Strategic Human Rights Litigation: A Feminist Reflection

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In 2012, I was lucky enough to attend a Black feminist event at the Trafford Rape Crisis Centre in Manchester, United Kingdom, where Kimberlé W. Crenshaw and Sara Ahmed spoke about intersectional feminism. Ahmed explained that she often turns to the work of Audre Lorde as a feminist lifeline. Lifelines can be “anything or perhaps it is always something” and that something might be “words sent out by a writer, gathered in the form of a book, words that you hang on to, that can pull you out of an existence, which can, perhaps later, on another day, pull you into a more livable world.”¹ Lorde’s work questioning whether the master’s tools could ever dismantle the master’s house, is among my lifelines.² The question has taken on a different significance for me and has become central to my own thinking about strategic feminist praxis and the law. Can the law ever really dismantle patriarchy and challenge the oppression and discrimination women suffer through structural inequalities? What is the role of the master’s tools in all of this? How is the law complicit in such oppression?

In this essay, I explain how Black feminist thinking has shaped my own commitment to feminist praxis as a human rights barrister through examples of the cases that I have worked on at Women’s Link Worldwide and at Doughty Street Chambers. Since 2009, I have worked in different countries and in different capacities litigating women’s rights and LGBTQI+ rights cases before regional and international human rights courts and treaty bodies.

I want to highlight how the client must always be the starting point and center of the case. This can go hand in hand with strategic feminist objectives to uncover ways in which the legal system is complicit in the discrimination and oppression of women and LGBTQI+ communities. In doing so, legal arguments can be infused with feminist legal thought. This

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analysis can be used to unearth the hidden gender and discrimination of the law.

Lived Experiences and Realities

In legal practice, I have learned to start with the life and situation of my client and work outwards. What is the problem that she is facing? How is the law contributing to that situation, and what can the law do to fix it? How do we get the courts to deal with the situation? What are the best arguments? I first learned how to be a feminist lawyer in 2009 when working at Women’s Link Worldwide, which is an incredible Global South-led organization that strategically litigates with the objective of securing more rights for more women. Over my two years of working there in Spain, I worked on issues relating to the prosecution of gender crimes perpetrated during the Argentinian dictatorship, and a number of cases before the European Court of Human Rights.

Perhaps the most significant case I worked on during that time was B.S. v. Spain. The B.S. case is a clear example of how feminist legal theory and practice can be co-constitutive. B.S. was a Nigerian migrant woman who was living and working in Spain. Not only did she face police brutality, but she faced indifference once she reported the police misconduct. During the incident, the police called her “puta negra” and hit her with a baton. She believed this was linked to her status as a Black, migrant woman engaged in sex work. Despite reporting the misconduct, the state failed to effectively investigate and identity the perpetrators. Women’s Link Worldwide represented her both in Spain and before the European Court of Human Rights. We wanted the Court to recognize that B.S. had indeed been a victim of police misconduct because of her status as a Black, migrant woman and sex worker. This would help buttress an intersectionality argument under Article 14, the non-discrimination article of the Convention for the Protection of Human Rights and Fundamental Freedoms.

When reading the work of Black feminists, one quickly understands that “[t]here is no such thing as a single-issue struggle because we do not live single-issue lives.” Many of us do not have the luxury of living single-issue lives because of who we are, where we are born, and how we live our lives. My experiences with racism and my later understanding of homophobia have ingrained in me a deep belief in the need for intersectional legal analysis. The term intersectionality was first coined by law professor Kimberlé W.

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5 Audre Lorde, Learning from the 60s, Malcolm X Weekend at Harvard University (Feb. 1982), in *SISTER OUTSIDER* 138 (1984).
Crenshaw in the United States. She analyzed judges’ flawed approach to evaluating discrimination claims along a single axis.

Crenshaw argued that Black women face discrimination due to the intersections of their race and gender. It is artificial for the law to pull those identities apart. When I teach intersectionality and the law, I use a clip from the film *Hidden Figures* to illustrate Crenshaw’s argument. Mary Jackson (played by Janelle Monáe) applies for a NASA engineer position but is told she needs to complete additional courses to qualify for the position—but those additional courses are only available in all-white colleges. She takes the case to court. Later, Katherine Johnson (Taraji P. Henson) calls out intersectional discrimination as she schools Al Harrison (Kevin Costner). Intersectionality is a theory that emerges from lived experience and reality. That is the power of Black feminist legal theory. It is attentive to women’s lived realities and uses such experiences to illustrate larger dominant structures of oppression, including capitalism, colonialism, and imperialism.

We pleaded our case in the European Court of Human Rights and asked the court to recognize the intersectional nature of the violence and discrimination B.S had faced. The Court found a violation of B.S.’s Article 3 (the prohibition of torture, cruel, inhuman, and degrading treatment) and Article 14 (the right to non-discrimination) rights. It held that the absolute *jus cogens* prohibition on torture, cruel, inhuman, and degrading treatment had been violated on a procedural basis. Ill-treatment by police on a discriminatory basis crosses the threshold of Article 3. A failure to investigate will lead to procedural violations.

The Article 3 violation was an important finding, but what really stood out was the Court’s analysis under Article 14, the non-discrimination clause. This is a parasitic right. It cannot be pleaded as a stand-alone violation but can only be relied upon if another Convention right is in play. In many cases, where the Court finds a violation of a different right within the Convention, it simply states that it has no reason to consider Article 14 separately. But we urged the Court in our pleadings to consider the discriminatory implications of the police’s behavior.

The Court’s conclusion that B.S.’s Article 14 rights were violated was unusual and landmark. The Court drew attention to her status as a Black, migrant woman and sex worker and found that this made her particularly vulnerable. While it didn’t explicitly use the word “intersectionality,” the Court effectively recognized that *multiple* statuses can be used to satisfy the “status” criteria under the European discrimination test.

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8 Id. ¶ 62.

I start with B.S. because it exemplifies how our team of attorneys was influenced by Black feminist thinking from the United States and saw Crenshaw’s critiques of legal adjudication in the United States as helpful and significant in the European context. I continue to use this framework in my legal submissions. The Inter-American Court of Human Rights has embraced intersectionality in a number of judgments, including in *Valentina Rosendo Cantu v. Mexico*, in which I co-authored an amicus brief. The European Court of Human Rights, however, lags behind. The fight to achieve legal recognition of the lived realities of women is ongoing. But this feminist strategic praxis led to a recent development in international human rights protections for LGBTQI+ rights.

**Queering Intersectionality before CEDAW**

In 2022, the Committee on the Elimination of Discrimination Against Women (CEDAW Committee) handed down its decision in *Rosanna Flamer-Caldera v. Sri Lanka*. I worked on this case with Karon Monaghan KC and Professor Christine Chinkin, instructed by the non-governmental organization the Human Dignity Trust and DLA Piper. We had filed four years earlier on behalf of Ms. Flamer-Caldera, a human rights activist and Executive Director of Equal Ground, which is an NGO that campaigns for LGBTQI+ rights in Sri Lanka. In this case, we argued that Sri Lanka’s law that specifically criminalized same-sex intimacy between women was discriminatory and violated the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The CEDAW Committee agreed with us.

The *Flamer-Caldera* decision is only the second time in history that an international treaty body has found violations of an international convention or treaty due to a country’s laws criminalizing gay or lesbian sex. It is the first finding by a UN human rights treaty body that the criminalization of lesbian conduct is a human rights violation. The decision

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14 Human Rights Council Comm’n, UN Doc. 488/1992, ¶ 5.1 (1994). The Human Rights Committee, when considering a similar provision in the Tasmanian Criminal Code, stated that the threat of prosecution itself constitutes a violation of the rights of adults consenting to same-sex conduct even if the provisions had not been enforced for a decade. There are other important international and regional cases involving the RIGHTS of lesbians. *See, e.g.*, Atala Riffo & Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (2012).
thus forms part of the important corpus of international law protecting LGBTQI+ rights. The “opinion is also significant for emphasizing the inclusive nature of CEDAW with the recommendations in particular directed to the protection and rights of lesbian, bisexual, trans and intersex women.”

In Flamer-Caldera, the CEDAW Committee found violations of “articles 2 (a) and (c)–(g), 5 (a), 7 (c), 15 and 16, read in conjunction with article 1, of the Convention, in the light of general recommendations Nos. 19, 33 and 35.” The CEDAW Committee found that criminal laws penalizing lesbians were both directly and indirectly discriminatory and used an intersectional analysis to explain that “certain groups of women, including lesbian women, are particularly vulnerable to discrimination through civil and penal laws, regulations and customary laws and practices.” This includes gender-based violence since criminalization makes lesbians vulnerable to arrest and prosecution for approaching law enforcement to file complaints of threats or harassment.

The CEDAW Committee recommended that Sri Lanka decriminalize same-sex conduct between women but also went further to find violations of Rosanna’s right to participate in activism protected under Article 7(c) of CEDAW. The CEDAW Committee held that the State in this case had “failed to protect the author against, and [has] partaken in, harassment, abuse and threats against the author’s work promoting the rights of the lesbian, gay, bisexual, transgender and intersex community in Sri Lanka.” This aspect of the Committee’s decision is incredibly important, given the extent to which women’s human rights defenders and LGBTQI+ defenders are increasingly targeted around the world. It confirms that a woman’s right to participate in activism includes participation in civil society organizations and that criminal laws can prevent such participation.

Reflecting on the case, Christine Chinkin and I have written that it “is a moment of queer celebration in working towards a world of greater equality, and the recognition of rainbow lives in the law.” We defer to the scholarly work of Black feminists again to reflect on law and emotion, and

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16 Comm. on the Elimination of Discrimination Against Women Comm’n CEDAW/C/81/D/134/2018 (Mar. 23, 2022) ¶ 9.2. This follows the Committee’s decision in Abaida v. Libya. Comm. on the Elimination of Discrimination Against Women Comm’n CEDAW/C/78/D/130/2018 (Feb. 18, 2021) (which also found a violation of Article 7(c)).
the impact of doing feminist international legal praxis in affective terms. While the language of the law flattens, its impact is often highly emotional for the clients and the lawyers who litigate these cases.

**The Hidden Gender of Criminal Data Retention Policies**

A part of my feminist legal praxis has been to work on cases that do not seem to explicitly relate to violence against women at a first glance but in which neutral laws impact women’s right to live a life free from gender-based violence. Legal practice is complicated by the “less visible obstacles,” which operate to silence, discriminate, and punish women. “Huge implementation gaps” exist between the standards and the laws. The terrain of legal practice has shifted within the last few decades. Previously, the objective was about setting standards: to overturn sexist laws and enact progressive laws in their place. Today, the objective is to identify the ways in which gender discrimination and patriarchy are embedded in the law. These laws continue to make women vulnerable to violence, though they appear to have little to do with gender discrimination and patriarchy at face value.

Take, for example, the case of Fiona Broadfoot, represented by the Center for Women’s Justice in England and Wales. This case concerned a seemingly neutral rule: someone who has been convicted of one offense may have the opportunity to clear their criminal record, but someone who has multiple convictions generally cannot. Offenses were to be held in the police database until the offender was 100 years old. The Center for Women’s Justice began to see a pattern emerge where women with criminal records for street prostitution were particularly affected and harmed by this blanket retention policy. There was no way for women to challenge the retention of the criminal convictions, which would be disclosed when applying for jobs.

The Center for Women’s Justice asked me and Karon Monaghan KC to represent Fiona Broadfoot and two similarly situated women. Having been in the care of the state as a teenager, Ms. Broadfoot was groomed and trafficked. Rather than protect her, the police arrested and prosecuted her.

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She obtained multiple convictions under Section 1 of the Sexual Offences Act 1959 for street prostitution, which at that time was gender-specific and could only be committed by women.26 “Common prostitute” was the offense recorded in the database and on the criminal record. After Ms. Broadfoot and the other women in the case exited prostitution, they found that the criminal records had a lasting impact on their lives. Thirty years later, Ms. Broadfoot was required to provide these criminal records when applying for jobs. New employers would know that she had been a “common prostitute,” and she would have to explain her painful history of exploitation.

In court, we argued that women in prostitution should not be criminalized and criminal laws that prohibit “street prostitution” should be repealed. This is supported by CEDAW General Recommendation No. 35, updating General Recommendation 19 on violence against women.27 Moreover, we argued that the retention of these old criminal records was a disproportionate interference with privacy rights. While we did not prevail on the former argument, we were able to clear the criminal records for our clients based on our arguments on the effects of the multiple conviction rule, which required job applications to disclose their convictions if they had more than one conviction.28

Fiona Broadfoot’s case highlights how a web of laws can affect victims and survivors of violence and, rather than protect them, punish them for being exploited. This results in a criminal record, which can have a cumulative effect on one’s employability and immigration status. International human rights materials recommend that these criminal records should be cleared when related to trafficking or sexual exploitation.29

These cases illustrate the importance of language. Feminism is not a monolith. Within feminism lies a multiplicity of feminist perspectives with divergent views on issues, such as prostitution/sex work. While we used the term “sex work” in the B.S. case, we used the term “prostitution” in the Broadfoot case. This reflects the language that the clients used to describe their cases. They are the ones who define their own lives and terminology—not my own feminist views on these issues. Putting the person before any feminist theory, ideology, or concept is important. Your duty as a lawyer is always to your client and to the court. This is, in my experience, a major difference between feminist legal theory and practice.

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26 Sexual Offences Act 1959, 4 & 5 Eliz. 2 c. 69, § 1 (Eng.).
28 QSA, Fiona Broadfoot, ARB v. Secretary of State for the Home Department [2020] EWCA (Civ) 130 (Eng.) [4].
The Hidden Gender of Media Law

The term “hidden gender of the law” is used by academics and practitioners in Australia to examine how the law, when applied to women’s lived experiences, reveals itself to have gendered differential impacts and effects, which are often discriminatory. In 2022, I published *How Many More Women* with my colleague from Doughty Street Chambers, the Australian international lawyer Jen Robinson, about the law’s complicity in silencing women and those who come forward with allegations of sexual and gender-based violence or misconduct. In our media and human rights practice, Jen and I were advising clients and seeing a trend in which defamation law, privacy laws, cyber harassment laws, and contract law were all being used to silence such allegations since the #MeToo movement went viral in 2017. In Europe, we have seen criminal defamation suits brought against grandmothers who raised concerns of child abuse to doctors and against directors of domestic violence shelters. Civil defamation suits are frequently threatened or brought against individuals alleging gender-based violence against powerful and wealthy men.

In the United Kingdom, the issue received press attention due to the Supreme Court ruling in *Stocker v. Stocker*. It “was beyond dispute that Mr. Stocker grasped his wife by the throat so tightly as to leave red marks on her neck visible to police officers two hours after the attack took place.” But the High Court and the Court of Appeal both found that Mrs. Stocker had libeled her ex-husband. This was based on the trial judge’s finding that “[t]he most likely explanation about what happened is that he did in temper attempt to silence her forcibly by placing one hand on her mouth and the other on her upper neck under her chin to hold her head still. His intention was to silence, not to kill.”

The judge found that Mrs. Stocker had libeled her ex-husband by saying “he tried to strangle me” in a Facebook post because the technical legal definition of strangulation, according to the judge and the dictionary, required an intent to kill. The irony is that the High Court judgment had the effect of silencing Mrs. Stocker. She was liable for costs and damages.

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34 Stocker v. Stocker [2019] UKSC 17 ¶ 61 (Eng.).
36 Stocker [2016] ¶ 43.
Mrs. Stocker eventually won in the Supreme Court after seven years of litigation and hundreds and thousands of pounds in legal fees. The Supreme Court found for Mrs. Stocker in a narrow decision focused on “meaning” in defamation law and did not consider the wider public interest of being able to speak about domestic violence in the medium of one’s choosing, whether that be on social media or otherwise. We have argued that this was a missed opportunity, especially since the Supreme Court had refused to hear from us on this issue. Through our legal practices and research, we have found that this is a global problem, with women who tweet or speak out accusations of harassment, rape, or violence being sued in courts across India, Colombia, Kenya, South Africa, Japan, and the United States.

Media law’s complicity in silencing women and, therefore, facilitating impunity, was little understood. However, a feminist analysis alongside our feminist practice made it clear that we have to advocate and fight to free women’s speech.

We need to ensure that courts understand that speaking out about gender-based violence is speech in the public interest. Through our practice, we were able to see legal threats, which are otherwise invisible to the public. We were also able to apply our feminist analysis to the issues we were seeing and that women are facing in their lives. By writing and speaking about it, we are calling for change by exposing the hidden gender and weaponization of media law.

In writing the book, we also became aware of the particular ways in which laws silence undocumented migrant women. In the United Kingdom, when migrant women came forward to report their abuse, they were arrested for immigration offenses and sent to immigration detention while their abuse remained uninvestigated. By adopting an intersectional feminist approach, we ensured that we spoke to and considered the cases of women in different situations and at different intersections to understand the ways in which the law was silencing women.

In this way, feminist theory and praxis are co-constitutive. They are both concerned with the conundrum of how the master’s tools can be used to dismantle the master’s house to put transformative equality in place for all.

38 ROBINSON & YOSHIDA, supra note 31, at 341-82.
40 For a further discussion of transformative equality, see MARSHA A. FREEMAN, CHRISTINE CHINKIN & BEATE RUDOLF, THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY 464 (2012).
That is the question we must keep asking ourselves in our strategic praxis. Black feminist legal theory and analysis can help us get there.