



FEMINIST LAW SOCIETY

2021

★ **PROGRAMME OF FEMINIST LAW LECTURES** ★

Presents:

DR HARRIET SAMUELS

PUBLIC LAW THROUGH A FEMINIST LAW LENS

LECTURE

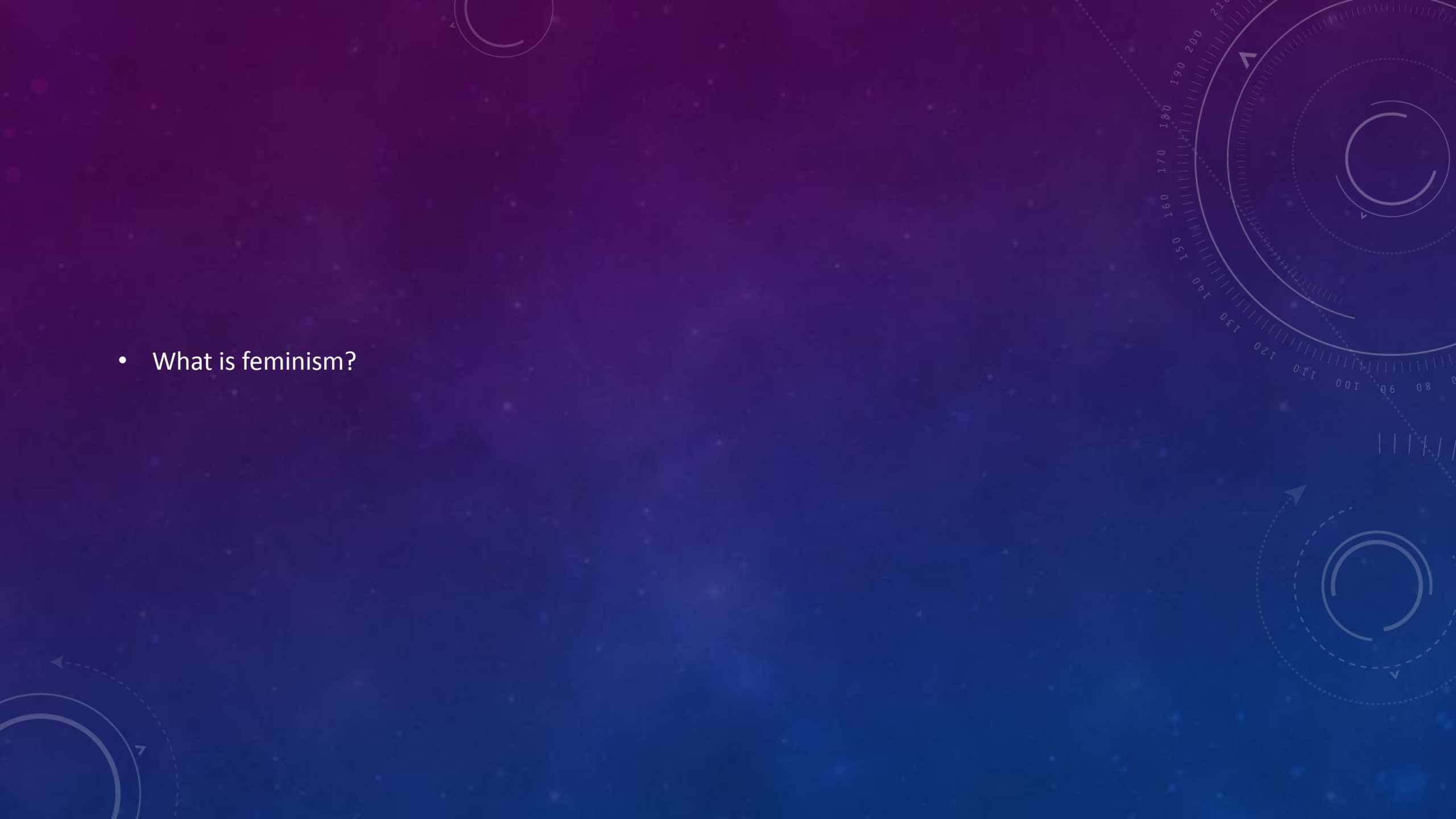
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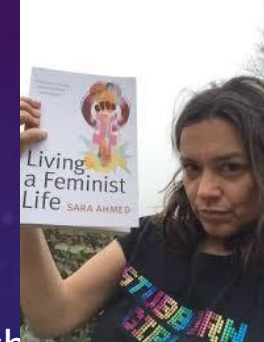
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- What is feminism?

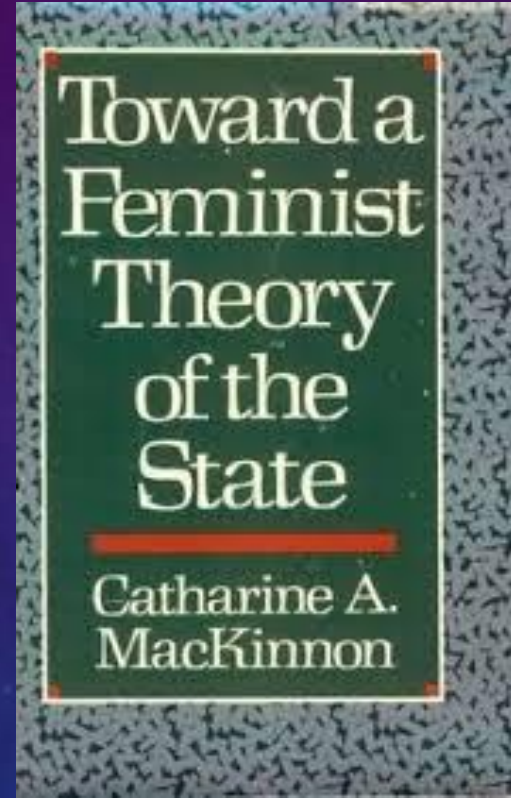
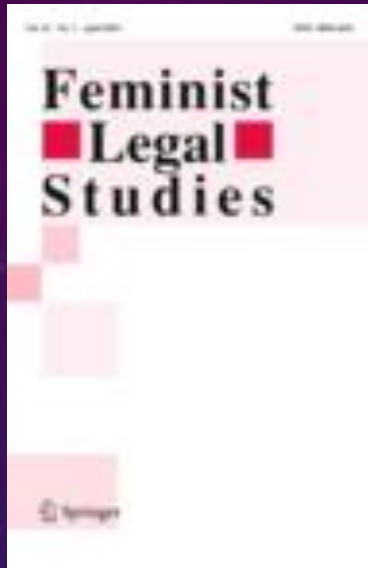


- ‘What do you hear when you hear the word *feminism* ? It is a word that fills me with hope, with energy. It brings to mind loud acts of refusal and rebellion as well as the quiet ways we might have of not holding on to things that diminish us. It brings to mind women who have stood up, spoken back, risked lives, homes, relationships in the struggle for more bearable worlds.’ Ahmed, Sara, *Living a Feminist Life*, Duke University Press, 2017,p.1

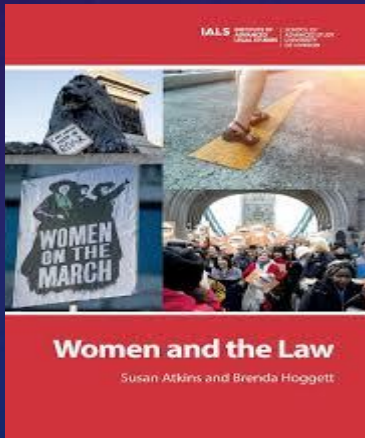


What is Feminism?

‘Feminism is a practical movement that seeks through theory, politics, culture, law and other means to expunge gendered practices. It sets out to imagine and recreate a world without gender hierarchy. Legal feminists seek to interrogate, explore and deploy law in this broader project.’ Harriet Samuels



- Feminism and Law?





- 'For the master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change. ..'Lorde, Audre, *Sister Outsider*, Crossing Press, Berkley,2007, p113

- How useful is law as a method to effect social change?
- Carol Smart's warning. See Carol Smart, *Feminism and the Power of Law* (Routledge 1989)
- 'As Smart pointed out in her key intervention in the 1980s, once laws are enacted they are vulnerable to the interpretations of those who have little understanding of the values of feminism. She argued by that by over-investing in law reform and legal scholarship feminists had conceded too much to law's claims to establish truth at the expense of disqualifying other forms of knowledge. She sought to de-centre law and to persuade feminists to look to non-legal strategies to solve problems. She urged feminists to 'resist the temptation that law offers, namely the promise of a solution'. Samuels, H. 'The Archers, the Radio, Violence against Women and Changing the World at Teatime' *Feminists@law* Vol 9, No 2 (2020)



- Nevertheless, Feminist lawyers have used every legal tool in the box to challenge patriarchal structures of the law and to inject a feminist perspective.

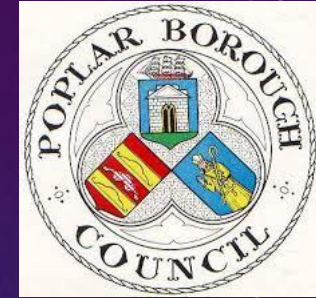
- Female Methodology:
- a. Asking the woman question:
- b. Questioning assumptions about the construction of sex and gender, especially gender roles.
- c. Questioning the Cartesian division: body and mind/ the rational and the emotional/
- d. Questioning assumptions about the public/private divide and gender roles within the public/private divide.
- e. Questioning what it means to be a person: Ideas about subjectivity and autonomy.
- f. Questioning the use of law and legal tools such as rights, harms, neutrality of law.
- g. Questioning ideas about equality. What does equality mean? Is there such a thing as equality/difference
- h. Questioning the interaction between sex, race, class, disability (critical race feminism, intersectionality)
- i. Questioning the neutrality of law and the state/ exploring patriarchy
- j. Rooting theory in practice and activism
- k. Idealist and utopian ideas. A belief that the world can be different.
- l. Feminist theory is rooted in praxis. Feminist ideas should be used to make real change.
- Barnett, Hilaire *Sourcebook in Feminist Jurisprudence*, Cavendish 1997
- Saul, Jennifer Mather, *Feminism*, Oxford University Press, 2003.

- Feminist Legal Method
- Asking the woman question and including women
- Promoting substantive equality and considering the gender implications of a decision
- Reasoning from context and the reality of women's lives rather than abstract principles
- Thinking reflexively
- Anti disadvantage principle-looking to the bottom

R. Hunter, "An Account of Feminist Judging" in R. Hunter, C. McGlynn and E. Rackley (eds), Feminist Judgments: From Theory to Practice (Oxford: Hart, 2010), pp.30–43.

- Judicial Review Principles, Gender and Common Law Values

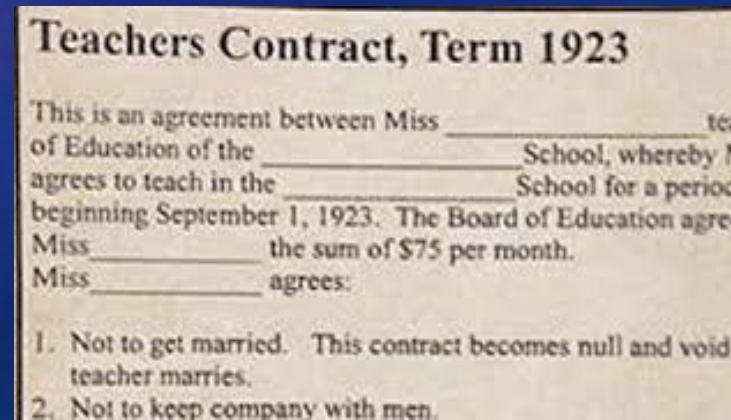
- Historic Approaches to Gender in Judicial Review Cases.



- *Roberts v Hopwood* , per Lord Atkinson [1925] A.C. 578
- s. 62 of the Metropolis Management Act, 1855 , a metropolitan borough Council, as the successors of the Board of Works, "shall employ such servants as may be necessary, and may allow to such servants such wages as (the Council) may think fit."
- 'The council would, in my view, fail in their duty if, in administering funds which did not belong to their members alone, they put aside all these aids to the ascertainment of what was just and reasonable remuneration to give for the services rendered to them, and allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour.' *Roberts v Hopwood* , per Lord Atkinson [1925] A.C. 578 at p 584

Short v Poole Corporation [1926] Ch. 66

- Dismissal of married teachers by local authority. By s. 148, sub-s. 1, of the Act, “a local education authority may appoint necessary officers, including teachers, to hold office during the pleasure of the authority, and may assign to them such salaries or remuneration (if any) as they think fit, and may remove any of those officers.”
- ‘Dealing with the present matter from this point of view, a determination to employ as far as possible women who are devoting their lives and energies entirely to the business of teaching without assuming the privilege and the burden of domestic ties, cannot in my judgment be irrelevant to the maintenance of the efficiency of the schools or the course of education in the district. So also if the adoption of the policy in question resulted from a desire that single women might be encouraged to undergo training with a fair hope of employment, it would not, as I think, be irrelevant to the question of efficiency or to the cause of education.’ per Warrington LJ.



- Pliability of Judicial Review Principles: A Cause for Hope?

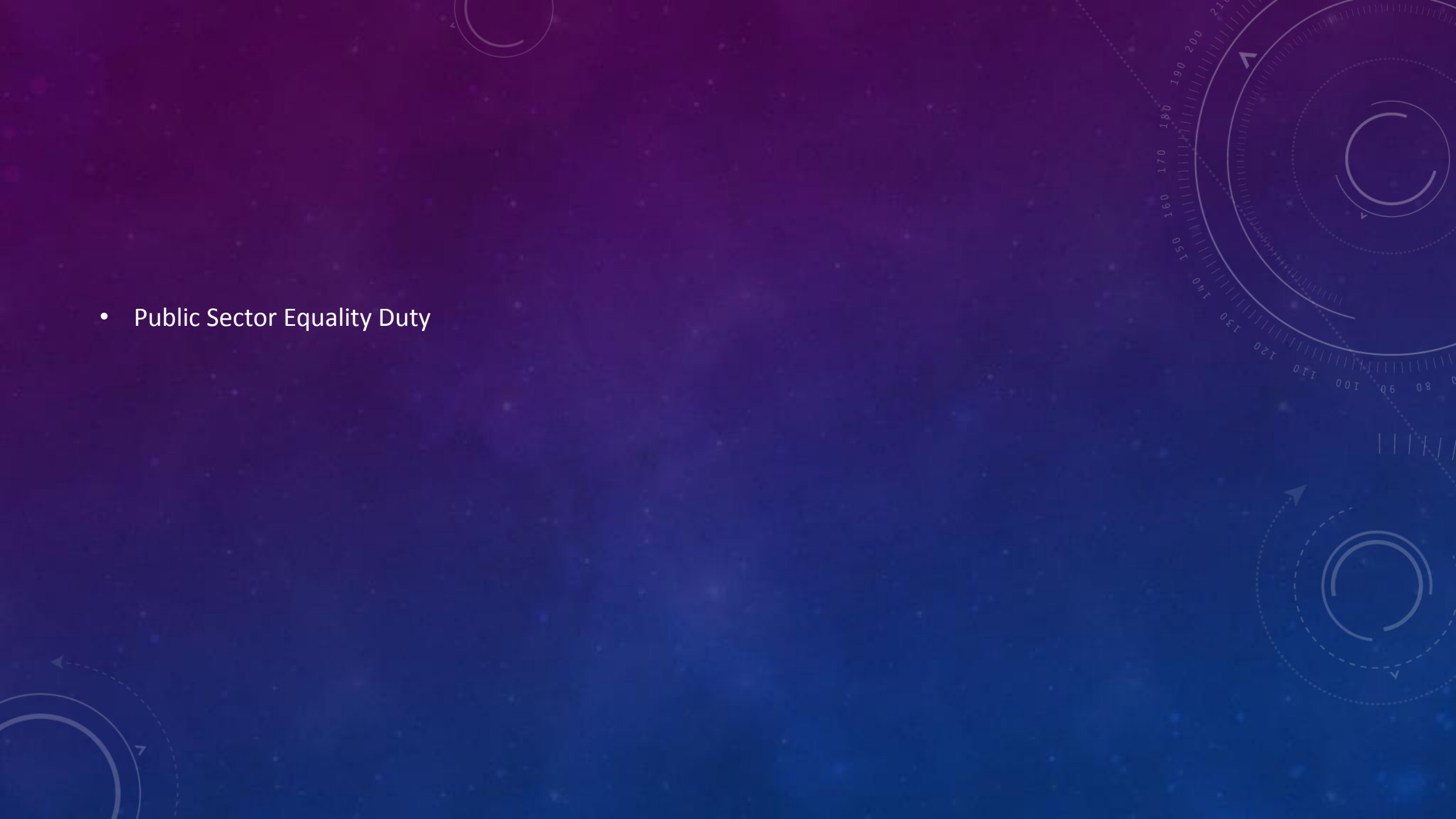
- **Legal Aid, Domestic Violence and Judicial Review**
- *R (on the Application of Rights of Women) v The Lord Chancellor and Secretary of State for Justice* [2016] EWCA Civ 91
- section 12 of the Legal Aid, Sentencing and Punishment of Offenders
- **regulation 33 provides that legal aid will not be available unless documentary verification of domestic violence is provided within the 24 month period before the application for legal aid is made**
- **‘The issue in this claim is whether procedural regulations have been unlawfully used to introduce more restrictive criteria for eligibility than those found in LASPO 2012, or whether they frustrate the statutory purpose, by prescribing the acceptable types of supporting evidence too rigidly and narrowly, thus excluding many women who ought to be eligible for legal aid under the terms of LASPO 2012 ‘**
- **‘47 So for the above reasons I would conclude that, subject to one point, regulation 33 does frustrate the purposes of LASPO in so far as it imposes a requirement that the verification of the domestic violence has to be dated within a period of 24 months before the application for legal aid and, indeed, insofar as it makes no provision for victims of financial abuse.’ The Court of Appeal applied the principles in the case of Padfield**

- **Legal Aid, Domestic Violence and Judicial Review**
- ‘Ultimately this is one of the ways we can bring about real change for all women, as opposed to the individual interventions that our direct services produce. We will continue to seek to influence changes to legislation, as we have in the past, but we remain absolutely committed to also using challenges that change regulation and law.’ Camplin, Hannah and Scott, E. “We Are a Group of Feminist Lawyers Doing What We Can”: An Interview with Emma Scott, Director of Rights of Women (2015) 23 Feminist Legal Studies 319-328.

- *Yemshaw v Hounslow London Borough Council (Secretary of State for Communities and Local Government and another intervening)* [2011] UKSC 3
- ‘The issue in this case is what is meant by the word “violence” in section 177(1) of the Housing Act 1996 Is it limited to physical contact or does it include other forms of violent conduct?’
- The court finds that the term violence includes threats, intimidating behaviour such as consistent denigration and withholding of finances.
- ‘28. That being the case, it seems clear to me that, whatever may have been the position in 1977, the general understanding of the harm which intimate partners or other family members may do to one another has moved on. The purpose of the legislation would be achieved if the term “domestic violence” were interpreted in the same sense in which it is used by Sir Mark Potter P, the President of the Family Division, in his *Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2)* [2009] 1 WLR 251 , para 2, suitably adapted to the forward-looking context of sections 177(1) and 198(2) of the Housing Act 1996 : “‘Domestic violence’ includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm.”’ per Lady Hale

- *Yemshaw v Hounslow London Borough Council (Secretary of State for Communities and Local Government and another intervening)* [2011] UKSC 3
- Feminist interpretation
- Third Party Intervention by the Women's Aid Federation
- '48. It has long been known that psychological abuse within a domestic context can cause at least as much long-term harm to the victim (most commonly the woman) as physical abuse. Certainly no one who has read the extensive material put before us by the Women's Aid Federation of England could fail to appreciate that fact.' Lor Brown para 48.
- Reliance on international human rights law (CEDAW)
- 'The court is grateful to the diligence of both interveners, the Secretary of State for Communities and Local Government and the Women's Aid Federation of England, for gathering so many of the references together. Internationally, in 1992 the United Nations Committee, which monitors the Convention on the Elimination of all Forms of Discrimination against Women ("CEDAW"), adopted General Recommendation 19, which included in its definition of discrimination in relation to gender based violence "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty". In 1993, the General Assembly adopted the Declaration on the Elimination of Violence against Women, defined for this purpose as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women" (article 1).' per Lady Hale para 20

- Public Sector Equality Duty



EQUALITY ACT 2010

149 Public sector equality duty

(1) A public authority must, in the exercise of its functions, have due regard to the need to—

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;**
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;**
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.**



Equality act 2010

section 149 (7) the relevant protected characteristics are—

age;

disability;

gender reassignment;

pregnancy and maternity;

race;

religion or belief;

sex;

sexual orientation.



Public Sector Equality Duty

R (on the application of Kaur and Shah) v London Borough of Ealing v The Equality & Human Rights Commission [2008] EWHC 2062 (Admin), 2008 WL 3819515

Section 71 of the Race Relations Act 1976

Failure to conduct an equality impact assessment of a change of policy on BAME women. The policy led to the replacement of SBS domestic violence services with one service provider for the whole borough. The court held that there was a breach of the statutory duty.

- 'Once the Borough of Ealing had identified a risk of adverse impact, it was incumbent upon the borough to consider the measures to avoid that impact before fixing on a particular solution. It erred: in having recognised the problem whilst merely hoping to assess its extent after it had settled on its criteria.' per Moses LJ para. 44

R (on the application of the Fawcett Society) v Chancellor of the Exchequer [2010] EWHC 3522

Section 76A of the Sex Discrimination Act 1975

Claimants argued the government failed to have 'due regard' to the need to eliminate unlawful discrimination and harassment and to promote equality of opportunity between men and women. This was because there was a failure to carry out a Gender Equality Impact Assessment of the Budget

The court rejected the challenge partly because the Budget had already been passed. However, the court acknowledged that the equality duty applied to government action such as the preparation and presentation of the Budget, including public expenditure limits.

- Reflexive Law?
- ***'The PSED is underpinned by a transformative model of equality, based on the idea of inclusion, with the aim of ending marginalisation and disadvantage and promoting social justice. The idea is that equality based on social inclusion can be achieved by encouraging minority or disadvantaged groups to participate in civic life, so that their voice within the community can become stronger.*** 'Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, 'The public sector equality duty: enforcing equality rights through second-generation regulation' (2018) 47 (3) Industrial Law Journal 365-398

- Human Rights Act 1998/European Convention on Human Rights

- Case law of the European Convention of Human Rights
- *Aydin v Turkey (57/1996/676/866) (rape by state officials was torture) Article 3*
- *MC v Bulgaria (2005) 40 EHRR 20* (state had a positive obligation under Article 3 and 8 to criminalise and investigate rape)
- *Opuz v. Turkey (App. No. 33401/02)* (failure of the state to protect against domestic violence was a breach of Articles, 2,3 and 14)
- *DSD and NBV v Commissioner of Police of the Metropolis [2018] UKSC 11* (The failure of the police to conduct an effective investigation in a rape case could give rise to a claim for compensation under the HRA)

- **Ghaidan v Godin-Mendoza [2004] 2 A.C. 557**

- ‘Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.’ per Lady Hale para. 132



- The Human Rights Act 1998-Article 14-Equality and Non-Discrimination in Domestic Law and Socio-Economic Rights

- Benefit Cap and Bedroom Tax Cases
- *R (on the application of Carmichael) v Secretary of State for Work and Pensions* [2016] UKSC 58
- **(Equality and Human Rights Commission intervening)**
- Regina (A) v Secretary of State for Work and Pensions (Equality and Human Rights Commission intervening)
- *R(on the application of SG and others (previously JS and others)) v Secretary of State for Work and Pensions* [2015] UKSC 16
- *R (on the application of DA) v Secretary of State for Work and Pensions* [2019] UKSC 21
- *J.D. and A v. the United Kingdom* (Applications nos. 32949/17 and 34614/17)
- [2020] H.L.R. 5

- REFLECTION

- IMPACT OF AUSTERITY ON WOMEN

- “Cooper accused the coalition government of sanctioning a budget whose impact fell disproportionately on women. The gender audit of the budget – structured by Cooper but conducted by the Commons library – showed that more than 70% of the revenue raised from direct tax and benefit changes is to come from female taxpayers.
- Of the nearly £8bn net revenue to be raised by the financial year 2014-15, nearly £6bn will be from women and just over £2bn from men.” Allegra Stratton (The Guardian); Women will bear brunt of budget cuts, says Yvette Cooper (4 July 2010)
- “New figures compiled by the House of Commons Library show women are still being hit three times harder than men by changes to welfare spending and taxation;
- Of the £16billion being raised in the current Parliament, £12billion is coming directly from the pockets of women. This includes changes to universal credit, childcare support and child benefit.” Yvette Cooper; Women are still being hit three times harder than men by Osborne’s Autumn Statement (26 November 2015)
- Keen, R. and Cracknell, R. ‘Estimating the gender impact of tax and benefits changes ‘ House of Commons Library, Briefing Paper, Number SN06758, 18 December 2017

- REFLECTION

- ‘Black and Asian lone mothers, respectively, stand to lose £4,000 and £4,200 a year on average by 2020 from the changes since 2010, about 15 and 17% of their net income.
- • Tax and benefit policies of this government are more regressive than those of the Coalition government, with men in the richest 50% of households actually gaining on average from tax and benefit changes since July 2015.’
- Runnymede Trust, *Intersecting Inequalities: The Impact of Austerity on BAME Ethnic Women in the UK*, 10th October 2017
- <https://www.runnymedetrust.org/uploads/PressReleases/Correct%20WBG%20report%20for%20Microsite.pdf> (referenced 9th November 2020).

- Reflections on Benefit Cap and Spare Bedroom Tax Cases
- The claimants were using equalities law to enforce socio economic rights
- Socio economic rights often regarded as secondary and not enforceable.
- The claimants had limited success using Article 14 ECHR and section 149 PSED.
- The courts applied the strict test of ‘manifestly without reasonable foundation’ in Article 14 cases.
- The courts are reluctant to intervene in such a politicised issue as welfare benefits and deferred to the executive/parliament.
- Lady Hale takes an alternative approach in her dissenting judgments prioritizing equality which she describes as a constitutional principle.

- Bedroom Tax/Spare room subsidy
- Welfare Reform Act 2012, introduced B13 Housing Benefit Regulation 2006
- A=a single parent who was a victim of domestic violence living in a home under a sanctuary scheme to provide security.
- A and the sanctuary scheme
- A felt safe with her neighbours and her property had been adapted and so she was reluctant to move, but she did not need a larger flat but was allocated one by the council as a smaller property was not available.. There were only a small number of people, mainly women, who were subjects of a sanctuary scheme and it was argued it was discrimination on the grounds of sex not to provide them with a specific exemption to the bedroom tax.
- Majority held that it was not discriminatory and that as their individual cases and needs were different it was reasonable for them to be dealt with by DHPs.
- There was also no breach of the PSED as there was an EIA on gender although it did not identify women in sanctuary schemes who would be adversely affected but they were a small number. The court said that there was no correlation between being in a sanctuary scheme and needing a larger room

- Baroness Hale and Lord Carnwarth Dissenting A case (sanctuary scheme)
- The housing regulations denies them the amount of benefit to stay in the property she needs.
- She does not need the extra space but to stay in the same property.
- This is unjustified discrimination against her on the grounds of her sex.
- Failing by the state to protect against gender based violence is a breach of Article 14. Sanctuary schemes meet that obligation in very serious cases. The state has a positive duty to protect against such violence.
- Denying her benefit to be able to remain is to treat her the same as any other single parent whereas she should be treated differently. See *Thlimmenos v Greece* (200) 31 EHRR 15
- The Secretary of State argues that the justification for the discrimination is that the government provides DHP. But this is not good enough as they are discretionary, cash limited, has a strict means test, hard to make applications and it is a short term solution causing anxiety to those in a very difficult situation.
- There would be no real difficulty in drafting exceptions to the regulations.
- Also held that there had been a failure to consider the PSED under section 149 Equalities Act 2010. there was nothing about those who were affected by gender based violence. This should have been considered when the public authority made its decision as their needs should be taken into account when policies are developed and this is likely to make decisions are better.

J.D. and A v. the United Kingdom *J.D. and A v. the United Kingdom (Applications nos. 32949/17 and 34614/17)* [\[2020\] H.L.R. 5](#)

A was successful in her application to the European Court of Human Rights based on Articles 14 and 8.

- ‘The Government have not provided any weighty reasons to justify the prioritisation of the aim of the present scheme over that of enabling victims of domestic violence who benefitted from protection in Sanctuary Schemes to remain in their own homes safely. In that context, the provision of DHP could not render proportionate the relationship between the means employed and the aim sought to be realised where it formed part of the scheme aimed at incentivising residents to leave their homes, as demonstrated by its identified disadvantages (see paragraph 102 above). ‘para 104

- CONCLUSION
- Challenges
- **Independent Independent Review of Administrative Law 2020** ,
<https://www.gov.uk/government/news/government-launches-independent-panel-to-look-at-judicial-review>
- Threats to judicial independence, government scrutiny and accountability
- Threats to the Human Rights Act and to equalities legislation
- Shutting out of feminist voices and closing down of legal spaces.

- Conclusion-Keeping Legal Spaces Open
- ‘Women’s Aid greatly values the current judicial review system in enabling the voices of women experiencing domestic violence to be heard in cases of public interest ... any changes to the standing for judicial reviews or costs of interveners will impact on charities representing the most vulnerable in society and will cut off their voices from being heard. ‘ Women’s Aid Consultation Response: Ministry of Justice Consultation on Judicial Review: Proposals for Further Reform October 2013, on file with the author as cited in Samuels, H. ‘Public interest litigation and the civil society factor ‘ (2018) 38 Legal Studies, 515-528

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