Gender Perspectives in Law 5

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Reassessing Feminist Legal Theories

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Reassessing Feminist Legal Theories: Introduction

Miodrag A. Jovanović and Ana Zdravković

The latest book in the Springer series *Gender Perspectives in Law*, which is entitled *Reassessing Feminist Legal Theories*, offers a perspective on theoretical/philosophical grounding of some of the dominant themes from the disciplinary field. The title of the volume, however, already pinpoints some of the intricate and harshly debated meta-theoretical issues of the scholarship. First of them concerns the adjective 'feminist' in correlation to law. By deliberately merging and contrasting some of the classical works in the field with fresh scholarly contributions, the volume problematizes the very meaning of concepts 'feminism/feminist' and 'gender', their mutual relation, as well as their correlation with 'law'.

To begin with, even if we assume, which is not in itself uncontroversial, that a 'feminist' perspective necessarily depicts the connexion between 'gender' and 'law', it is far from clear how one should think of the resultant disciplinary endeavour. Namely, does this perspective enable grounding of a discipline labelled 'law and gender', akin to similar scholarly fields, such as 'law and society', or 'law and religion'? This seems to be Conaghan's approach, who states at the beginning of her book with that exact title, that it is about "exploring the relationship between law and gender."[1] Alternatively, a feminist perspective may serve the purpose of devising a

[1] Conaghan (2013), p. 5. By the end of the book, she offers some tentative conclusions. Namely, while "gender is not *inherent* in law in any absolute sense", that is, "the law–gender relationship is contingent rather than necessary", this alone "does not preclude a determination that gender is indeed built into the very forms of law", Conaghan (2013), p. 245. Hence, when arguing that "law is gendered", Conaghan is interested in "deploying gender as an evaluative tool in legal contexts", that

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distinctive area of law, called 'law on gender'/'gender law', akin to 'law on contracts and torts', or 'criminal law'. In order for something to count as an 'area of law', it should form "a subset of the legal norms in the system", which is as such "intersubjectively recognised by the legal complex in that system",[2] that is, by "a cluster of legal actors",[3] such as "judges, legislators, legal academics, private and government lawyers, civil servants, law reform movements, legal services regulators, law commissions, legal advisors, academic publishers, conference organisers, law journal editors, legal associations, court registries, casebook and textbook writers, case reporters, and the like."[4] It is important to note that, even if the dominant classification system of norms does not contain particular area of law (e.g. gender law'), one of the tasks of legal scholarship may be to try to "inaugurate" such area.[5] A feminist perspective may serve exactly this purpose.

Indeterminacy with respect to what a 'feminist perspective' amounts to has a further implication. Hence, by using 'legal theory' in plural, the volume's title indicates that different theoretical approaches towards the subject matter are possible. Indeed, a cursory overview of the literature demonstrates the lack of consensus when it comes to *the* adequate disciplinary methodology. Feminist jurisprudence is often depicted as a parcel of the wider project of critical legal studies, thereby belonging to what Bentham famously characterized as "censorial jurisprudence".[6] Such is, for example, the understanding of "feminist philosophy of law" as the discipline which "identifies the pervasive influence of patriarchy and masculinist norms on legal structures and demonstrates their effects on the material conditions of women and girls and those who may not conform to cisgender norms. It also considers problems at the intersection of sexuality and law and develops reforms to correct gender injustice, exploitation, or restriction."[7] As such, it "is an effort to

is, in "prompt[ing] a better (more inclusive) understanding of law in which gender considerations come more easily to the fore." See Conaghan (2013), p. 247.

[2] Khaitan and Steel (2023), p. 78.

[3] They are "related to each other in dynamic structures and constituted and reconstituted through a variety of processes", most important of them being "drafting, representing, advising, judging, prosecuting, teaching, and writing law." Karpik and Halliday (2011), pp. 220–221.

[4] Khaitan and Steel emphasize that, "[w]hile legal scholars are part of the legal complex, they matter with respect to determining the existence of an area of law only to the extent that their research and teaching interacts with and influences the practice of law", Khaitan and Steel (2023), p. 80.

[5] Khaitan and Steel (2023), p. 79.

[6] Whereas "expository jurisprudence" is the investigation of what the law is, "censorial jurisprudence" is the investigation of whether the existing law ought to be in line with a certain assumed standard, Bentham (1780/1789) (Kitchener: Batoche Books, 2000), p. 234. *Cf.* Bentham (1891), p. 99.

[7] "To these ends, feminist philosophy of law applies insights from feminist epistemology, relational metaphysics and progressive social ontology, feminist political theory, and other developments in feminist philosophy to understand how legal institutions enforce dominant gendered and masculinist norms. Contemporary feminist philosophy of law also draws from diverse scholarly perspectives such as international human rights theory, postcolonial theory, critical legal studies, critical race theory, queer theory, and disability studies", Francis and Smith (2021). The pressing need to

examine and reformulate legal doctrine to overcome entrenched bias and enforced inequality of the past as it structures human concepts and institutions for the future."[8]

Conaghan is not satisfied with the thus conceived methodological orientation of feminist jurisprudence. She finds it "striking . . . that although feminism and critical legal theory have together produced vast reams of literature which contest virtually every aspect of how law is traditionally conceived, mainstream legal scholarship remains strangely immune to the contamination which such a challenge presents." Therefore, she urges for "a gendered analysis",[9] a seemingly much needed methodological approach for elucidating the relation between gender and law.

Green is, however, unpersuaded by this attempt at providing a feminist analytical jurisprudence. He says that "to establish that the very forms of law are 'gendered' would take an explanation of those forms and an account of the sense in which they are masculine (or feminine)." In Green's opinion, "Conaghan does not undertake that analysis."[10] His ultimate conclusion is that, while "gender is of no relevance to general jurisprudence", it is "highly relevant to law because gender norms shape the content and application of the law." Therefore, gender warrants a familiar normative methodological approach of critical evaluation, but it is also relevant "to some problems in special jurisprudence",[11] understood as a discipline concerned with conceptual problems about some specific doctrinary issues (e.g. in family law, anti-discrimination law, labour law, etc.).[12]

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The contributions to this volume include papers written by Nicola M. Lacey, Duncan Kennedy, Dragica Vujadinović and Adriana Zaharijević, Duška Franeta, Lídia Balogh, Francesca Poggi, Zara Saeizadeh, Fabio Macioce, Wojciech Załuski and Antonio Álvarez del Cuvillo. The volume opens with the reprints of two remarkable papers that has firstly been published more than two decades ago yet have not lost their relevance.

Nicola M. Lacey addresses the fact that feminism, while challenging the concept of gender or sexual neutrality, questions the very existence of such neutrality—an

enhance the legal and factual status of women and girls, including through theoretical considerations of these matters, can also be understood in light of the fact that the prohibition of (gender) discrimination can be regarded as a *jus cogens* norm, see Zdravković (2021), p. 155.

[8] Francis and Smith (2021).

[9] Conaghan (2013), p. 15.

[10] Green (2020), p. 898. And indeed, when defining what she means by the preferred analytical method, Conaghan admits that "a truly gendered analysis turns out to require a layer of investigation not generally considered to be part of legal enquiry. Unearthing the normative premises which support legal rules and doctrines and considering their impact and effects in a wider social, political and cultural context requires a penetration of the boundaries of the strictly legal and a reframing of the legal landscape in terms which threaten the integrity of law as a discrete sphere of operation." Conaghan (2013), pp. 82–83.

[11] Green (2020), p. 911.

[12] Green (2020), p. 894. For reviewing approaches to the gender perspective in Public International Law, see Zdravković (2023) and the reviewed book.

ideal deeply ingrained in the self-conception of a liberal legal order and a crucial methodological tenet of good scholarship. Starting from the position that sex or gender plays a significant role in determining and thus elucidating the structure of social practices such as law, as well as that the impact of gender on society is inherently politically contentious, in the sense that gender serves as a focal point for oppression and inequality rather than just a form of distinction, the paper outlines the evolution of feminist legal thought. Lacey contrasts "liberal feminism" perspective, which highlights the exclusion of women from complete legal subjectivity, focusing on achieving inclusion through sex-blind equality, from "difference feminism", in which the analytical emphasis is on the assimilation of women into a male-centric understanding of legal subjectivity and which advocates for embracing and accommodating gender differences. The paper delves into the 'doble binds' that feminism encounters as it seemingly diverges from the neutrality that plays a central role in contemporary thought and the modern vision of the rule of law, while attempting to explore the implications of difference feminism on feminist practices and answer how this perspective intersects with other critical theories, particularly those addressing class and race issues, together with the question of how the concept of law influences these debates.

Duncan Kennedy offers an in-depth analysis of the complex issues surrounding male sexual abuse of women and provocative dressing, while highlighting two conflicting viewpoints: the "conventional view" which perceives provocative female attire as a trigger for abuse; and "radical feminism" which views sexual abuse as a foundational element of the patriarchal system. Through a thorough examination of how legal systems and mainstream culture eroticize dominance, violence, and abuse, the author recognizes that according to radical feminists, patriarchy manifests itself in the realm of fashion, utilizing sexual abuse as a tool for male disciplinary terror against women. This power dynamic is further entrenched by the integration of erotic pleasures of male dominance in all aspects of society. The paper concludes that abuse is harmful for both genders, not solely due to the imperative of safeguarding human rights, but also because abuse discourages risking different forms of pleasure found in the imagery of anything that abuts the real-life sites of oppression.

First originally published contribution in the book is the one co-authored by Dragica Vujadinović and Adriana Zaharijević, which represents feminist critical reconsideration of justice, identifying that it is necessary to include family justice and gender justice within the inclusive understanding of justice and equality within constitutional democracies and the context of global justice. In addition, it draws attention to the disputable nature of the mainstream separation between the public and private spheres and the ensuing reduction of justice to the public sphere. By challenging the conventional portrayal of justice as a female figure and examining the origins and interpretations of justice, particularly in relation to family and gender dynamics, this chapter delves into the evolving discourse on gender justice within contemporary justice theories. In that regard, John Rawls's idea of justice is specifically examined, together with two other mainstream theories of justice, Michael Walzer's communitarian theory and Philip Green's social-democratic theory, both of

which incorporate aspects of family and gender equality. Furthermore, the paper leans on the perspectives of liberal feminist thought on justice of Susan Moller Okin, the feminist socialist thought on justice of Nancy Fraser, and the social justice conception of Iris Marion Young.

Duška Franeta explores the common applications of the concept of human dignity within feminist discussions, particularly the concept of objectification which stems from the Kantian idea that people should not be treated as means to an end. Specifically, this concept is applied to social practices or behaviours that dehumanize women, particularly in contexts related to sex. The paper reminds that certain authors within feminist discourse advocate for the legal abolition of sexual harassment and exploitation, viewing them as forms of objectification, while for others, human dignity is critically examined as an element of (in Peter Sloterdijk's terms) the *thymotic* conceptual arsenal that closely links it to independence, autonomy, impartiality, justice, etc. When viewed in this light, human dignity is seen as disruptive to the acknowledgment of important moral values, potentially reinforcing male dominance over women. A third perspective on the usage of human dignity concentrates on shame societies and the relationship between shame and dignity, while contrasting ancient *dignitas*, shaming practices, patriarchal rank and honour with societies that respect the human dignity of women. These varying interpretations of human dignity in feminist discourse differently reflect on contemporary morality, law, and practical philosophy. Finally, Franeta elucidates ways in which they advocate for a more consistent safeguarding of human dignity, a more nuanced understanding of dignity, and challenge certain foundational aspects of contemporary law and morality.

In the next chapter, Lídia Balogh provokingly questions the role of gender as a legal concept for advancing women's rights, by trying to underline the need to separate law from the realm of activism. By recalling the constructivist understanding of gender in legal and public policy realms, which meant that it primarily served as an analytical concept that encompassed the social roles of women and men, along with the associated social expectations, stereotypes and power dynamics, it is shown that the interpretation of the notion has recently changed, since it has evolved into an activist concept, and this shift may not serve the promotion of women's issues. The analysis suggests that viewing gender as an analytical concept remains valuable in social science research for understanding gender dynamics and addressing social issues. Nonetheless, as a legal concept, gender is shown to be less relevant to women's rights than anticipated and as a political and movement slogan, it may be detrimental to women's causes. The study delves into the complex history of the Istanbul Convention and the contentious debates surrounding gender and women's rights. To contextualize gender as a legal concept, the Balogh draws parallels with the evolution of intersectionality, prompting reflection on whether a concept should be adopted in legal frameworks purely based on its success in academic analysis and activism.

Francesca Poggi conceptually analyses gender-based violence, since the concept is vague and lacks final definition, yet it is still crucial for the feminist movement. Even though the concept of gender-based violence is perhaps one of the most

important contributions that feminist thought has made to legal theory and its political and social significance is demonstrated by its widespread adoption in both theory and practice, it still raises several challenges. The theoretical aspect is particularly complex, as there are multiple interpretations of the concept within literature and legal frameworks, leading to ambiguity. From the political perspective, the feminist movement's struggle to assert gender violence has reinforced societal stereotypes by portraying women as weak and as victims. Poggi also recognizes that there has simultaneously been an overemphasis on adopting new gender-oriented criminal offences. The conceptual analysis such as the one included in this chapter should precede the identified debate in order to clarify the notions of violence and gender and their interplay.

Zara Saeizadeh deals with the citizenship of trans* individuals. Feminist perspectives on citizenship have long critiqued the traditional focus on male, white, heterosexual, and able-bodied citizenship. However, many feminist theories on citizenship uphold the gender binary system and the concept of universal rights for all, which often overlooks differences and systemic inequalities. Saeizadeh focuses on how feminist politics address the citizenship of trans* individuals through the framework of trans* citizenship as proposed by Surya Monro, while also considering Nancy Fraser's ideas on recognition. She focuses on the politics of recognition, which highlights the status and needs of citizens as crucial for achieving social justice and also illuminates the limitations of identity-based politics of recognition in feminist theories and practices which have led to social injustices and affected trans* people's needs, directly impacting their citizenship. It is argued that trans* citizenship demands the attention of feminist socio-legal researchers, practitioners, and policy makers to address the social status and needs of trans* individuals, recognizing the diversity of their knowledge and experiences.

In the paper by Fabio Macioce, the notion of vulnerability is reassessed from a feminist perspective, bearing in mind the connection between privilege and gender oppression. Within the feminist debate, it was developed in light of women's status and the issue of gender-based violence. In this later context, the notion of vulnerability has faced significant criticism for being seen as promoting unjustified essentialism and potentially reinforcing exclusion and victimhood. The paper aims to demonstrate how re-evaluating the concept of vulnerability, especially group vulnerability, can be both theoretically coherent and politically beneficial. By fostering forms of collective agency that are politically constructive, Macioce suggests that reconsideration of vulnerability can serve as a prerequisite for contesting prevailing power hierarchies, fostering new dialogues, introducing alternative narratives and uniting otherwise marginalized interests and needs.

Wojciech Załuski reflects on whether the "reasonable person standard" should be "genderized", since some courts have already adopted the "reasonable woman standard" within sexual harassment law, assuming that women have a lower threshold for identifying conduct as sexual harassment compared to men. The analysis identifies the most common arguments against such change, together with its normative implications. The main criticisms are that it may reinforce gender stereotypes and lacks a solid scientific foundation. However, it is argued in this paper that

the latter objection is not as strong, since scientific theories, such as evolutionary theory and neuroscience, support the idea of gender differences in the perception of sexual misconduct, as well as in other mental traits like attitude to risk, dominance assertion, and empathy. This suggests a following normative implication: instead of confining the reasonable woman standard to sexual harassment cases alone, it is proposed for consistency reasons either to completely discard gender differentiation in the standard (if one agrees with the first objection and/or believes that 'reasonableness' should be defined by mental faculties common to both genders), or to apply it in more legal contexts beyond sexual harassment law. The paper advocates for the former option, which involves embracing a personalist (i.e. based on philosophical view called "personalism") interpretation of the reasonable person standard, as a more convincing approach.

In the final chapter, Antonio Álvarez del Cuvillo recalls that certain feminist authors claimed that individualist notion of discrimination, derived from Aristotelian concept of equality, ineffectively address women's oppression. This concept is closely related to the idea of substantial equality prevalent in modern democracies. However, the regulations against discrimination often rely on individualistic legal frameworks, which can be narrowly interpreted by legal practitioners, reducing marginalized groups to abstract reasons for differentiated treatment. In order to reconstruct a group-based understanding of sex discrimination, it is essential to develop a theory on the damage caused by discriminatory conduct, articulating both individual and social harm. The paper claims that such an approach sheds light on various issues, including justifying affirmative action, the possibility of reverse discrimination, applying discrimination by association, distinguishing discrimination from stigmatization, and considering whether men can challenge indirect discrimination that harms them individually and women globally.

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Volumes of this sort are rarely expected to solve all the open issues in the given disciplinary field. In that respect, this volume is no exception. Although at times it may appear to reinforce some of the aforementioned divisions within the scholarship, it nonetheless strives to open the room for distinctive methodological approaches to various gender issues. In doing so, the volume fosters the idea that feminist scholarship is—to paraphrase Julie Dickson's dictum for general jurisprudence—"a broad church",[13] insofar as it welcomes all theoretical accounts that can elucidate various complex aspects of the relation between gender and law.

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