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# Eunomia is a Woman: Philip Allott and Feminism

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Is Philip Allott a feminist? There are reasons to feel that he might be. Eunomia, after all, is a woman. Literally a 'good social order', which Solon lauds as straightening crooked judgments and stopping the works of factional strife, the title of Allott's extraordinary book<sup>1</sup> is also the name of one of the three daughters of Zeus (chief of the gods) and Themis (tribal law).<sup>2</sup> But there is more than this. Allott's profoundly reasoned message – that human society is a product of human imagination and sense of possibility – is one that resonates for many feminists. As a methodological matter, almost all feminist legal theorists share his social constructionist stance. In feminist legal theory, this is manifested in the view that the meaning and power of sex/gender<sup>3</sup> come from culture, not nature, and that gender relations are therefore open to revision through the reform of important social institutions such as law.<sup>4</sup> Similarly, Allott writes in *Eunomia* that the international system is 'nothing other than a structure of ideas',<sup>5</sup> thereby exhorting us, feminists included, to interrogate international law at this deep ideational level because such an interrogation can bring about fundamental change.<sup>6</sup>

However, any intuition that Allott is a feminist or, at least, that there is an affinity or potential alliance between his project and a feminist project, must contend with his silence about women. In *The Health of Nations*, Allott's most recent book, a work of over 400 pages on the need for a global revolution of ideas aimed at remaking all of

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<sup>1</sup> P. Allott, *Eunomia: New Order for a New World* (paperback ed., 2001) [hereinafter *Eunomia*].

<sup>2</sup> P. Allott, *The Health of Nations: Society and Law beyond the State* (2002), at 363–364 [hereinafter *The Health of Nations*].

<sup>3</sup> The distinction is usually made between sex as a bodily or biological description and gender as the socially constructed meaning of sex. For an instance of this distinction made in international law, see Article 7(3) of the Rome Statute of the International Criminal Court, 17 July 1998, UN Doc. A/CONF.183/9\*, as corrected, reprinted in 37 ILM (1998) 999. However, feminist philosophers such as Judith Butler have problematized the assumption that sex is a natural attribute. See, for example, J. Butler, *Bodies That Matter: On the Discursive Limits of 'Sex'* (1993).

<sup>4</sup> See N. Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (1998) 3.

<sup>5</sup> *Eunomia*, at xlv.

<sup>6</sup> See Knop, 'Re/Statements: Feminism and State Sovereignty in International Law', 3 *Transn'l L. & Contemp. Probs.* (1993) 293, at 344.

human society, the words ‘woman’<sup>7</sup> and ‘sex’<sup>8</sup> are scarcely found, and the words ‘gender’ and ‘feminism’, never. Despite a six-page index of names, references to specific women are equally rare. Among the few mentioned are Margaret Thatcher, for her reliance on Hayek;<sup>9</sup> Madame du Deffand, for her Parisian *salon*;<sup>10</sup> and, perhaps most memorably, Cleopatra (or, rather, her nose) in Blaise Pascal’s musing on historical contingencies: ‘Cleopatra’s nose: if it had been shorter the whole face of the earth would have been different’.<sup>11</sup> The only female thinkers cited are Hannah Arendt<sup>12</sup> and Virginia Woolf, whose description of university graduates as ‘pale, preoccupied and silent’ Allott quotes approvingly. Woolf goes on to say that it was as if, during their three years at Cambridge, ‘some awful communication had been made to them, and they went burdened with a secret too dreadful to impart’.<sup>13</sup>

But counting words and names is, of course, too simple a gauge of feminism. In his earlier, more abstract treatise, *Eunomia*, Allott meticulously avoids any use of the male or female pronoun in order to convey the all-encompassing nature of the new international society that he philosophizes.<sup>14</sup> As this suggests, there is silence and there is silence. Silence about women may be, for example, an active attempt to exclude, an unwitting overlooking, a considered act of support that leaves or even makes space for inclusion.<sup>15</sup>

How then might we judge Allott’s silence in *The Health of Nations*? In this article I discuss whether *The Health of Nations* positions Allott as a feminist and if so, what kind. In the alternative, I examine whether there is nevertheless a possible affinity or alliance between the theory that Allott elaborates in the book<sup>16</sup> and some version of feminism, in particular feminist legal theory as it has developed in international law.

<sup>7</sup> By my count, the word ‘woman’ appears twice: once in a gender-neutral reference to the man- or woman-in-the-street (*The Health of Nations*, at 189), and once in a description of Christ as ‘the son of a Jewish woman’ (*ibid.*, at 111).

<sup>8</sup> The word ‘sex’ is found only once: in a footnote with Darwin’s title *The Descent of Man and Selection in Relation to Sex*. *Ibid.*, at 322, n.9.

<sup>9</sup> *Ibid.*, at 189, n.15.

<sup>10</sup> *Ibid.*, at 266.

<sup>11</sup> *Ibid.*, at 333, n.30.

<sup>12</sup> *Ibid.*, at 138, n.7; 139–140, n.10.

<sup>13</sup> *Ibid.*, at 17, n. 37.

<sup>14</sup> Philip Allott, in discussion at ‘Thinking Another World: ‘This Cannot be How the World Was Meant to Be’, An Event to Mark the Retirement of Professor Philip Allott, Professor of International Public Law, University of Cambridge, Lauterpacht Research Centre for International Law, Cambridge, 28 May 2004.

<sup>15</sup> But compare Charlesworth, ‘Cries and Whispers: Responses to Feminist Scholarship in International Law’, 65 *Nordic J. Int’l L.* (1996) 561, at 571 (interpreting faint mention of feminist approaches to international law among radical, critical and liberal democratic theorists of international law as evidence that such authors regard feminism as ‘a specialized discrete area, without serious theoretical consequences’) with Halewood, ‘White Men Can’t Jump: Critical Epistemologies, Embodiment, and the Praxis of Legal Scholarship’, 7 *Yale J.L. & Feminism* (1995) 1 (discussing whether white men should or can effectively write about oppression).

<sup>16</sup> I do not attempt to summarize the book’s thesis in this article. For an excellent introduction to and commentary on Allott’s vision, see Scobbie, ‘Slouching towards the Holy City: Some Weeds for Philip Allott’, this issue, at 297.

This focus also has, I hope, the advantage of highlighting a key issue, if not the key issue, that flows from *The Health of Nations*: What exactly would the conversation about the best ideas of society and law that Allott desires look like?

The article's inquiry is divided into two parts, corresponding to the two claims that Nicola Lacey defines as foundational in feminist legal theory.<sup>17</sup> The first of these claims is analytical, and the second, normative. At an analytical and indeed a sociological level, feminist legal theory is characterized by the claim that sex/gender is a powerful social structure or discourse, and, as such, is one of the forces that shape law and other dominant institutions in society. Hence, the analytical claim basic to feminist legal theory is that attention to the influence of sex/gender will lead to a more sophisticated understanding of law and how it works. The second foundational claim is that at a normative or political level, 'the ways in which sex/gender has shaped the legal realm are presumptively politically and ethically problematic, in that sex/gender is an axis not merely of differentiation but also of discrimination, domination or oppression'.<sup>18</sup> The normative aim common to feminist legal theory is thus to provide a critique of the law as it stands. For some, but not all, feminist legal theorists, this aim goes hand in hand with developing a positive conception of how law might be reconstructed in ways that better advance the ideals of sex equality or gender justice.

## 1 Sex/Gender as an Analytical Divide

While Allott draws luminously from many different fields of knowledge in *The Health of Nations*, feminism and its defining attention to sex/gender are not among them. In a number of places, moreover, sex/gender or feminism seem to call out for mention. For example, Allott refers to 'self-conceiving collective subjectivities of every kind', which he then lists in parentheses as 'nations, states, cities, corporations, races, peoples, faiths, cultures'.<sup>19</sup> Sex/gender is not on the list – despite the women's movement and, perhaps even more relevant to Allott's vision, the women's peace movement which already during World War I crossed enemy lines to meet in an act of gender and human solidarity aimed at developing ideas for ending the war.<sup>20</sup> To give another example, while Marx figures prominently in Allott's various synopses of the history of ideas, no feminist thinker does, even though, as Catharine MacKinnon memorably put it, sexuality is to feminism what work is to Marxism – that which is most one's own and yet most taken away.<sup>21</sup> A final example of the conspicuous absence of sex/gender in *The Health of Nations* is that the section of the book on

<sup>17</sup> Lacey, *supra* note 4, at 3. Lacey's definition of feminist legal theory is obviously not the only possible one. On the problem of definition, see Réaume, 'What's Distinctive about a Feminist Analysis of Law?: A Conceptual Analysis of Women's Exclusion from Law', 2 *Legal Theory* (1996) 265.

<sup>18</sup> Lacey, *supra* note 4, at 3.

<sup>19</sup> *The Health of Nations*, at 100.

<sup>20</sup> See, for example, J. Addams, E.G. Balch and A. Hamilton, *Women at The Hague: The International Congress of Women and Its Results* (1915).

<sup>21</sup> C. A. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987), at 48.

'lawyers' philosophies'<sup>22</sup> contains no reference to feminist legal theory. A clue to this omission may be the footnote defining lawyers' philosophies as self-contained and therefore excluding external theories such as law and economics and, in Allott's phrase, 'law and such-and-such'.<sup>23</sup> But even if we assume that Allott excludes feminist legal theory from the discussion on this ground, his categorization would be questionable and his inclusion of women in 'such-and-such', a rather slighting explanation.

Given that sex/gender is evidently not an axis of differentiation in Allott's diagnosis of international society and international law in *The Health of Nations*, it is clearly impossible to classify the work as feminist. Nevertheless, we may find in the book an analytical affinity and alliance with feminism and perhaps with post-colonialism as well.

Like a number of feminist and post-colonial writers,<sup>24</sup> Allott uses psychoanalytic theory to reveal the personification of the state and other collectivities, and the effects of this personification in international law. A second affinity is that Allott, like many feminists, is concerned with the imaginative monopoly of what he calls the two-realm structure of international legal society, according to which the international and national realms are intrinsically independent of one another.<sup>25</sup> What Allott's account brings to an understanding of personification in international law is, among other things, a precision about the psychological process of national self-identification,<sup>26</sup> and a differentiation of the constitutional psychologies of state, nation and society in the European context.<sup>27</sup> What *The Health of Nations* contributes to an awareness of the two-realm structure is, among other things, a pinpointing of its intellectual origins and an exposition of the leading visions of international legal society that it displaced.<sup>28</sup> Feminists offer a different and, as I shall try to show, an allied set of insights into personification and the two-realm structure respectively. The point I seek to make in the following sections is that feminists' attention to the importance of sex/gender may both support and refine Allott's conception of international law and its workings. In so doing, moreover, it may add to the normative alternatives available

<sup>22</sup> *The Health of Nations*, at 45–56.

<sup>23</sup> *Ibid.*, at 46, n.3

<sup>24</sup> Although the comparison that follows draws on work that is both feminist and post-colonial, it does not pursue the post-colonial insight that the personification of a state and its relations with other states may involve the implicit attribution of race as well as gender and sexuality. In addition to Berman, 'The Appeals of the Orient': Colonized Desire and the War of the Rif, in K. Knop, (ed.), *Gender and Human Rights* (2004) 195 and Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', 10 *EJIL* (1999) 679, both discussed below, see, for example, Ruskola, 'Homeroetic Violation as the Condition of Possibility of International Law: Gendering and Racing "International Legal Persons"', paper delivered at 'New World Legal Orders Conference: New Approaches Meet New Worlds of Law', Joint Conference of Osgoode Hall Law School and the University of Toronto Faculty of Law, Toronto, April 24, 2004.

<sup>25</sup> *The Health of Nations*, at 302.

<sup>26</sup> *Ibid.*, at ch.4.

<sup>27</sup> *Ibid.*, at ch.7.

<sup>28</sup> *Ibid.*, at 410–419.

for consideration in the conversation about the best ideas of society and law that Allott advocates as the way to a new ideal of humanity.<sup>29</sup>

### *A Personification in International Law*

Throughout *The Health of Nations*, Allott pursues the importance of what might loosely be termed the personification of collectivities:<sup>30</sup> the body politic and especially the mind politic.<sup>31</sup> In Allott's eyes, states behave like children: 'The governments of states, acting in relation to each other, are at an infantile stage of moral development'.<sup>32</sup> They are the seven-year-olds studied by Piaget.<sup>33</sup> Elsewhere in the book, he writes of states personified, 'Their psychology is the psychology of the nursery'.<sup>34</sup> But do all children act alike? The ground-breaking research of social psychologist Carol Gilligan shows that little boys and little girls think and act differently when confronted with moral problems, and that the dominant developmental standards have valued little boys' ways of thinking over those of little girls. Gilligan found that little boys more often use an individualistic, rights or justice-based mode of constructing moral questions, whereas little girls tend to adopt a holistic, responsibility-based, relational or caring model.<sup>35</sup> Hence, Gilligan's work not only identifies a bias, but formulates an alternative ethic to be valued.

Although Allott does not consider whether the state behaviour he depicts as childish might be gender-related, other of his similes and metaphors for states are gendered and make this connection seemingly inadvertently. He writes of US-USSR superpower rivalry in *The Health of Nations*: 'In the Cold War, the two nations drove each other . . . into more and more irrational behaviour, above all into a wildly hypertrophic accumulation of military weapons – those fetishistic props of troubled identity, like a fast car or a young mistress'.<sup>36</sup> This is unmistakably the stereotype of the ring-a-ding ding Western heterosexual male mid-life crisis, yet Allott neither notes nor pursues the gendered implications of his comparison. In Allott's discussion of the psychology of national self-identification, he quotes such examples as David Garrick's 'Britannia triumphant, her ships sweep the sea; Her standard is Justice her watchword, "Be free" '<sup>37</sup> and Adam Ferguson's 'Athens was

<sup>29</sup> On this conversation, see Section 2A *infra*. I should emphasize that my focus here is limited to how Allott's project as expressed in *The Health of Nations* might benefit from feminist perspectives on international law, and I therefore do not take up what Allott's scholarship might offer feminism.

<sup>30</sup> For example, *The Health of Nations*, at 58 (Vattel's 'pseudo-persons'), 104 (creations of the human mind reified and 'treated as autonomous sources of energy and significance, as if they were human actors full of human desire and human meaning', an example being 'England expects . . .'), 183 and 210 (Michelet's language of the 'soul and person' of France applied to Europe), 314 (personality assigned to 'reified ideas of particular social systems ('nation' or 'state' or 'class'), so that actuality-making choice is isolated from any particular human moral agent or agents').

<sup>31</sup> On the difference between the body politic and the mind politic, see *ibid.*, at 114–115.

<sup>32</sup> *Ibid.*, at 68.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*, at 125.

<sup>35</sup> C. Gilligan, *In a Different Voice* (1993).

<sup>36</sup> *The Health of Nations*, at 126–127.

<sup>37</sup> *Ibid.*, at 113.

necessary to Sparta, in the exercise of her virtue, as steel is to flint in the production of fire',<sup>38</sup> but the female possessive pronoun in these personifications likewise goes unremarked.

If sex/gender is absent from Allott's Freudian analysis of the projection of individual psychic processes onto collectivities and the consequences of this projection,<sup>39</sup> it is (logically) sexuality that is missing in his analysis of relations between collectivities, whether states, nations or societies. In comparison, the feminist and post-colonial international legal literature has hypothesized that particular legal stands taken by states in relation to other states can be ascribed partly to the mapping of unconscious sexualized desires onto the relationship.

Like Allott, Nathaniel Berman, for instance, views the irrational or unconscious mind as lending power to rational ideas, including rational ideas of international legal society.<sup>40</sup> More specifically, both Allott and Berman identify the projection of individual psychic processes onto collectivities as influential. They differ, however, in that Berman produces a more complex conception of personification in international law by also examining the gendering of collectivities and the sexualizing of their relations. In a historical study,<sup>41</sup> Berman uses the language of desire and the language of law to understand the positions taken by a variety of political and cultural figures on the 1925 'War of the Riff' between France and a group of Riffan rebels fighting against increasing European encroachment on their region of Morocco. In examining French images of the colonized world, Berman highlights the prominence of gender imagery and the expression of libidinal desires, and traces the ways that these fantasies inform the positions taken on the war and the international legal order appropriate to colonialism more generally. The desire of the French Socialists was chivalrously 'to save the damsel in distress, in the guise of the chaotic and fragmented Moroccan countryside'; 'the homoerotic Communist desire [was] to instruct "barbarian" virility, in the guise of the urbanized Moroccan worker';<sup>42</sup> the Surrealists' attitude toward the war revealed yet another gendered and sexualized fantasy. Berman demonstrates that the French Socialists, Communists and Surrealists each assigned man/woman, male/female or masculine/feminine differently to the Occident and the Orient, each desired a different relationship between them, and, accordingly, each advocated a different French approach to the War of the Riff.

This line of feminist analysis also has the potential to dovetail various aspects of Allott's critique in *The Health of Nations*. While Allott is concerned with projection, he does not delve into why we project one trait, quality or emotion as opposed to another. While he is troubled by the impact of popular culture,<sup>43</sup> he does not

<sup>38</sup> *Ibid.*, at 124, n.39.

<sup>39</sup> Allott identifies a threefold process in national self-identification: '(1) projection of the individual's self-process onto the collectivity; (2) *introjection* of the collectivity's self-process into the individual; (3) the forming of a *subjective totality* identified as the collectivity (the nation).' *Ibid.*, at 113.

<sup>40</sup> *Ibid.*, at 78.

<sup>41</sup> Berman, *supra* note 24.

<sup>42</sup> *Ibid.*, at 213.

<sup>43</sup> For example, *The Health of Nations*, at 14, 272.

connect it with projection. But if we pursue the gendering and sexualizing involved in projection, then we come to the questions why we imagine a certain state as man rather than woman or masculine rather than feminine, and why we sexualize its relationship with a certain other state in the way that we do. For Anne Orford, one answer lies in popular culture; particularly, the standard characters and plots that we know and internalize from popular cinema. Orford argues that the international discourse justifying intervention in Kosovo relied on narratives ingrained in the Western imagination to cast the international community as masculine action hero and the state targeted for intervention as helpless feminine victim.<sup>44</sup> Orford's analysis thus offers a possible way to use Allott's views on the influence of popular culture to develop his views on personification. It should be emphasized that critical to Orford's argument is not just her identification of a male/female subtext, but her attention to the disparity between male and female in the subtext and the function of that disparity in international legal argument. In the action-film genre, man and masculinity are usually associated with activity and strength – the ability to make and act on decisions – whereas woman and femininity correspond to passivity and weakness. And, according to Orford, the assignment of these big-screen gender roles by the international community served to legitimate its intervention in Kosovo and to minimize concern for the autonomy of the populations concerned.

### ***B Two-realm Structure of International Legal Society***

The other resemblance between Allott's structural critique of international law and feminist critiques lies in his problematizing of the two-realm structure of international legal society. Like many feminist theorists of international law, Allott argues that the division of international legal society into independent international and national realms is historically contingent. Rather than being natural or necessary, it reflects a certain view of the world legal order that found acceptance at a certain moment in the history of ideas and hence is open to revision.<sup>45</sup> But whereas Allott analyses the intellectual origins and endurance of the two-realm structure as such (the wrong turn at Vattel), these feminist theorists explain its grip on our thinking through its correspondence to the idea of separate public and private spheres that informs much of national law. That is, they trace the power of the two-realm structure to the public/private distinction in liberalism which operates at the level of national society, and to the mapping of the public/private distinction onto international society through the analogy between the individual in national society and the state in international society.

Although such feminists, like Allott,<sup>46</sup> criticize the two-realm structure as not only artificial, but harmful, unjust and discriminatory, the focus of their concerns, unlike his, is that these effects are disproportionately experienced by women. In the context

<sup>44</sup> Orford, *supra* note 24.

<sup>45</sup> *The Health of Nations*, at ch.10, 14.

<sup>46</sup> See, for example, *ibid.*, at 58–59 and the discussion in Scobbie, *supra* note 16.

of national society, the public/private distinction refers to the notional line between public and private, which is most often drawn either between the state and civil society, or within civil society so as to mark off the domestic space of family life as private. Women have traditionally existed in the private sphere. In Seyla Benhabib's words, 'Women, and the activities to which they have been historically confined, like child-rearing, housekeeping, satisfying the emotional and sexual needs of the male, tending to the sick and the elderly, have been placed until very recently beyond the pale of justice. The norms of freedom and equality have stopped at the household door'.<sup>47</sup> Feminist analysis of national law has shown that women are more vulnerable than men to serious wrongs in the private sphere, yet the public/private distinction has often prevented the law from intervening to remedy them. Feminists have imported this critique into international human rights law, where it operates directly in areas such as state responsibility for domestic violence;<sup>48</sup> and into public international law, where it operates by analogy in areas such as intervention in matters within the domestic jurisdiction of states.<sup>49</sup> Accordingly, just as liberalism traditionally safeguarded the right of the paterfamilias to make decisions within the family and continues to safeguard the freedom of market actors, the right to control one's private property or the inviolability of the individual's body (depending on the particular public/private line), international law marks off the realm of the state as a separate and unreachable sphere.

To summarize, by the analytical yardstick of feminist legal theory – the claim that sex/gender is one of the social discourses that gives law its shape – *The Health of Nations* is not a feminist work. All the same, Allott is unusual in targeting some of the same structural features of international law as feminists have and in pursuing similar types of inquiry. Beyond this resemblance, moreover, I have suggested that certain feminist analyses of personification in international law and of the two-realm structure of international legal society are compatible with Allott's in *The Health of Nations*; indeed, they may even be reinforcing and refining.

## 2 Sex/Gender and Normative Critique and Reconstruction

*The Health of Nations* is no more a feminist work when measured against the normative claim foundational to feminist legal theory than it is when stacked up against feminist legal theory's fundamental analytical claim. Allott is silent on the negative

<sup>47</sup> S. Benhabib, *Situating the Self: Gender, Community and Postmodernism in Contemporary Ethics* (1992), at 12–13.

<sup>48</sup> See, for example, Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law', in R. J. Cook (ed.), *Human Rights of Women: National and International Perspectives* (1994) 85.

<sup>49</sup> See, for example, H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000), at 30–31, 56–57; Walker, 'An Exploration of Article 2(7) of the United Nations Charter as an Embodiment of the Public/Private Distinction in International Law', 26 *NYU Int'l L. & Pol.* (1994) 173. For an overview of the debate among feminists in public international law about the value and implications of this critique, see Knop, 'Introduction', in Knop, *supra* note 24, 1, at 6–7.

influence of sex/gender on the design of the law, and, moreover, he invokes uncritically, even positively, ideas that feminism has shown to be problematic for women, such as beauty.<sup>50</sup> As at the analytical level, the question therefore becomes one of an affinity or alliance between *The Health of Nations* and feminist legal theory. At the normative level, however, this is a finer question, in part because the normative message of Allott's book appears to have a certain ambiguity. It is also a finer question because feminist legal theories vary considerably in whether they endorse a normative project of reconstruction as well as critique. Whereas the attempt to demonstrate how sex/gender currently structures the law in discriminatory and oppressive ways is basic to all feminist legal theory, not all feminist legal theorists are engaged in the sort of utopianism that would align them with Allott's themes in *The Health of Nations*.<sup>51</sup>

The book's themes include a particular approach to philosophy (social idealism), a particular *démarche* (the making of a revolution in our minds) and a particular structure for global society (the society of all societies). Allott equates social idealism with 'a belief in the capacity of the human mind to transcend itself in thought, to take power over the human future, to choose the human future, to make the human future conform to our ideals, to our best ideas of what we are and what we might be'.<sup>52</sup> If we try to relate this theme to the other two, the espousal of social idealism sounds consistent with the need 'to reconnect with . . . [our] intellectual inheritance, to explore new and better lines of thought, to search out new and better connections between ideas, ideas which may still be of redemptive value even if they are ancient ideas'<sup>53</sup> and the desire for 'a human society which does not abolish our national societies but embraces and completes them'.<sup>54</sup> It is not immediately clear, however, how the latter themes are consistent with one another; that is, if a collective process of mental transformation is needed to think the world anew, then how can Allott already seemingly be committed to a new outcome? Rather than attempt to deduce how Allott resolves this tension or how it might be resolved, and thus narrow the potential for a normative affinity or alliance with feminism, I will leave aside the outcome that Allott proposes and look only at his approach to philosophy and the process in which he places his faith.

### A Approach to Philosophy

Given his philosophy of social idealism, Allott would almost certainly disagree with the varieties of feminist theory that reject or are sceptical of transcendentalism or

<sup>50</sup> See, for example, *The Health of Nations*, at 156, 270–271. But compare E. Scarry, *On Beauty and Being Just* (1999) (defending beauty and arguing that beauty presses us toward a greater concern for justice) with N. Wolf, *The Beauty Myth* (rev. ed. 1997) (arguing (at 10) that '[t]he more legal and material hindrances women have broken through, the more strictly and heavily and cruelly images of female beauty have come to weigh upon us').

<sup>51</sup> Lacey, *supra* note 4 at 3.

<sup>52</sup> *The Health of Nations*, at x.

<sup>53</sup> *Ibid.*, at xiii.

<sup>54</sup> *Ibid.*, at 421.

‘grand theory’.<sup>55</sup> Although Allott makes no mention of feminist theory, he opposes anti-transcendentalism generally. In tracing the decline of high culture in Europe, for instance, he refers to the ‘new anti-transcendental metaphysic – the cult of the particular, scorn for the universal; adoration for the contingent, and scorn for the eternal’.<sup>56</sup> However, utopian feminism is engaged in a re-imaginative project of a nature and scale similar to Allott’s in *The Health of Nations*. As Boaventura de Sousa Santos notes – in writing on a new global utopia that differs markedly from Allott’s – utopian feminism is one of the strongest utopian undercurrents in 20th-century thought.<sup>57</sup> The tradition includes feminist utopian fiction, describing in detail societies made up entirely of women, governed by women or structured by what are considered women’s values;<sup>58</sup> feminist theorizing about the concept of utopia; and, in feminist theory, cultural feminism and also work by some post-structuralist feminists.

In the international legal literature, utopian feminism is found primarily in the form of cultural feminist arguments. Cultural feminists see sexual difference as grounded in women’s distinctive bodily experiences and relationships which generate a certain female culture or ethic. They therefore argue for a revaluation of the feminine.<sup>59</sup> A good example in international law is Hilary Charlesworth and Christine Chinkin’s critique of the priorities reflected in *jus cogens* as male.<sup>60</sup> The most thorough-going proponent of the feminine ideal in international law is perhaps the eminent British international lawyer Thomas Baty (1869–1954). This ideal is only glimpsed in Baty’s legal scholarship, but is elaborated in the feminist essays and utopian fiction that he wrote under the pseudonym Irene Clyde.<sup>61</sup> In his 1954 book *International Law in Twilight*, Baty begins with the argument that international law is in decline because it rests on the world’s common convictions, and the world no longer has any.<sup>62</sup> Some new unifying principle is therefore needed, and Baty ends by proposing ‘the dethronement of the masculine’ and ‘the according of world-wide acclaim to the Feminine as super eminent’.<sup>63</sup> While he commends sweetness, affection and honour

<sup>55</sup> Since my inquiry is about a normative affinity or alliance between *The Health of Nations* and feminist legal theory, I will not take up the possible critiques, feminist and other, of social idealism. Interestingly, one such argument is implicit in Allott’s own account of how a mobilizing idea and ideal like democracy goes badly and powerfully wrong. See Allott, ‘The Emerging International Aristocracy’, 35 *NYUJ Int’l L. & Pol.* (2003) 309.

<sup>56</sup> *The Health of Nations*, at 13.

<sup>57</sup> de Sousa Santos, ‘Three Metaphors for a New Conception of Law: The Frontier, the Baroque, and the South’, 29 *L. & Soc’y Rev.* (1995) 569, at 573, n. 4.

<sup>58</sup> Not all feminist utopian fiction is potentially relevant to Allott’s work. For Allott, the imaginary alternative depicted would have to be worthy and capable of realization at some level. See *The Health of Nations*, at 156, n.30.

<sup>59</sup> For a discussion of cultural feminism as compared to other varieties of feminism, see Lacey, ‘Feminist Legal Theory and the Rights of Women’, in Knop, *supra* note 24, 13, at 23–24. Carol Gilligan’s work has been an important source of cultural feminist arguments. See *supra* note 35 and accompanying text.

<sup>60</sup> Charlesworth and Chinkin, ‘The Gender of *Jus Cogens*’, 15 *HRQ* (1993) 63.

<sup>61</sup> There is a growing literature on various aspects of Baty’s life and work. For an appreciation of Baty and a bibliography, see Murase, ‘Thomas Baty in Japan: Seeing Through the Twilight’, 73 *BYbIL* (2002) 315.

<sup>62</sup> T. Baty, *International Law in Twilight* (1954), at 13.

<sup>63</sup> *Ibid.*, at 300.

over self-assertion and bluff imperiousness,<sup>64</sup> Baty does not elaborate on the meaning of feminine and masculine in *International Law in Twilight*. Instead, a footnote in the introduction<sup>65</sup> refers the reader to a volume of essays by I. Clyde entitled *Eve's Sour Apples*, in which Baty/Clyde takes as his/her watchwords 'feminism, aristocracy and pacifism'.<sup>66</sup> Intriguingly, the lament in *Eve's Sour Apples* for the demise of the cultivated classes, which Baty/Clyde took to be more delicate and hence more feminine,<sup>67</sup> is not entirely unlike portions of Allott's history of ideas.<sup>68</sup>

Although neither writes in international law, the post-structuralist feminists whose utopianism most resembles Allott's are probably Drucilla Cornell and Luce Irigaray. Nicola Lacey's description of Cornell's and Irigaray's work highlights the affinity:

they operate first and foremost at an imaginative and rhetorical level. They build on the importance of critique's insight about contingency, by insisting that we can imagine the world differently, and that the normative concepts in terms of which we shape our world – rights, justice, equality – can be reimagined, reconstructed in radically different ways.<sup>69</sup>

## B Process

Since the nature and scale of various utopian feminist projects are similar to Allott's project in *The Health of Nations*, they are conceivably a source of encouragement, inspiration and ideas for the process, or indeed the structure, that the book seeks to promote. But there is a stronger possible nexus between *The Health of Nations* and feminism; namely, that feminist ideas more generally might find a hearing or even acceptance in the conversation that Allott anticipates will generate a new ideal for humanity. Near the end of the book, Allott writes:

We will let our best ideas of society and law flow into our imagining and our understanding of the human world. By *best ideas* I mean ideas that are philosophically fruitful, psychologically empowering, morally inspiring, practically effective. Within ourselves we can find unrealised *best ideas of society and law* which are an inheritance secreted from more than 5,000 years of intense social experience. We will, at last, take up our best ideas of society and law. We will make them into humanity's ideal. We will choose them as the programme of a revolution.<sup>70</sup>

To determine whether this process is receptive to feminist voices, we need to know how the 'flow' of ideas will occur. Allott does not specify the conditions. However, by piecing together what he tells us in different contexts in *The Health of Nations*, we can say at least the following:

<sup>64</sup> *Ibid.*, at 299. See also *ibid.*, at 14 (sweetness, beauty and honour), 297 (the preservation of culture, beauty and refinement).

<sup>65</sup> *Ibid.*, at 14, n.1.

<sup>66</sup> I. Clyde, *Eve's Sour Apples* (1934), at ch.9.

<sup>67</sup> *Ibid.*, at 219.

<sup>68</sup> For example, *The Health of Nations*, at 8–14, 32.

<sup>69</sup> Lacey, *supra* note 4, at 234.

<sup>70</sup> *The Health of Nations*, at 419–420.

- (1) The best ideas of society and law are the heritage of the past 5,000 years.<sup>71</sup>
- (2) Certain polities have a larger and exemplary role to play as global agents of the ideal: especially the United States<sup>72</sup> and potentially a re-energized European Union.<sup>73</sup> There is ‘perhaps’ a role for non-Western participants.<sup>74</sup>
- (3) The universities are central to this intellectual regeneration.<sup>75</sup>
- (4) Imagination and feeling have a role to play.<sup>76</sup>

By way of comment on these features, let us return to Virginia Woolf, one of the few female voices in *The Health of Nations*. As mentioned earlier, Allott quotes Woolf’s description of Cambridge graduates as ‘pale, preoccupied and silent’ in support of his criticism of the academic system. What he does not remark upon is that Woolf’s view, developed in her two major political works *A Room of One’s Own*<sup>77</sup> and *Three Guineas*,<sup>78</sup> is bound up with the fact that Woolf herself did not have the option of a university education because in her family the boys went to public boarding-school and then to Cambridge, while the girls were educated at home. Boys were seen to need ‘not only school and college fees, but also friends, conversation, travel and independent accommodation, and all these were bought at the expense of the girls’.<sup>79</sup> Hence, although Woolf’s perspective as an outsider is integral to her appraisal of universities, she was not an outsider by her own choice.

Virginia Woolf serves as a reminder of the reasons to doubt that feminism could find a hearing, let alone a place, in the process that Allott advocates. If we take each feature of the process in turn, the first three, without more, seem unpromising, whereas the last offers some hope:

- (1) There are gender inequality and other forms of social inequality built into the theories that are Woolf’s and our intellectual inheritance and on which Allott relies. While he is sensitive to the history of colonialism and contemporary inequalities between states,<sup>80</sup> these other inequalities do not figure in his accounts of such theories.
- (2) The United States in its world leadership role has hardly shown itself to be committed to sex equality or gender justice.<sup>81</sup>
- (3) A conversation centred on universities would exclude precisely the kind of outsider thinking that Woolf brought. This elite environment contrasts with, for

<sup>71</sup> See *ibid.* See also *ibid.*, at xiii.

<sup>72</sup> *Ibid.*, at 151–152.

<sup>73</sup> *Ibid.*, at 181, 228.

<sup>74</sup> *Ibid.*, at 313. In stronger terms, see *ibid.*, at 151 (asserting that global agents of the ideal must include all those whose religion or tradition or self-conceiving recognizes the idea of the ideal), 352 (noting a parallel development in the idea and the ideal of law in otherwise disparate cultures).

<sup>75</sup> *Ibid.*, at xii–xiii, 4–5, 9, 32.

<sup>76</sup> *Ibid.*, at 133.

<sup>77</sup> V. Woolf, *A Room of One’s Own* (1929).

<sup>78</sup> V. Woolf, *Three Guineas* (1938).

<sup>79</sup> Barrett, ‘Introduction’, to V. Woolf, *A Room of One’s Own and Three Guineas* (M. Barrett, ed., 1993) ix, at xiii.

<sup>80</sup> See, for example, *The Health of Nations*, at 301, 400–405.

<sup>81</sup> See, for example, ‘Ten Years’ Hard Labour’ *The Economist*, 4 September 2004, at 74.

example, the forms of local consciousness-raising typical of the early women's movement, which develop new critiques and ideals from experience.<sup>82</sup>

- (4) Allott's recognition of the role of imagination and feeling suggests that fiction such as Woolf's could constitute a contribution to the conversation. Indeed, he comments, in response to Plato's fear of the corrupting power of the imaginary:

high art, including Homer and the Greek tragedians but also including works of Mozart and Turner and Dostoyevsky, enables us to philosophise, inwardly and perhaps unconsciously, to contemplate ourselves, our human-made reality, and consciousness itself.<sup>83</sup>

This role for the fictional is potentially in sympathy both with feminist work on the role of the affective in judgment<sup>84</sup> or, more specifically, the importance of literature to law;<sup>85</sup> and with feminism's emphasis on the particular.<sup>86</sup>

Moreover, Allott's attitude to the imaginary could also expand the conversation that he anticipates, whether actually or virtually. Then again, this depends on how Allott defines 'high art' and whether his definition is capable of incorporating a wide variety of standpoints and experiences. Would Woolf's writing indeed count? It is, after all, not the philosopher Mr. Ramsay, but his wife Mrs. Ramsay, who may be considered the central figure in Woolf's *To the Lighthouse*.<sup>87</sup>

\* \* \*

Is Philip Allott a feminist? *The Health of Nations* is not a feminist work, although we may find in it an affinity to or a possible alliance with some varieties of feminism. But even if we find none, *The Health of Nations* may nevertheless contribute to a feminist project in international law. A number of commentators have remarked on or responded to Allott's style of writing. Ronald St. John Macdonald, an enthusiast of utopian thinking in international law,<sup>88</sup> says of *Eunomia*'s prose: 'Within a rigid structure, the writing itself is at times almost poetic; there is an internal rhythm to the work, a sense of cycle and process. Devices of repetition and reiteration are used, creating a rather liturgical effect'.<sup>89</sup> In a similar vein, Martti Koskenniemi ends his

<sup>82</sup> See C. A. MacKinnon, *Toward a Feminist Theory of the State* (1989), at ch. 5.

<sup>83</sup> *The Health of Nations*, at 23. See also *ibid.*, at 271 ('The imagining of a parallel world is a continuation of philosophy by other means').

<sup>84</sup> See, for example, Nedelsky, 'Embodied Diversity and the Challenges to Law', 42 *McGill L.J.* (1997) 91.

<sup>85</sup> See, for example, M. C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* (1995).

<sup>86</sup> As Seyla Benhabib has written: 'Since they have had to deal with concrete individuals, with their needs, endowments, wants and abilities, dreams as well as failures, women in their capacities as primary caregivers have had to exercise insight into the claims of the particular. In a sense the art of the particular has been their domain.' Benhabib, *supra* note 47, at 14.

<sup>87</sup> V. Woolf, *To the Lighthouse* (1927).

<sup>88</sup> See Knop, 'Utopia Without Apology: Form and Imagination in the Work of Ronald St. John Macdonald', 40 *Can. Y.B. Int'l L.* (2002) 287.

<sup>89</sup> Macdonald, Book Review of *Eunomia: New Order for a New World* by P. Allott, 70 *Can. Bar Rev.* (1991) 822, at 823.

review of *Eunomia* with the word ‘Amen’.<sup>90</sup> Although Fredric Jameson has a more specific set of mental operations in mind, Macdonald’s description of *Eunomia*’s effect as ‘liturgical’ and the register of Koskenniemi’s closing are reminiscent of the approach to utopias that Jameson sets forth. For Jameson, it is less illuminating to treat utopian discourse as a mode of narrative than to appreciate it as ‘an object of meditation, analogous to the riddles or *koan* of the various mystical traditions, or the aporias of classical philosophy, whose function is to . . . jar the mind into some heightened but unconceptualizable consciousness of its own powers, functions, aims and structural limits’.<sup>91</sup> As such an object of meditation, Allott’s work contributes immeasurably to all emancipatory projects in international law.

<sup>90</sup> Koskenniemi, Book Review of *Eunomia: New Order for a New World* by P. Allott, 87 *AJIL* (1993) 160, at 164. See also Koskenniemi, ‘International Law as Therapy: Reading The Health of Nations’, this issue at 327.

<sup>91</sup> Jameson, ‘Of Islands and Trenches: Naturalization and the Production of Utopian Discourse’, 7:2 *Diacritics* (1977) 2, at 11.