
FEMINISM AND ITS “OTHER”: FEMALE AUTONOMY IN AN AGE OF “DIFFERENCE”

*Maleiha Malik**

I. INTRODUCTION: THE CHALLENGE OF THE “OTHER WOMAN”¹

A central challenge for contemporary feminist theory is to formulate more sophisticated approaches to the intersection between sexual and cultural difference. The problem of understanding the “other” is rendered yet more complex when the subject is the “other woman” because of the complex way in which gender and culture operate within each category such as “self” and “other” or “Western” and “non-Western.” Many of the responses to this debate have viewed the fact of cultural difference as a problem of values, so that the argument is converted into a clash between the positive values that “we” have (*e.g.*, freedom and choice) as contrasted with the more negative values that “they” are committed to, such as “tradition,” “culture” and “religion.” This confrontation of values maps onto debates about modernity that use a linear concept of time which pushes “them” back in history so that their values of tradition and culture are rendered “backward” as compared with “modern” and “progressive” ways of living.

The translation of “difference” into a clash of values obscures the extent to which hierarchies of power are the key problem in the debate about feminism and minority women. Yet the mere reversal of these

* Maleiha.malik@kcl.ac.uk. Maleiha Malik is a Reader in Law at the School of Law, King’s College, University of London. She is co-author of *DISCRIMINATION LAW: THEORY AND CONTEXT* (2008) and author of *Complex Equality: Muslim Women and the ‘Headscarf,’* 68 *DROIT ET SOCIETE* 127 (2008). Draft versions of this paper were presented at the following research seminars: “Constitutionalism and Secularism in An Age of Religious Revival: The Challenge of Global and Local Fundamentalisms,” Cardozo School of Law (Autumn, 2008); the Law and Feminism Workshop at the Faculty of Law, University of Toronto (Autumn, 2008); and at the Centre for the Study of Ethnicity and Citizenship (Spring 2009). The author would like to thank the organisers and participants for their thoughtful comments.

¹ A number of writers have used this phrase. I am particularly grateful for a recent discussion of this topic in a forthcoming article. Sonya Fernandez, *The Crusade Over The Bodies of Women*, in *ANTI-MUSLIM PREJUDICE: PAST AND PRESENT* (Maleiha Malik ed., forthcoming 2010) (on file with author).

hierarchies of power does not provide a solution. Merely reversing the binary of majority and minority so that feminism is forced to accept the perspective of the “other” does not interrupt the process. For example, take the confrontation between “Western” women committed to choice and agency, and “non-Western” women committed to tradition and religion. This approach fails to sufficiently scrutinise the subject position of Western women. More specifically, this approach needs to take into account two particular aspects. First, what are the processes through which “Western” women come to construct themselves as autonomous and free agent; and how do masculinist ideas of agency and power influence this process? Second, how does the idea of cultural difference between “Western” and “non-Western” women become converted into hierarchies of power whereby “Western” ideas of autonomy and freedom are represented as the norm toward which feminism must aspire? A related question which also arises is to ask how and through what process “Western” feminists are able to authorize for themselves the power to set the goals and objectives for feminist theory. Once these issues have been addressed it becomes easier to argue that although there may be a pivotal role for universal values such as autonomy, the process through which these values become entrenched needs to be analyzed to understand the way in which it can operate to oppress or exclude some women.

These issues are also important for constitutionalism for a number of reasons. A shift towards a wider definition of “cultural racism” and responding to non-Christian and non-Western religions also raises questions about the place of “native” and colonial peoples in definitions of the political community. As Bhikhu Parekh notes, classical liberal theorists such as Locke and Mill had no difficulty in justifying English colonialism and they categorized members of different non-European cultures as “backward.” These writers saw no reason to respect the integrity of non-Western cultures or to see them as including a valid way of life or set of values. It followed, therefore, that there were no serious obstacles to dismantling these cultures, denying them territorial integrity and making them subject to an external European “civilizing” mission.² James Tully has also noted the relationship between colonialism and traditional liberal constitutionalism. Tully argues that many of the assumptions that underlie modern constitutionalism, and particularly its bias against non-European cultures, were formed during the age of European imperialism, which makes them inhospitable for claims of cultural accommodation. Tully proposes alternative constitutional frameworks and conventions that open up a dialogic process between all citizens and which, he argues, is a form of

² BHIKHU PAREKH, *RETHINKING MULTICULTURALISM: CULTURAL DIVERSITY AND POLITICAL THEORY* 38-49 (2006).

constitutionalism that can accommodate cultural diversity in liberal democracies.³ Within an analysis of liberal constitutionalism the issue of women's rights has taken on particular salience. In the context of evaluating political structures and other cultures, the issue of how "women" are treated has increasingly become a touchstone of whether or not the standards of liberal constitutionalism have been met, as illustrated by incidents such as the headscarf debates in Europe.⁴

This Article explores some of these issues by addressing two aspects of how we can better understand the "Other Woman." Section II is a diagnosis of how certain processes operate to construct some women as "different" to Western paradigms. Section III develops a method for the study of minority women that gives priority to their own viewpoint and self-understanding.

II. FEMINISM AND THE "OTHER WOMAN"

The response of feminism to the challenge of theorizing cultural and religious difference has at times caused "universalism" to become a pejorative word in contemporary feminist scholarship. The critique of universalism by postmodern scholarship presents two distinct problems for law and theory. First, anti-universalism critiques undermine the normative basis of international and domestic human rights law's claim to legitimacy and authority. Second, and more specifically, difference feminists insist that universalism oppresses (or marginalizes) women from non-Western races, cultures and religions. Of course, postmodern feminists such as Iris Marion Young⁵ and Drucilla Cornell⁶ made an important contribution to our understanding of "difference" among women. These writers revealed the way in which the chimera of

³ JAMES TULLY, *STRANGE MULTIPLICITY: CONSTITUTIONALISM IN AN AGE OF DIVERSITY* chs. 1-3 (1995).

⁴ See Maleiha Malik, *Complex Equality: Muslim Women and the "Headscarf,"* 68 *DROIT ET SOCIÉTÉ* 127 (2008) (Fr.). For a detailed discussion of the legal regulation (and legal cases) on headscarves, see DOMINIC MCGOLDRICK, *HUMAN RIGHTS AND RELIGION: THE ISLAMIC HEADSCARF DEBATE IN EUROPE* (2006). For discussion of case law and legislation, see, e.g., *R. v. Headteacher and Governors of Denbigh High School (ex parte Shabina Begum)* [2006] UKHL 15, [2007] 1 A.C. 100 (Eng.) [hereinafter *Shabina Begum*]; *Ludin* [BverfG] [Federal Constitutional Court] Sept. 24, 2004, 2 BvR 1436/02 (F.R.G.). For a detailed discussion of *Ludin* (both the decisions of the Federal Administrative Court and the Federal Constitutional Court) see Matthias Mahlmann, *Religious Tolerance, Pluralist Society, and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case*, 11 *GERMAN L. J.* 1099 (2003); *Dahlab v. Switzerland*, Eur. Ct. H. R. (Application No. 42393/98, Feb 15, 2001); *Karaduman v. Turkey*, 74 Eur. Comm'n H. R. Dec. & Rep. 93 (1993); *Leyla Şahin v. Turkey*, Eur. Ct. H. R. (Application No. 44774/98, Nov. 10, 2005).

⁵ IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE*, ch. 2 (1990).

⁶ Drucilla Cornell, *What is Ethical Feminism?*, in SEYLA BENHABIB ET AL., *FEMINIST CONTENTIONS: A PHILOSOPHICAL EXCHANGE* 75 (1995) [hereinafter *FEMINIST CONTENTIONS*].

“universalism” masked the reality of hegemony. A small, powerful elite of women—majority feminists—who had greater social, economic, and political power were given yet more power through their control over concepts, language, and the ability to define categories in feminist theory. The claims to neutrality of “universalism” allowed these powerful women to represent their subjective viewpoints and interests as the truth about all women. Majority feminists with immense power to define the dominant feminist discourse were, and still are, able to impose their constructions of female empowerment upon all women irrespective of differences of race, culture, religion, sexuality or class. Postmodern feminism has made an outstanding contribution by exposing the injustice perpetrated by powerful majority feminists over their less powerful sisters. However, all women have paid a significant price as international feminism has distanced itself from crude universalism. One by-product of the increased sophistication in our understanding of “difference” has been a splintering of international feminist alliances and inertia in tackling the vicious misogynist practices that continue to harm women.

Those who want to defend universalism in the form of concepts such as female autonomy need to take seriously the challenges posed by cultural and religious difference. The rest of this section, therefore, is an exploratory discussion of the processes through which cultural and religious difference operates to oppress and marginalize certain women. The analysis also focuses on the implications of this process for our understanding of female autonomy and the construction of potentially exclusionary binaries—for example, “West” and “non-West,” “civilised” and “barbaric,” and “modern” and “progressive.” These binaries are significant for the present discussion—about our understanding of female autonomy in an age of religious difference—because of their continuing relevance to our understanding of feminism and the status of women. An increasingly sophisticated understanding of cultural racism in contemporary scholarship has confirmed the need to respond to changes caused by increasing cultural diversity and to the emerging “politics of recognition.” Race as a “biological” construct is now widely accepted as an inappropriate paradigm for discussions of racism as a “social” problem. Although difference based on “color” or visible ethnic difference remains a crucial way in which individuals and social groups become racialized, there is an increasing recognition that cultural and religious difference can generate forms of cultural racism. Etienne Balibar, for example, has developed the concept of cultural racism through an analogy with anti-Semitism. He concludes that cultural racism also concerns itself with “signs of a deep psychology, as signs of a spiritual inheritance rather than a biological heredity.” Balibar writes that this wider definition is more appropriate to capture

the range of harm caused by "racism in the era of 'decolonisation' which is based on the movement of peoples from the former colonies into Western Europe."⁷

Cultural racism is also a useful category for an understanding of the challenge posed by religious difference because—as the headscarf cases in the European Court of Human Rights illustrate—the claims of individuals for the accommodation of non-Western religious and cultural practices pose a specific problem for liberal constitutionalism.⁸ In this context, an idea of racism that focuses on "color" or "national" difference is unhelpful because not only "minority" Muslim women (who may be Pakistani or Algerian) but also "majority" Muslim women (who may be white British or French) may adopt the Islamic headscarf. The process through which cultural racism maps onto ideas of civilization that render certain religious practices, such as the Islamic headscarf, as barbaric, reactionary, or intrinsically incompatible with modernity, can be traced through an analysis of the history of ideas concerning classical evolutionism. George W. Stocking, Jr. has identified the way in which ideas of civilization in mid-eighteenth and nineteenth century British, French, and German thought are influenced by "ethnological" thinking about human races. These Victorian origins of contemporary thought on human, social, and cultural evolution remain significant for our present analysis. One tendency that Stocking identifies is the way in which ideas of human progress were mapped onto changes in the ideas of the origin of man, which were in turn influenced by changes in the religious meaning of human development. Stocking states:

The religious assumptions that had provided the underlying basis of ethnological explanation were now among the major phenomena to be explained. Conversely, the psychic unity of man was no longer a conclusion supporting the single origin of mankind, but rather a premise for establishing the human invention of cultural forms.⁹

This fragmentation in the idea of a single religious origin for man also had a temporal consequence because within this emerging "evolutionary" paradigm, contemporary non-Western "savages" were sharing the same temporal and spatial space as Western "gentlemen." Stocking concludes:

Although united in origin with the rest of mankind, their assumed

⁷ For a general discussion of cultural racism see TARIQ MODOOD, *MULTICULTURAL POLITICS: RACISM, ETHNICITY AND MUSLIMS IN BRITAIN* ch. 1 (2005). For the quotation of Etienne Balibar see *id.* at 27, 28.

⁸ See CAROLYN EVANS, *FREEDOM OF RELIGION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2001); see also Carolyn Evans, *The "Islamic Scarf" in the European Court of Human Rights*, 7 MELBOURNE J. INT'L LAW 52 (2006) (providing a specific example of this argument in the context of the ECHR headscarf cases).

⁹ GEORGE W. STOCKING, JR., *VICTORIAN ANTHROPOLOGY* 184 (1987).

inferiority of culture and capacity now reduced them to the status of missing links in the evolutionary chain. Their cultural forms, although at the centre of anthropological attention, had still only a subordinate interest. One studied these forms not for themselves, or in terms of the meaning they might have to the people who created them, but in order to cast light on the processes by which the ape had developed into the British gentleman.¹⁰

This comparative method uses the fact of cultural difference between European and non-European cultures as a way of affirming the superiority of Europeans, as well as reaffirming binaries between civilization and barbarianism.

Stocking also demonstrates that within this process the “position of women” became a measure of civilization. Yet, the feminism and minority women debate rarely interrogates the process through which the comparison between European and non-European cultures, and the “status of women,” operated to confirm the superiority of European self-belief and the confidence in European “values.” Instead, contemporary feminism—like some forms of liberalism—usually assumes that it remains free of the corruption of the type of “evolutionist” thought that distorts our analysis of non-Western cultures.

An analysis of feminism needs to take seriously the wider context of evolutionary thinking about civilizations because these “past” ideas may continue to corrupt our “present” thinking about non-Western cultural difference. In her analysis of the relationship between Orientalism and feminism, Yegenoglu argues that one way in which Western feminism’s universalist foundations have been, and continue to be, secured is by denying the context in which the Western subject is analyzing (or comparing herself) to the non-Western subject.¹¹ Her analysis suggests that Western feminism reenacts the errors of Orientalist thoughts at a fundamental level, because “the Western subject (irrespective of the gender identity of the person who represents the Orient) occupies not only the position of the colonial, but also a masculine subject position.”¹² For Yegenoglu, this insight is important because it allows us to understand that the Western woman (and the Western self more generally) achieves its goal of autonomy through a process of interaction with its non-Western “Other.”¹³

An analysis of Stocking and Yegenoglu assists in the understanding of how “cultural” and “religious” difference is constructed to create hierarchies so that the West becomes associated

¹⁰ *Id.* at 185.

¹¹ MEYDA YEGENOGLU, *COLONIAL FANTASIES: TOWARDS A FEMINIST READING OF ORIENTALISM* ch. 4 (1998).

¹² *Id.* at 59.

¹³ *Id.* at 11.

with civilization and women's equality, while other cultures and religions are assumed to be at an "earlier" stage of development. Stocking's analysis, for example, suggests that evolutionary forms of analysis place cultural and religious differences on a linear temporal scale for comparison that treats "difference" as part of the same process of development rather than as indicative of plural life forms. This process supports assumptions that visible signs of cultural or religious difference, such as the Islamic headscarf, are evidence of the unfinished project of modernity. Where individuals fail to adapt themselves to this linear time scale of "civilised modern" conduct, the response is to try to re-impose this linear time scale by employing solutions that require the elimination of the difference (e.g., a ban on the Islamic headscarf) through processes of assimilation.

Yet, there are alternative contemporary approaches to cultural and religious difference that may avoid or minimize the risk of cultural racism or reproducing Orientalist errors. The central challenge is to avoid the constructing of cultural or religious difference in linear evolutionary terms that places it as pre-modern in comparison to the West. The next section explores some of the methods that allow a synchronic and pluralist approach to understanding non-Western cultures and the "Other" woman.

III. ACCOMMODATING THE "OTHER WOMAN"¹⁴

In this section, rather than explicitly making a choice between alternative ways of "doing" feminist theory, I want to take a different approach. I do not want to set myself the impossible challenge of providing a conclusive answer on how we should theorize difference. Instead, I want to make a tentative gesture towards examining whether there are methods that can assist us in capturing the beliefs and experiences of minority women without distortion and misrepresentation. One way of making this issue more manageable is to reduce the methodological choices that we face to two contrasting models. Of course, such a reductive choice is vulnerable to the criticism that it is a caricature. At the same time, presenting the arguments in this way has a number of advantages for our purposes. I hope that this contrast will make clear not only what, but more importantly, how much is at stake in our initial choice of method. In addition, the reduction of complex positions to their simple end results will allow us to see that each of the models reflects ideas,

¹⁴ Based on work previously published as Maleiha Malik, "The Branch On Which We Sit": *Feminism, Multiculturalism and Minority Women*, in *FEMINIST PERSPECTIVES ON FAMILY LAW* 211 (Alison Diduick & Katherine O'Donovan eds., 2006).

presuppositions and debates which will be immediately familiar to us all. The aim of this analysis is neither to resolve the issue between postmodern feminism and its critics, nor to provide one overarching theoretical approach. Rather, what follows is a more modest task of retrieval: what types of modifications do we need to make to the usual methods of feminist analysis so that we can better understand—and accommodate—minority women?

The first cluster of ideas, which I have loosely called “scientism,”¹⁵ is similar in some respects to the “scientific feminism” of approaches that have been criticized by Carol Smart and Drucilla Cornell. This approach has as its central presupposition the belief that the study of human practices can model itself on the natural and physical sciences. It is partly summarized in the approach of certain writers such as A. J. Ayer: “[J]ust as I must define material things . . . in terms of their empirical manifestations, so I must define other people in terms of their empirical manifestations—that is, in terms of the behaviour of their bodies”¹⁶ There are a number of aspects of this approach which are important for an analysis of gender and minority women. The first is the belief that there must be a strict separation between fact and value: the description of a social practice is one thing; its evaluation is something quite different. The second is the *priority of the right over the good*—that is, the belief that human agency is about the capacity to create an identity through the exercise of radical choice, rather than about participating in any prior conception of the individual or common good. Third, the subject is abstracted from the context of decision-making such as language, community and culture so that identity tends to be interpreted as a “monological” process. Thus, there is an atomistic treatment of human conduct: complex human actions are analyzed in terms of their simple components. This ahistorical analysis emphasizes the basic action as the proper temporal unit for the study. The importance of the intentions, motivation and inner-states of consciousness of the human agent, are ignored, or at the very least, marginalized.

The techniques for analysis which this model advocates are description and observation. The theorist is encouraged to neutralize her own perspective and evaluative criteria before studying the subject matter. In this way, the subject matter is made more manageable: the focus is on qualities which are absolute and can be stated with precision; the theorist is necessarily forced to concentrate on the outward rather than inner dimensions of human conduct. A particular

¹⁵ For an example of the use of this term see E.F. SCHUMACHER, A GUIDE FOR THE PERPLEXED 4, 35, 37, 44 (1977).

¹⁶ ALFRED JULES AYER, LANGUAGE, TRUTH AND LOGIC 130 (2d ed., Dover Publ'ns 1952) (1936).

practice is described using accurate, certain and definite concepts, and in an all or nothing way. Finally, this positivist model is consistent with an understanding of language as an instrument for "designating" existing subject matter and reality that exists "out there."

I think it will be clear from the way in which I have presented the model that I do not consider it an attractive way to proceed, nor do I find its assumptions concerning human agency convincing. Moreover, this method is inappropriate to address the central challenge of understanding minority women because it does not have the appropriate resources to allow for the description of, and qualitative distinctions relating to, inner-states. These inner-states—motivations, feelings and desires—cannot be stated with scientific accuracy and by using empirical proof, which is the main tool of scientism.

Most importantly, this approach ignores the need for feminist theory to move beyond claims that it has access to one absolute truth so that it can accommodate the complexity of difference in the lives of women. Recognition of difference means that that the focus of our inquiry—the lives and practices of women—is no longer homogenous or stable. Smart, for example, argues for a method that is willing to sacrifice some certainty and objectivity in favor of greater responsiveness to difference.¹⁷ This comes closer to what I term a "human sciences" approach that lies in contrast to "scientific feminism." I do not want to undertake a point by point comparison of "scientific feminism" to a "human sciences" approach to feminism, but some contrast between the two is illuminating because it reveals the specific ways in which we need to modify feminist analysis to accommodate minority women and take their experiences and differences seriously.

The key distinction between the two models is that the human sciences approach takes as an essential principle the fact that human agency raises unique issues for method and analysis. This has a number of consequences for feminist theory. First, this alternative approach challenges not only the validity but also the possibility of describing human conduct without first undertaking the difficult task of evaluation—that is, we cannot understand human action without first understanding the purpose for which that action was undertaken. Therefore, understanding the point, value and significance of conduct as conceived by the people who performed it—and which are reflected in their discourse, actions and institutions—is a key task for the theorist.¹⁸ Second, any study of individual human conduct must also attend to the

¹⁷ Carol Smart, *The Quest for a Feminist Jurisprudence*, in FEMINISM AND THE POWER OF LAW 66 (Maureen Cain & Carol Smart eds., 1989).

¹⁸ See generally Max Weber, *The Nature of Social Action*, in SELECTIONS IN TRANSLATION (W.G. Runciman ed., Eric Matthews trans., 1978).

communal context of actions, such as language, community and culture. This means that individuals cannot be understood in an atomistic all or nothing way; the exercise of freedom and choice by an individual must be understood in this wider context. Third, this different approach is less resistant to shifting the focus of analysis from the outward manifestation of human conduct towards inner-states of consciousness. It is consistent with the view that an essential rather than contingent feature of human agency is that agents not only make choices about what they want, but they also undertake a process of reflection about these choices by ranking them against evaluative criteria. They undertake a process of self-interpretation to judge certain inner-states as belonging to an integrated—and therefore more valuable—mode of life; and others as unworthy.¹⁹ Purpose, intent, motivations and inner-states necessarily require us to place these features within the context of the agent's history, and social practices become intelligible only when understood as part of an ongoing tradition. The basic action gives way to a different temporal unit for analyzing human conduct. Human action, therefore, needs to be analyzed not as a static one off event, but as part of a dynamic process. To paraphrase Alisdair Macintyre's observations: human agency is "a quest—a narrative—a progression towards purpose and unity."²⁰ Like postmodern feminism, this approach takes seriously the need to "situate" women in a wider context for analysis.

So this contrast between "scientific" and a more "human science" feminism highlights the way in which certain modifications need to be made to theory in order to better understand differences amongst women. The main point is that these modifications will allow a greater focus on the purposes, intentions and motives of subjects. This approach will also take seriously the way in which historical and social contexts are important to the self-definition of women, their feelings and their choices. In this way, it is more likely that the experiences of minority women can be better articulated, understood and accommodated.

This alternative approach also has important implications for our choice of method, concepts and language. Observation and description remain important devices, but the theorist has to start by undertaking the

¹⁹ This is the idea of "strong evaluations" that we find in the work of Charles Taylor and the idea of second-order desires and reflexivity in Harry Frankfurt's discussions of the mind-body problem. The idea is that motivations, intention and inner-states of consciousness should be a central focus for the study of human conduct. See, e.g., Charles Taylor, *What is Human Agency*, in HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS, VOL. I 15-44 (1985); Charles Taylor, *Interpretation and the Sciences of Man*, in PHILOSOPHY AND THE HUMAN SCIENCES: PHILOSOPHICAL PAPERS 2, 15-57 (1985); Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

²⁰ ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (1981).

difficult task of identifying the point, value and significance that the subjects feel they are pursuing. Rather than mere description of outer action, this method gives a better understanding of the subject *from her own perspective*. This results in an inter-subjective understanding rather than an objective description that is being forced from the outside.²¹ However, this modification—that is, the move from neutral universal description to inter-subjective understanding—is fraught with difficulties. More specifically, this different method raises some intractable problems. How can an outsider to a tradition (race, culture or religion) accurately understand purpose and inner-motivations? Are there any evaluative criteria by which we can judge some purposes and inner-motivations as being better or worse, beneficial or harmful to women? There will be a wide variety of purposes and inner-states of consciousness which will vary between minority women and within the individual lives of minority women. How can a method capture such unstable subject matter?

If a non-distorted understanding of minority women requires attention to purpose, point and inner-motivation, then this has important implications. Any theoretical perspective and selection of viewpoint must remain sensitive to these aspects. As stated earlier, texts that are able to reflect these aspects—written by women who are themselves able to recognize, appreciate and accurately describe the inner-motivations of subjects—become more important. Most importantly, analysis must at each stage align itself with the lived experiences of minority women, as they understand them. In a less formal sense, this idea is reflected in Iris Murdoch's philosophical and fiction writing which is a passionate call for our theorizing to connect with essential features of our human experiences.²² In the present context, paying attention to texts that have authority in the lives of minority women, and their own writing and literature, will be essential for any theorist who sets herself the task of making minority women's inner-lives more intelligible.

There remain more fundamental problems of "uncertainty" which arise because attention to point, motivation and inner-states of consciousness complicates the subject matter. These features vary between different persons and contexts, and they can also vary considerably within the life of the same person over a period of time. Taking them into account makes the lives of women less amenable to study using descriptive and "all or nothing" concepts. Conceptual

²¹ Maleiha Malik, *Faith and the State of Jurisprudence*, in FAITH IN LAW: ESSAYS IN LEGAL THEORY 129 (Peter Oliver et al. eds., 2000).

²² E.g., IRIS MURDOCH, METAPHYSICS AS A GUIDE TO MORALS (1992) [hereinafter MURDOCH, METAPHYSICS]; IRIS MURDOCH, EXISTENTIALISTS AND MYSTICS: WRITINGS ON PHILOSOPHY AND LITERATURE (Peter Conradi ed., 1997).

devices such as the identification of the focal meaning or the ideal type of a traditional practice, which are then used as the basis for evaluating and analysing how and in what ways the current practice has become corrupted, become more useful.²³

Other acute problems of uncertainty will arise in evaluating the lives of minority women. Recent postmodern scholarship tells us that this problem of “ethnocentrism” arises whenever we seek to understand a tradition as outsiders by applying evaluative criteria which are external to that tradition. Feminist theory has taken both sets of issues seriously. Critics have argued that these approaches risk eliminating “normative philosophy” from feminist theory. Benhabib, for example, argues that to move away from universal claims about the importance of equality as a universal value underpinning feminism is to throw away crucial foundations that are “the branch on which we sit.”²⁴ Butler replies that there is a need to challenge these foundations because power precedes theory, but argues that the resulting uncertainty need not collapse into nihilism.²⁵

This is a longstanding debate between postmodern feminism and its critics. Postmodern theory provides two interrelated ways of treating the problem of applying evaluative criteria by “outsiders” to the practices of “different insiders.” First, there are those—often relying on the work of Nietzsche and Foucault—who suggest that all criteria is ultimately a matter of “power” and therefore refuse to use any standards for evaluation. Second, there are others who emphasize “diversity” and suggest that the application of judgments is to do “violence”—a term which Jacques Derrida uses—to the other, and shows a failure to respect the “difference” of the other. In the present context of understanding minority women, it is unlikely that refusal to apply evaluative criteria, for whatever reason, will be helpful. For minority women, especially for those who rely on traditional cultural and religious norms, it is of critical importance that they believe these norms to be objectively true criteria for making value judgments. Therefore, a proper understanding

²³ Max Weber states in relation to ideal types:

the sociologist seeks also to comprehend such irrational phenomenon as mysticism, prophecy, inspiration and emotional states by theoretical concepts which are adequate on the level of meaning. In all cases, rational and irrational alike, he abstracts himself from reality and advances our knowledge of it by elucidating the degree of *approximation* to which a particular historical phenomenon can be classified in terms of one or more of these concepts. . . . In order that these terms should have *clear* meaning, the sociologist must for his part formulate ‘pure’ or ‘ideal’ types of systems of the relevant kind which exhibit the internal coherence and unity which belongs to the most complete possible adequacy at the level of *meaning*.

Weber, *supra* note 18, at 23 (emphasis in original).

²⁴ Seyla Benhabib, *Subjectivity, Historiography, and Politics*, in FEMINIST CONTENTIONS, *supra* note 6, at 118.

²⁵ Judith Butler, *Contingent Foundations*, in FEMINIST CONTENTIONS, *supra* note 6, at 35.

of these norms and their status in the life of minority women must take this fact seriously. In these circumstances, it is tempting to fall back on a descriptive method that is "neutral" between truth claims. At least observing and adopting a neutral "point from nowhere" has advantages because it allows us to bypass difficult questions about the choice of evaluative criteria. However, this model, as suggested above, is not ideal. The fact that there is evaluation taking place becomes obscure, but that does not mean that it is not operating.²⁶ In particular, this method will miss altogether purpose, motive, intention and sentiment, which are essential features for a non-distorted understanding of the other tradition. Therefore, a seemingly innocuous description results in distortion and misunderstanding.

This dilemma may be resolved, in part, by remaining committed to, rather than abandoning, the central requirements of the human sciences model. Hans Gadamer's work reminds us that in these contexts we come to understand through an act of comparison that allows us to "place" the different practice against a similar or analogous home practice. Attention to the purpose, intention and motivation that is necessary for us to make sense of our own practice, also provides the basic modular frame within which the different practice is accommodated and made more intelligible. Gadamer states that "only the support of the familiar and common understanding makes possible the venture into the alien, the lifting out of something out of the alien, and thus the broadening and enrichment of our own experience of the world."²⁷

The introduction of a method that makes comparison between the familiar "home" understanding of a practice and the new "alien" practice has a number of significant consequences for those involved in theorizing difference. For observers, this requires moving beyond the dominant idea that "understanding" is about reaching agreement on foundational arguments, which is an epistemology encouraged by scientific modes of thought. Once we start to move away from the assumptions of that model we can start to see the way in which the idea of "understanding" needs to be recast as a hermeneutic and relational process. In this analysis, the act of comparison of the practices and experiences of minority women with our home understanding carries within it the seeds of its own success. Whereas previously the other practice may have been viewed as merely different, undertaking

²⁶ Iris Murdoch states: "Theories which endeavour to show that all evaluation (ascription of value) is subjective, relative, historically determined, psychologically determined, often do so in aid of other differently described or covert value systems, whether political or aesthetic." MURDOCH, *METAPHYSICS*, *supra* note 22, at 204.

²⁷ Hans-Georg Gadamer, *The Universality of the Hermeneutic Problem*, in *PHILOSOPHICAL HERMENEUTICS* 8, 15 (David E. Linge ed. and trans., 1976).

comparison in a self-conscious and formal context can be illuminating. Placing the different practice against an analogous “home” practice that has point, value and significance within the life of the observer, may allow a shift, albeit a modest one, in understanding.

The use of hermeneutic methods, in a comparative context of a theorist seeking to make the practice of minority women more intelligible, may also have some transformative potential in two important respects. First, and most obviously, it can allow the theorist to gain a more accurate appreciation of the value of the practice and beliefs of minority women as they themselves experience them. Second, and more subtly, it presents a formidable and intimate challenge to the theorist’s own perspective. This alternative approach uses a “home” understanding rather than a neutral point from nowhere as the essential starting point for analysis. It follows that success in this method will require the theorist to have a more accurate understanding of her own “home” perspective—that is, she will need to review and reexamine her own commitments as a feminist. Self-understanding and the ability to analyze these preexisting commitments will be as important as objective observation and description. The theorist will need to remain open to the possibility of transformation: the study of minority women may lead to a change and shift in the fundamental criteria that are the starting point of her analysis.

There will also be important limits to this method. Most importantly, in many situations it will lead to the problem of the “hermeneutical circle,” which minority women cannot enter into because they are not able to share the “home” understanding of the theorist, and which cannot be broken because we have jettisoned the appeal to an objective and neutral set of criteria. The method will work well where despite difference there remains a sufficient basis for some shared goals, attributes and experiences. It will not work as well where these criteria start to diverge significantly. Moreover, it may fail altogether where there is a substantial chasm or binary opposition between the two worldviews: that of the theorist and that of the “different” subject. Therefore, in some cases the tradition or practice of minority women may be so alien and irrational that there is no possibility of any advance in understanding. One example of this may be the clash between a commitment to autonomy in the home understanding of the theorist and a minority woman’s insistence on adhering to a practice that causes her substantial harm. There are many practical examples of exactly these types of conflicts, ranging from the extreme cases of consent to female circumcision to other examples such as voluntary veiling or gender segregation. In the family context, the Islamic and Jewish law practice of making a right to divorce conditional on the consent of the husband is an obvious example. When faced with

these fact situations, the immediate response of the outside observer may be, "Why did she consent?" In these situations, comparison between the theorist's preexisting commitments and values and the claims of minority women may not be illuminating because the "home" understanding may act as an absolute barrier to understanding. These practices will remain irrational and inexplicable to the theorist, and will be accompanied by a judgment (using the home understanding as evaluative criteria) that they are wrong. Therefore, it could be argued that this approach will fail in exactly those situations where there is the greatest need to make the practices of minority women more intelligible.

This last problem sheds light on the limits inherent in attempts to move away from neutral objectivity as the preferred method for analysis. The argument in this Article suggests that the term "woman" needs to be subjected to an analysis that allows greater accommodation for minority women. The methods advocated do not resolve all the issues, but they do provide one way of gaining a more accurate understanding of the claims of minority women from their own perspectives. Further work needs to be done that allows us to delineate the issues with greater precision. Is difference always relevant? If not, what are the circumstances in which we need to be specially vigilant about differences caused by race, culture and religion? We also need to ask ourselves about the status of traditional values in the lives of women and the limits of consent.²⁸ Is there a floor of individual rights which minority women cannot negotiate away?²⁹ Out of these inquiries we can start to develop a better theoretical understanding of the priorities—emotions, desires and choices—of minority women and whether, and if so how, feminist theory and liberal constitutionalism can accommodate these aspects.

²⁸ Many of the cases that arise where there is a conflict between women's rights and traditional cultural and religious practices raise issues of consent. More specifically, many of these cases relate to the apparent consent of young women to marriage which they later repudiate. See, e.g., *Sohrab v. Khan* [2002] SCLR 663, Outer House (Scotland); *P. v. R.* [2003] Fam Law 162, Family Div.

²⁹ One possible source for establishing limits on consent to harmful practices is international human rights law. See Dominic McGoldrick *Multiculturalism and its Discontents*, 5 HUM. RTS. L. REV. 27 (2005).

An example of existing limits on consent to harmful practices is female circumcision. The Female Genital Mutilation Act, 2003, c. 31 (Eng.) repealed and re-enacted the Prohibition of Female Circumcision Act, 1985, c. 38 (Eng.). It makes it an offence for UK nationals or permanent UK residents to carry out female genital mutilation abroad, or to aid, abet, counsel or procure the carrying out of female genital mutilation abroad, even in countries where the practice is legal. The 2003 Act also increases the maximum penalty from five to fourteen years' imprisonment.

IV. CONCLUSION

Feminism and liberal constitutionalism already contain considerable resources that allow us to develop an intelligent response to how we can reconcile autonomy and gender equality with a more sensitive analysis of cultural and religious difference. Existing concepts, such as “autonomy,” “power,” “hierarchy” and “false-consciousness,” can be reexamined in light of our increased understanding of racism and colonialism. At the same time, we need to open up a discussion about the way in which these concepts have been tainted by ideas of evolutionary thinking and assumptions about the inferiority of non-Western cultures that continue to distort our understanding of cultural and religious difference. The starting point must be a better understanding of the choices, experiences and feelings of women from their own perspective. With this knowledge in place, it becomes easier to understand cultural and religious difference from the point of view of the subjects themselves. This is risky ground for feminism, as well as liberal constitutionalism, because this strategy opens up a series of other questions. Can we find a common basis for a “home” understanding of feminist theory around these wider sets of concerns? Is it possible to challenge dominant constructions of “woman” without collapsing into nihilism?³⁰ Is it unrealistic to hope that autonomy remains a fundamental and transformative organizing principle for feminism and liberalism? If feminism and liberal constitutionalism are to remain viable “universal” goals that also appeal to minority women—as well as non-Western cultures—then there is a pressing need to address these troubling questions.

³⁰ One response to this challenge is Drucilla Cornell’s call that definitions of the concept “woman” require feminism to take seriously issues of “ethics” and define what we mean by the “feminine.” In the context of the discussion on minority women this raises particular problems: how do we define the “ethical” and “feminine” in the face of deep differences between women? See Cornell, *supra* note 6.