conflicts, as well as situations in peace time). For legal claims to be made, a rights holder is needed, thus the retention of subjectivity and the sense particularly of women as subjects in their own right is essential. Accordingly, it is part of my argument that the "local" will need to be transcended in favour of ideas of common humanity and international human rights' standards, while being sensitive to the differences between all individual humans, including their cultural heritage, and

<sup>8</sup> J Conaghan "Reassessing the Feminist Theoretical Project in Law" 27 *Journal of Law and Society* (2000) Vol 3 351 maps this element within feminism. This is dealt with in Chapter 3.

<sup>9</sup> See B Marshall *Engendering Modernity: Feminism, Social Theory and Social Change* (Cambridge: Polity Press 1994).

<sup>10</sup> B Marshall, 1994, p 148.

<sup>11</sup> B Marshall, 1994, p 158.

<sup>12</sup> See I Barwell "Towards A Defence of Objectivity" in K Lennon and M Whitford (eds) *Knowing the Difference* (New York and London: Routledge 1994).

aiming to prevent the imposition of norms or standards that could be, or could be seen as, exclusionary.

Closely linked to that concept is my fourth. As the world gets smaller with the impact of information technology, global non-governmental organisations, the international economic and political community, world-wide terrorism and general globalisation issues, valuable work is being done to highlight human beings' shared humanity rather than irreconcilable differences in this global "community".<sup>13</sup> Global institutions are contributing to this process, not only by their very existence, but also through the policies and law applied through them. I look at the case law of the International Criminal Tribunal for the Former Yugoslavia (the ICTY) in relation to rape and sexual violence in this context.<sup>14</sup>

### The Importance of Freedom

These four contentions are highlighted throughout this work, showing their development and expansion through the increase of individual freedom and a more consistent expression of the ideals of egalitarian liberalism.

To live freely, women need a strong sense of self or subjectivity to be empowered to plan their own projects. This strong subjectivity is developed through the use of imagination or critical consciousness, then through discourse with others, being listened to and acknowledged, while at the same time changes to external structures are needed. Feminists want to free women to shape their own lives, and form their own self-definitions, rather than simply accepting pre-existing definitions given to them by others.<sup>15</sup> Feminists therefore need a language of freedom with which to express the value underlying this concern. Freedom is the goal of women as it enables them to live more worthwhile lives.

The position is taken that in the formation of human beings' sense of selfhood their environment is crucial and thus it is imperative that a certain type of environment and society be encouraged to thrive. The constitutiveness of the individual in a network of social relations is combined with the value of self-determination. As individual consciousness is created in large part by the social

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<sup>13</sup> See, for example, R Falk *Law in An Emerging Global Village: A Post-Westphalian Perspective* (Ardsley, New York: Transnational Publishers Inc 1998); B Holden (ed) *Global Democracy: Key Debates* (New York and London: Routledge 2000); N Dower and J Williams (eds) *Global Citizenship: A Critical Reader* (Edinburgh: Edinburgh University Press 2002); T Dunne and NJ Wheeler (eds) *Human Rights in Global Politics* (Cambridge: Cambridge University Press 1999); F Robinson *Globalizing Care: Ethics, Feminist Theory and International Relations* (Colorado and Oxford: Westview Press 1999); T Franck *Fairness in International Law and Institutions* (Oxford: Clarendon Press 1995); TW Pogge (ed) *Global Justice* (Oxford: Blackwell Publishing 2001); R Brownsword (ed) *Global Governance and the Quest for Justice* Vol 4 (Oxford: Hart 2004).

<sup>14</sup> S C Res 827 (25 May 1993) establishing the International Criminal Tribunal for the former Yugoslavia.

<sup>15</sup> See J Nedelsky "Reconceiving Autonomy: Sources, Thoughts and Possibilities" (1989) 1 *Yale Journal of Law and Feminism* 7 at p 8.

conditions in which people find themselves, and when born and growing up most have little or no choice as to these social conditions, it is important that feminist legal theory retains an idea that these social conditions allow for the development of a consciousness that will increase the freedom of every human being. A person's consciousness, in turn the choices made, and its context in surrounding social conditions are therefore fundamentally connected. It is shown that social conditions which encourage such consciousness to develop will be found in a society based on care, love and empathy, interdependency and the mutual recognition of each individual as a fully free subject. External structures, including international law and international institutions and courts, will form a part of those conditions.

Such conditions will lead to ideas of a more inclusive conception of the human subject which involves treating everyone as a free human being. Such treatment will, in turn, lead to a fairer, more just world and a better foundation for human flourishing. Human beings need the freedom to decide on their own plan of life, rather than it being imposed on them, as in doing so, they engage in a uniquely human experience that expresses their moral dignity and worth. The aim is to create social, political and legal structures that assist all individuals in their search for a flourishing life. In this respect, therefore it is possible to say that all human beings share a common potentiality to develop and grow as persons. This potentiality is something that all humanity has in common and which should be encouraged to progressively develop. Such a conception of the human subject does not involve ideas of a "common essence" in that it is not the unified, unchanging subject often presented and critiqued as the subject of Western philosophical, political and legal thought. Instead, it leads to a claim to the possibility of an ever-changing, unfixed personhood, with a corresponding right to be treated as an end and not an instrument of others, not to be categorised according to someone else's imposed view of how one ought to behave or live because as an individual human subject there exists the potentiality to develop and grow and make real choices for oneself. It is argued that gendered identity, as currently existing in hierarchical patriarchal structures, is socially constructed, and restricts the freedom of women by preventing them from living a free existence.

The conception of the human subject presented is one that develops, flourishes and is protected most when the ideals of egalitarian liberalism are embodied in the legal and political system. This is different from existing liberal states which do not currently enshrine these ideals of liberalism. Feminist analyses, critiques and reconstructions of the human being or subject made by "second wave" feminists are examined.<sup>16</sup> Focus is placed on feminist work that critiques the Western philosophical tradition, in particular liberalism, and some time is spent analysing the issues surrounding feminist critiques of the liberal individual. When certain feminists critique liberalism, a common occurrence during the 1980s in

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<sup>16</sup> The "second wave" is traditionally considered to be from the 1960s onwards. The first wave of feminism is usually considered to run through the 19th century and end in the early 20th century suffrage movement – see J Mitchell and A Oakley *What is Feminism?* (Oxford: Basil Blackwell 1986).

particular, they often produce a "straw man" of liberalism, highlighting the worst qualities within it, and ignoring other aspects of the rich and varied liberal tradition, particularly the positive, social welfare liberal tradition of, for example, LT Hobhouse and TH Green.<sup>17</sup> In feminist critiques of liberalism, classic liberalism has been the main focus. Further, often the critiques fail to convince that they are arguing for anything other than a *fuller expression* of the liberal tradition, usually retaining concepts of freedom and equality of the individual human being. This aspect of such critiques is explored.

The focus on the feminist critiques of liberalism further highlights how many of these critiques centre around the allegation that liberals say all individuals are equal and should be treated normatively as free and equal. Yet, at the same time, many feminists argue that this is what feminism is all about. Liberalism began as an emancipatory project which expressed the radical moral belief in the equal and intrinsic worth of each individual. Further, the freedom of the individual is the most important liberal value.<sup>18</sup> As freedom is the most important liberal value and liberalism's central belief rests on the intrinsic dignity and equal worth of each individual, inevitably the interaction between individuals will be fundamental. If each individual in liberal theory is an end in themselves, it is an important question how limitations can be put or imposed on what people can do in society without impinging on others' freedom and thus potentially using some people as means to others' own ends rather than as ends in themselves.<sup>19</sup>

The relationship between feminism and liberalism has been described as close but complex.<sup>20</sup> The roots of both lie in the emergence of individualism as a general theory of social life – both need some conception of individuals as free and equal beings, emancipated from the ascribed, hierarchical bonds of traditional society. Feminism has sometimes been presented as the completion of the liberal revolution – an extension of liberal principles and rights to women as well as men.<sup>21</sup> However, according to many feminists, such attempts to universalise liberalism have far-reaching consequences because in the end, they challenge liberalism itself.<sup>22</sup> It is argued here that there is still much to be gained from liberal theory, particularly at the international level, and that feminism is an expression of

<sup>17</sup> See LT Hobhouse *Liberalisms* (New York and Oxford: Oxford University Press 1964); TH Green *Lectures on the Principles of Political Obligation* (London: Longmans, Green 1895).

<sup>18</sup> See M Ramsay *What's Wrong with Liberalism?* (London: Leicester University Press 1987) at p. 7 and p. 17.

<sup>19</sup> A Kantian notion: see I Kant *Fundamental Principles of the Metaphysic of Morals* (New York: Prometheus Books 1988).

<sup>20</sup> C Pateman "Feminist Critiques of the Public/Private Dichotomy" in A Phillips (ed) *Feminism and Equality* (Oxford: Basil Blackwell 1987) at p. 103.

<sup>21</sup> C Pateman, 1987.

<sup>22</sup> C Pateman, 1987; Z Eisenstein *The Radical Future of Liberal Feminism* (NY: Longman 1981); E Frazer and N Lacey *The Politics of the Community: A Feminist Critique of the Liberal-communitarian debate* (Hemel Hempstead: Harvester 1993); N Lacey *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing 1998).



the basic tenets of liberalism – that every human being should be treated as free and equal.<sup>23</sup>

The issue is also raised that liberal theory underpins Western political and legal structures in contemporary society, and has increasingly spread throughout the world following the fall of communism in Eastern Europe and the former Soviet Union. This is particularly noticeable in the field of international law, the work of the United Nations and the forces of globalisation.<sup>24</sup>

### ***The Structure of Humanity, Freedom and Feminism***

The book has three parts. Part I, consisting of an Introduction and the following three chapters, presents a thematic intellectual history of how second wave feminist legal theory critiqued existing conceptions of the human subject, finding them based on male experiences while being presented as the “human” norm. It examines how some feminists then looked for an inclusive human subject while others argue for a separate woman-centred subject and still others argue for the deconstruction of the subject. Part I sets out the theorists’ arguments, objections to arguments and then my counter-arguments, often aiming to use the arguments of those theorists critiqued to realise their own ideas more fully.

In Chapter 1, I show how feminists critiqued existing conceptions of the human subject to see if these conceptions included women; asking who the individual is at the heart of Western philosophy. I show how they uncovered the paradigm of the human to be male. Included within this Chapter are feminist critiques of the nature of what it means to be human, the “man” of reason, transcendence and reason as achievement.

While some feminists sought to include women in the definition of the universal human being or subject, I also examine those feminists who began to question the standards by which moral subjectivity is judged. The debate between this type of feminism and the type which tried to include women within the universal subject is often described as the “sameness/difference” debate. In Chapter 2, the universal and abstract reasoning method of liberalism, often using social contract theory, is examined from the perspective of critiques by communitarians and ethic of care theorists. In this context, claims of the presentation of the liberal individual as radically possessive, atomistic and aprioristic, seemingly exclusionary of the dependency of human beings on social context, is critiqued. In particular, the work of Carol Gilligan and Robin West is

<sup>23</sup> In the same way as it has been argued that socialism is an extension of liberalism but is obviously not liberalism, so feminism can be seen as an extension of liberalism. However, some have difficulty incorporating it into the definition of liberalism as currently understood.

<sup>24</sup> Indeed, I argue that international law is largely governed by liberal philosophy. This is perhaps seen most obviously in the United Nations, international law and liberal globalisation. This is one of the reasons why I have concentrated on the individual and the human being that comes from this tradition.