Introduction

From Law and Gender to Law as Gender – The Legal Subject and the Co-production Hypothesis

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In terms of gender equality, law is a fundamentally ambivalent artefact. It can certainly be a vector for progressive change, as documented in several of the contributions in this volume. Indeed, law has played a crucial role in many decisive battles and victories for gender equality globally, from the extension of political franchise to all those that were initially excluded therefrom (such as women, racialized minorities, servants, dependants, etc.),[1] to the more contemporary steps in the confirmation of a principle of equality among sexual orientations, gender identities,[2] family arrangements and so on. Accompanying a number of social and political struggles, law has helped tackle forms of discrimination and exclusion that were once entrenched in law and channelled claims of equal recognition and equality of opportunities relevant to the dignitarian, redistributive and participatory dimensions of equality.[3]

Conversely, law can also entrench profound inequalities – including gender inequality. Indeed, law has a long (and unfinished) history of doing exactly that, for it is also inevitably an instrument of power. Feminist legal scholars have largely documented and analysed the numerous ways in which legal rules and concepts have consolidated inequality between the sexes,[4] from the denial of political franchise to unequal civil and marital status as well as criminal protection. Formal differentiations between the sexes which underlie patriarchal legal orders are not fully in the past either. As Melanie Toombs and Kim Rubenstein remind us in Chapter 8, in 2019, twenty-five states still upheld laws with patrilineal rules of nationality transmission. Women are impeded from passing on their

[1] Hennette Vauchez and Rubio Marin, Chapter 10 in this volume.
[2] Catto and Osella, Chapter 1 in this volume.
[3] N. Fraser, *Fortunes of Feminism: From State-Managed Capitalism to Neoliberal Crisis* (New York: Verso Books, 2013).
[4] See, for example, C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989).

nationality to their children, either on an equal basis with men or altogether, because they are perceived as part of a male household and lacking independent citizenship status. These rules coexist with norms of 'marital denaturalization', still present in twenty-five countries today, which perceive women's allegiance to the state as mediated through marriage in the understanding that, when a woman marries a foreigner, she leaves her former identity behind or she betrays the home state through marriage to a non-citizen.

As the concept of gender gained traction and increasingly came to be read as one part of a much larger matrix of power dynamics and inequality (in conjunction with race, class, religion, geography, disability, etc.), feminist studies broadened their scope. They now confirm the paradoxical compatibility between formal legal proclamations of 'gender or sex equality' as a general overarching principle, an axiom in liberal democratic orders, and massively unequal outcomes in their concrete operation as testimony to the law's severe shortcomings. Women and other social groups that were historically deprived of political rights remain massively under-represented in key political decision-making arenas decades and sometimes centuries after gaining the franchise. Moreover, the striking down of racial segregation in countries where it was once legally enshrined, such as the United States or South Africa, has been unable to overcome the de facto segregation which in many ways continues to exclude racially oppressed groups from certain residential areas, educational and professional opportunities, and institutions of power. More generally, a number of important human rights – from the right to education to that of religious freedom or privacy rights – continue to be unevenly enjoyed by individuals (notably depending on their gender, race, class, ability and/or other factors), in spite of them being universally recognized.

1. Law Perpetuating and Legitimizing Gender Inequality

Time and again, law at the service of power has shown its capacity to metamorphosize in a process labelled 'preservation through transformation',[5] which allows for the emergence of new legal doctrines

[5] R. B. Siegel, 'The Rule of Love: Wife Beating as Prerogative and Privacy' (1996) 105 *Yale Law Journal* 2117–2207 at 2178–2187.

able to restrain the effects of legislation intended to overcome inequalities and, as critical race and gender scholars have shown, maintain the unequal gender and racial status quo. Law routinely expresses itself through rules and concepts that in fact perpetuate (or aggravate) inequality, even when sex-based classifications are avoided. This volume provides many examples of formally neutral legal norms that nonetheless produce enduringly and consistently unequal results, both in hermeneutical and empirical terms. Despite many affirmations to the contrary, gender-blind legal rules seem not to be blind at all, but one-eyed at best.[6]

Gender bias is often hidden behind general legal concepts and technical legal rules that may appear gender neutral in principle. In terms of general legal concepts, several chapters in this volume testify to their ambivalence. For example, in her chapter on the procreational subject (Chapter 6), Joanna Erdman highlights the ways in which the concept of 'reproductive rights' remains tied to female bodies (and thereby to the female sex) in international human rights law, and thus perpetuates the invisibilization of all other reproductive bodies, as well as the cognitive suppression of the bodies of those women who do not match 'essential womanhood'. As far as technical legal rules are concerned, labour law provides us with numerous examples. Minimum hours thresholds governing access to employment protection, or labour collectivism shaped after the manufacturing model and equal pay standards which require establishing comparisons to workers employed in the same establishment, account for much of the marginalization and segregation of women in the employment market, and the precariousness of their position in it.[7] Legal requirements in citizenship tests that do not take into account higher levels of women's illiteracy or poverty when setting fees, such as knowledge and language tests, have gendered consequences too, as do migration rules that make circular migration difficult, since this impedes migrant women from travelling back and forth to fulfil care responsibilities back home.[8] In Chapter 1, Catto and Osella tellingly document the ways in which the legal rules pertaining to sexual identity, as well as the legal requirement that every individual's sex be defined at birth, have played in most parts of the world:

[6] S. Hennette Vauchez, M. Pichard and D. Roman (eds.), *La loi & le genre, Etudes critiques de droit français* (Paris: CNRS Éditions, 2014).
[7] Conaghan, Chapter 5 in this volume.
[8] Toombs and Rubenstein, Chapter 8 in this volume.

Not only have they caused the erasure (intersex individuals) or containment (trans individuals) of physical and psychological variations in 'sex', they have also legitimized and even led to the requirement of medical practices (reassignment surgery) that would have otherwise been qualified as unacceptable violations of physical integrity.

Other examples in this volume point to the limits of many of the traditionally crafted legal remedies in tackling the roots of discrimination, or its intersectional nature, even while trying to compensate for some of its effects, or in overcoming law's territorially bounded scope in a globalized world. In Chapter 7, on the caring subject, Herring mentions the possibility of moving towards the concept of family responsibilities discrimination, rather than a broadly conceived notion of sex-based discrimination or measures to assist *women* with reconciling work and family, as a way to ensure that law does not further entrench existing gender roles while looking for remedies. The contemporary debate about extending maternity leaves versus advancing towards joint adoption of paternity/maternity leaves and gender-neutral parental leaves, which he also mentions, raises similar concerns. The possibility that all these remedies might still be insufficient to compensate for the current care labour shortage in advanced democracies leads to the phenomenon of the global care chain, showing how deficiencies in national regulatory systems are likely to have spill-over effects beyond national borders, entrenching existing socio-economic, gender and racial gaps across the globe as a result. Moreover, the phenomenon by which legal rules fail to apply fully and universally to all individuals appears repeatedly throughout the volume, making the call for intersectional analysis all the more compelling: Family law tends to either fail to protect or play out adversely for those poor, coloured, unmarried or otherwise nonconforming individuals;[9] legal regimes pertaining to the protection of women against domestic violence seem to effectively operate along the lines of pre-existing and untouched hierarchies of race and class.[10] Labour law is also filled with legal loopholes that have gendered and racialized impacts. Several of our authors remind us that the lived realities of domestic workers provide a good example of the collusion of law with structures of sexism and racism: These workers traditionally fell outside the scope of employment protection and thus

[9] Nicola and Shalleck, Chapter 9 in this volume.
[10] Bernardes and Martins, Chapter 3 in this volume.

remain uncovered by several forms of protection, such as those provided by working time and minimum wage laws, with particularly exploitative effects on live-ins.

Beyond instances where the law fails to correct gender inequality, this volume confirms that it can even legitimize it by affirming domains of legal exemption and drawing up legal exceptions in ways that entrench gendered social arrangements and gender bias. The inconceivability of marital rape in many legal systems until well into the twentieth century is a case in point: In the United Kingdom, Australia, France and the United States, it was not until the 1990s that courts and legislators reversed the principle according to which marriage conferred a right on husbands to force intercourse upon their wives, thus de facto proclaiming the family and the marital context as a domain in which protections against sexual violence against women did not apply (see also Murray, Chapter 4 in this volume). Between 1999 and 2008, the Italian Corte di Cassazione formulated the 'blue jeans exemption', refusing to find legal instances of rape whenever the victim was wearing blue jeans, based on the notion that 'it is nearly impossible to slip off tight jeans even partly without the active collaboration of the person who is wearing them'.[11] In many countries, marriage after rape continues to shield the perpetrator from liability for the aggression. In other words, the legal institution of marriage has been legally constructed to legitimize sexual violence.

2. Gender Theory and (In)Equality

The varied, complex and at times erratic ways in which both gender equality and gender inequality occur as the result or the effect of legal rules are now well documented. They are further echoed in the immensely sophisticated theoretical and epistemological discussion which is ongoing in feminist legal theory and, more generally, in all scholarship that looks at law from the perspective of gender. The topic of law and gender (in) equality has indeed generated a vast body of literature that is uniquely variegated in its theoretical underpinnings and orientations, including

[11] Cass., sez. III, 6 nov. 1998, n. 1636. B. Faedi, 'Rape, Blue Jeans, and Judicial Developments in Italy' (2009) 16 *Columbia Journal of European Law Online* 13–18.

liberal,[12] materialist,[13] radical,[14] (a variety of) postmodern,[15] and other frames, with hardly one dominant approach. In fact, scholars concerned with gender equality strongly differ in their opinions on the very identification of the best intellectual tools to shed light on the intersectional forms of oppression and subordination that women continue to be subject to. While some have called for a break with feminism,[16] others claim that feminist fundamentalism[17] is the key. Others still see more contemporary concepts and debates, such as those opened up by the perspective of intersectionality,[18] not as a disavowal of feminism but rather as a mostly welcome paradigmatic shift enabling new and mostly complementary angles of analysis.[19]

To a certain extent, the fundamental affirmation which brings together much of this astonishingly rich, sophisticated and variegated literature is that law reproduces gendered outcomes when acting upon already gendered social facts. Be it in constitutional law, contract law, land law, family law, international law, human rights law, labour law or basically any domain regulated by law, one of the accomplishments of feminist legal theory and gendered studies of law has been to establish the various ways in which law operates as a tool of perpetuation, aggravation and

[12] M. Wollstonecraft, *A Vindication of the Rights of Woman* [1792] (New York: Knopf, 1992); H. Taylor Mill, 'Enfranchisement of Women', in A. S. Rossi (ed.), *Essays on Sex Equality* (Chicago, IL: University of Chicago Press, 1970), 89–121.

[13] C. McKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989).

[14] S. Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: William Morrow, 1970); M. Wittig, *The Straight Mind* (Boston, MA: Beacon Press, 1992); A. Dworkin, *Right-Wing Women* (New York: Perigee, 1978).

[15] J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990); M. J. Frug, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1992) 105 *Harvard Law Review* 1045–1075; H. Cixous, *The Newly Born Woman* (Minneapolis: University of Minnesota Press, 1986).

[16] J. Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton, NJ: Princeton University Press, 2006).

[17] M. A. Case, 'Feminist Fundamentalism and Constitutional Citizenship' in J. Grossman and L. McClain (eds.), *Dimensions of Women's Equal Citizenship* (Cambridge: Cambridge University Press, 2009), 107.

[18] K. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1 *University of Chicago Legal Forum* 139–167; S. Atrey, *Intersectional Discrimination* (Oxford: Oxford University Press, 2009).

[19] J. Conaghan, 'General Introduction', in J. Conaghan (ed.), *Feminist Legal Studies* (London: Routledge, 2009), 10.

legitimization of gender inequality as a social reality, in spite of the fact that the banning of sex-based inequality has come to be accepted as a fundamental pillar in the affirmation of their legitimacy in more and more countries.

As the examples already mentioned show, the present volume certainly supports these important findings. However, the book uses a wider gaze in seeking to examine not only 'the many ways in which law ... harms women', or other individuals that are subordinated on the grounds of gender norms for that matter, but rather 'to make sense of the many ways gender shapes law'.[20] Starting from the premise of law's claim to knowledge and truth,[21] it intends to analyse not only the social effects of legal regulation and the deficiencies of law in changing social outcomes, but also the manner in which law actually shapes the world as we understand it both cognitively and normatively. It seeks to underline the ways in which law is gender*ing*, and not only the ways in which it is gender*ed*.[22] Such an endeavour presupposes a number of epistemological clarifications. Seeking to analyse the gendered effects of law or to unearth the ways in which it is gendering are two different analytical aims that require different epistemological starting points.

3. Social Constructionism in Law and Gender

Scholarly attempts to analyse the gendered effects of a particular set of legal rules typically posit 'law' and 'gender' as two distinct orders: 'Law' is seen as the acting normative order and 'gendered effects' are measured as empirical results from pre-existing sex-specific social facts. Such efforts tend to verify the gendered dimension of law on the basis of social outcomes that are arguably (re)produced by law. For instance, data is used to support the need for parity rules: The fact that the share of women in parliamentary representation had remained roughly the same for decades was instrumental in foregrounding the critique of falsely neutral constitutional rules pertaining to political representation, and subsequently, legitimizing active measures by means of legal reform. The assessment of

[20] N. Naffine, 'In Praise of Legal Feminism' (2002) 22 *Legal Studies* 71–101 at 72.
[21] Smart, *Feminism and the Power of the Law*.
[22] J. Conaghan, *Law and Gender* (Oxford: Oxford University Press, 2013), 67.

Nelson Mandela's decision to pardon inmates who were also mothers (as opposed to fathers) relied heavily on data indicating that mothers shouldered a disproportionate share of care duties, thus justifying the differential treatment on the basis of sex by a presidential order that ultimately sought to ensure the well-being of the country's youth.[23]

The project underlying this volume seeks to complexify the epistemology of the study of the interaction between law and gender, and the relationship between the legal and the social. It seeks to further the notion that gender (in)equality is not merely social, but also normative, and that law plays a constitutive role in shaping social reality. Data alone is insufficient to measure and analyse the full extent of the ways in which gender is pervasive in the organization and operation of socio-political orders, and in the legal rules that they put in place. The social and the legal should not be treated as two fully distinct realms of operation and effect. As Conaghan argues in this volume, the convention that affirms this separation enables 'law to self-present as an autonomous repository of norms'. This in turn has certain 'consequences for how gender is mobilized and conceptualized in law'. Specifically, 'it positions gender as a *social* rather than legal category, a product of social arrangements not legal forms, [and since] gender is conceived as extraneous to law, law may comfortably acquit itself of responsibility for gender-unequal outcomes'. In her view, a view that we share,

> [If] we adopt a conceptual frame which positions law within rather than without the iterative processes contributing to the construction of the social fabric, another picture of the relation between law and gender emerges. In this alternative conception, law does not simply act upon an already gendered social world; it is already imbricated in processes by which gender roles and relations come into being and garner normative potency. Law *genders*: In conjunction with other forms of discourse, law constrains and enables gendered identities and behaviours, fashioning and refashioning distinct gendered subjectivities.[24]

The goal of this volume is thus to contribute to the scrutiny of the ways in which social norms pertaining to gender, an instrument that actually produces sex differentiation and regulation, infuse and shape legal rules

[23] *President of the Republic of South Africa and Another* v. *Hugo* (CCT11/96) [1997] ZACC 4; 1997 (6) BCLR 708; 1997 (4) SA 1 (18 April 1997).
[24] Conaghan, Chapter 5 in this volume.

and concepts. The question underlying the volume is the following: Once gender is defined as a social construct made of social norms that are often reinforced and echoed by legal norms, to what extent can law offer emancipatory options, entangled as it is in the very making of that gender order?

Since its successful establishment of the need to complement the concept of sex (biological) with that of gender (social),[25] gender theory has experienced major debates and evolutions, many of which have been sparked by the refinement of that primary differentiation. Back in the 1980s, authors such as Moira Gatens criticized the strict opposition between nature and culture implied in the affirmation of the social dimension of 'gender' as opposed to the natural dimension of sex.[26] Judith Butler later famously suggested that sex rested on social construction as well, and that gender was in fact a performance.[27] Works by historian Thomas Laqueur and biologist Ann Fausto-Sterling further uncovered the variations in the definition(s) of sex over time and in biological substance. While the former powerfully established that the definition of two sexes as both opposite and incommensurable only dates back to the eighteenth century,[28] the latter reinforced the notion that gender effectively precedes sex: '[L]e sexe d'un corps est tout simplement trop complexe. Loin de l'alternative "ou bien/ou bien", la différence est affaire de nuances'; 'apposer sur quelqu'un l'étiquette "homme" ou "femme" est une decision sociale. Le savoir scientifique peut nous aider à prendre cette décision, mais seules nos croyances sur le genre – et non la science – définissent le sexe'.[29] Other authors, such as Gayle Rubin[30] and Eve Sedgwick,[31] also

[25] A. Oakley, *Sex, Gender and Society* (Farnham: Ashgate, 1972); K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld & Nicolson, 1985).
[26] M. Gatens, 'A Critique of the Sex/Gender Distinction', in J. Allen and P. Patton (eds.), *Beyond Marxism: Interventions after Marx* (Sydney: Intervention Publications, 1983), 143–146.
[27] Butler, *Gender Trouble*.
[28] T. Laqueur, *Making Sex: Body and Gender from Greeks to Freud* (Cambridge, MA: Harvard University Press, 1992).
[29] A. Fausto-Sterling, *Sexing the Body: Gender Politics and the Construction of Sexuality* (New York: Basic Books, 2000), 19.
[30] G. Rubin, 'Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality', in C. Vance (ed.), *Pleasure and Danger* (London: Routledge & Kegan, Paul, 1984); G. Rubin, 'The Traffic in Women: Notes on the "Political Economy" of Sex', in R. Reiter (ed.), *Toward an Anthropology of Women* (New York: Monthly View Press, 1975).
[31] E. Sedgwick, *Epistemology of the Closet* (Berkeley: University of California Press, 1990).

invited reflection on the co-dependency between gender and sexuality, linking the construction of both to the notion of heteronormativity. This connection has also been highlighted by Michel Foucault,[32] Monique Wittig[33] and, perhaps most famously, Judith Butler, who argued that 'the internal coherence or unity of either gender, man or woman, thereby requires both a stable and oppositional heterosexuality. That institutional heterosexuality both requires and produces the univocity of each of the gendered terms that constitute the limit of gendered possibilities within an oppositional, binary gender system'.[34] Queer of colour critique has explored and discussed the 'race' dimension of the definition of gender and sexuality.[35] This relationship has also been explored in the field of queer anthropology, which has highlighted how gender and sexuality are situated vis-à-vis a plurality of social factors, such as class, immigrant status, race and nationality.[36] These works and many others have complexified our understanding of sex, gender and sexuality. Certainly, the issue of the ontological primacy of the social (culture) over the biological (nature) remains debated and variable. It is also a topic causing much political anxiety, for the affirmation of gender as a social construct (the core operator of social reproduction) as opposed to a natural given necessarily places it within the reach of political will, thereby shaking the foundations of many arguments opposing reform such as eternity, fate or immutability. This explains the numerous and vocal political contestations to 'gender theory',[37] many of which are central to contemporary nationalist, conservative and populist agendas.

Concerned with the identification of those processes through which *law genders*, the core research question that unites the chapters of this volume

[32] M. Foucault, *The History of Sexuality*, trans. R. Huxley, 4 vols. (New York: Vintage Books, 1990), vol. 1, 152.
[33] M. Wittig, 'The Category of Sex', in *The Straight Mind and Other Essays* (Boston, MA: Beacon Press, 1992), 2–5.
[34] Butler, *Gender Trouble*, 31.
[35] R. Ferguson, *Aberrations in Black: Toward a Queer of Color Critique* (Minneapolis: University of Minnesota Press, 2003); F. El-Tayeb, *European Others: Queering Ethnicity in Postnational Europe* (Minneapolis: University of Minnesota Press, 2011).
[36] See, for example, D. Valentine, *Imagining Transgender: An Ethnography of a Category* (Durham, NC: Duke University Press, 2007); M. F. Manalaansan IV, *Global Divas: Filipino Gay Men in the Diaspora* (Durham, NC: Duke University Press, 2003).
[37] C. Robcis, *The Law of Kinship* (Ithaca, NY: Cornell University Press, 2013); R. Kuhar and D. Paternotte (eds.), *Anti-Gender Campaigns in Europe: Mobilizing against Equality* (London: Rowman & Littlefield, 2017).