

Feminism and the Idea of Law

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A Challenge – Reimagining Law

In recent years feminist legal scholars in Canada and the United Kingdom have set themselves an intriguing task – to expose the politics embedded in major appeal court decisions by rewriting certain judgments from a feminist point of view. The Women’s Court of Canada, devised over dinner at an Italian restaurant in Toronto in 2004 (Majury 2006: 1) was born of frustration at the narrowing focus of the Canadian Supreme Court in its equality jurisprudence. With the assistance of organisations such as the Women’s Legal Education and Action Fund and under the influence of the *Canadian Charter for Rights and Freedoms*, the Supreme Court had once been willing to innovate, but feminists had noticed it becoming increasingly less progressive. The Women’s Court, established as a loose coalition of feminist lawyers, scholars and activists, was established with the intention of illustrating that any judicial opinion is always just one possibility among many. Alternative opinions and decisions can always be made which are based on more imaginative approaches to the equality (and other) jurisprudence. The UK-based Feminist Judgments Project (Hunter, McGlynn and Rackley 2010a) took some inspiration from this approach, but applied the feminist judgment concept to a broader range of cases, including medical, property, criminal, family, and public law matters.

The Women’s Court, the Judgments Project, and other similar activist interventions¹ consciously perform a paradox: they are established to refuse and resist a dominant jurisprudence, yet of necessity they deploy the techniques and substance of that jurisprudence in their processes. This very personal as well as institutional conflict is nicely captured by Diana Majury in her introduction to the first series of judgments of the Women’s Court:

A successor Women’s Court might try to envision a very different legal system from the existing one and explore what judicial decisions might look like in that context. We are a bit aghast at ourselves as a Women’s Court issuing thirty-five page decisions written in technical legal language. Future Women’s Court judges may opt to be bolder and more visionary (2006: 6).

There are two open challenges contained in this statement – first to try to ‘envision a very different legal system’ and second to ‘explore what judicial decisions might look like in that context’. For a

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¹ Such as the Women’s International War Crimes Tribunal. See Chinkin (2001).

legal theorist they are calls towards a positive renewal, reconstruction, or even revolutionary understanding of law.

At the same time, there are some critical doubts about certain aspects of such a challenge – is it *really* possible to envision a different legal system when we are so embedded in our own legal paradigm? More to the point, perhaps Majury is unnecessarily self-deprecating about the work of the Court: doesn't a Women's Court or a Feminist Judgment *already* perform a large part of that particular task (insofar as it is possible) in the sense that it imagines a legal system peopled by reflective judges sensitive to questions of gender and aware of the implications of their interventions? It is difficult if not impossible to envision a completely different legal system. But it is always possible to envision incremental changes to the existing legal system which go beyond simple reform to touch upon the underlying ethos or culture of the legal system. Such incremental changes might, for instance, consist of an increased level of reflexivity among decision-makers regarding gender (as indeed modelled by the Women's Court of Canada and the Feminist Judgments Project) or an increased emphasis upon alternative modes of dispute settlement.

The editors of *Feminist Judgments: From Theory to Practice* make the point (to my mind) persuasively:

The Feminist Judgments Project represents a form of academic activism, an attempt to tackle power and authority not from the distance of critique but on their own ground. By appropriating judgment-writing for feminist purposes the judgment writers engage in a form of parodic – and hence subversive – performance. In much the same way as Judith Butler describes 'drag' as a performance that subverts gender norms, these feminist academics dressed up as judges powerfully denaturalise existing judicial and doctrinal norms, exposing them as contingent, and as themselves (the product of) performances (Hunter, McGlynn and Rackley 2010b: 8).

But this is only one part of the feminist judgments story. It is not only a parodic exposure and critique of 'normal' judicial decision-making. It has an equally powerful constructive dimension because it also (like drag) has the potential to alter our perception of the 'normal'. Feminist – and other critical – judgments help to bring narratives of diversity and otherness into the legal consciousness, thereby disrupting the comfortable hegemony of legal doctrinal tradition and to some degree normalising the alternative perspective (see Hunter 2010). Of course, the very notion of a judgment is about determination and fixity – inevitably a judge makes a decision which enforces a particular norm and excludes alternative possibilities (Cover 1983; Davies 1996) meaning that any underlying diversity and contestation is at one moment overtaken by the very practical and immediate need for determinacy and coherence.

Whatever our scepticism about envisioning a different legal system therefore, from a theoretical point of view, it is certainly possible to envision the 'same' legal system differently. Such a project is in many ways implied in these activist feminist projects to re-imagine legal doctrine and decision making. The emphasis of such projects is upon a practical rather than a theoretical purpose, to envision essentially the same law coming up with different answers, sometimes using slightly altered methods, in specific doctrinal contexts. But what if we try to imagine the legal system itself from a different perspective? What if we look at the same legal system but with different conventions of 'looking'? What, for instance, if we change the scale of legal theory away from the nation state to the micro-interactions of legal actors, and its perspective away from the expert insider – typically the judge – to anyone who engages with law (that is, anyone at all)? In the remainder of this paper, I want to respond further to the feminist challenge by identifying a key epistemological point of departure for contemporary understandings of law, and then ask what law looks like when we subvert or reorient that framework.

Law and the Subject

The perspective I wish to reconsider is that of the positivist separation of law. Traditionally, this separation was cast as a separation (or separability) of law from some vague notion of 'morality' (Hart 1958; Naffine 2010). A more contemporary iteration of positivist separation concerns the separation or autonomy of law from a general non-legal sphere – politics, social norms, religion, and other normative pluralities. The emphasis of positivist separation is on the limits of law, in other words the idea that law is defined by certain limiting features differentiating what is law from what is not law.

One such limit or division which has received patchy theoretical attention is the separation of law from the subject. The positivist presumption is that law and all of these other normative pluralities exist in a sphere separate from individual human beings. Law is seen as a system or set of institutions which is simply imposed upon us as an external code – affecting our actions, perhaps our status, but not our inner identity. Feminists and critical theorists have of course challenged this separation, but the emphasis has often been on how 'the law' (as institution, system, abstract set of doctrines, or concrete disciplinary procedures) subjects, constrains, or constructs. Identity and subjectivity become an effect of law, and to a certain degree this is clearly right. We are made as subjects by a multiplicity of normative – legal, cultural, psycho-social, and political – contexts. Although such approaches correctly diagnose the reliance of subjectivity on environments which normalise and constrain, they often maintain the image of law as a superstructural, essentially abstract but nonetheless *existing*, phenomenon. Law effects individuals, but the reliance of law on the mundane, everyday microprocesses of human action and interaction is more rarely perceived or theorised, except where such actions are channelled through the 'proper' avenues for change already laid down by legal procedure – winning a case with a novel argument, promoting a law reform, and so forth.

There are a number of problems, well known to feminist legal scholars, with regarding law as an autonomous and abstract set of institutions. The view of law as separate from human life is both theoretically inadequate as an understanding of law, as well as limiting as a framework for achieving feminist transformation. It is a theoretically inadequate account of law because it reifies law and removes it from the actual and the practical contexts in which law is experienced and lived – it represents law as having a particular identity and shape at the systemic and institutional level, but masks the empirical substance of law, obscuring in consequence law's own participation in distributions of power. The separatist account of law also arguably limits our appreciation of the potential avenues for legal transformation. By emphasising methods of legal change which are prescribed by law itself (notably legislative reform or intervention in litigation), positivist/separatist accounts fail to recognise the openness of law to resistance and renewal from other less formal channels.

In arguing that the positivist conception of law is theoretically inadequate and politically limited, I am not claiming that it is useless or even that it is false in some simplistic way. Rather, I am claiming that *despite* the fact that it is useful in some contexts and carries its own fictive and self-defining 'truth', it is nonetheless important to look at law from other perspectives and in other dimensions. The point is not that we ought to abandon positivist ideas about law (or for that matter the critique of positivism), but rather that it is also possible to regard law as a different set of interactions altogether. Part of my motivation is to respond to what has so often been seen as the fatal gap of all forms of legal critique – that they fail to provide positive reconstructions of the concept of law. Feminist judgments reconstruct law in the practical dimension, but it is also important to think about our general image, concept or understanding of law.

The Norm-Subject²

Instead of starting with law as an object of expert knowledge which is separate from human subjectivity, legal theory also needs to consider the primacy of the subject in the construction of law. When we go out into the legal world, act and interact with others, perform, practice, mimic, contest and create the law, we live in a completely disjointed legal world. It has a horizontality where meaning is being made and understood in the immediate context, but there is no totality of meaning attached to law. My experience of law is simply one of fragments of interactions, held together in the first instance by the fact that they all involve me. Numerous legal and other messages pass through me (as one instantiation of Lyotard's famous 'nodal point': 1984: 15) but these messages do not collectively amount to a general or systematic understanding of law. They coalesce in various ways across diverse sections of the population without necessarily being fixed in any particular form. Of course, many of the messages I receive about law are in fact informed or underpinned by some

² More extensive analysis of the ideas in this section can be found in Davies (2007, 2008).

total or general view of law, which everyone, especially those with a legal education, has probably internalised to some degree: this is unavoidable since the very idea of law is normally now based around the ideal or concept of a totality or system. But it is important to remember that that ideal is simply a fiction – an influential one, but nonetheless a fiction or assumption held in place by large numbers of people acting as if it is true.

Starting then from the bottom up, experiential position of the ordinary (non-expert) subject what changes about our understanding of law and why is this of any significance to feminist legal theory?

First and most obviously, regarding law from the non-reified perspective of ordinary subjects exposes the mythical nature of the separation thesis. Law as an abstract and fictional object might be separate from religious, moral, or social norms similarly abstracted from selves, but there is little sense in saying that law is experientially or existentially separate in any sense. On the contrary, law is a facet of a complex social existence, and is intertwined with many other dimensions of everyday life. Law infuses social life and takes back from it the conventions, cultural values, interpretive imperatives and other practice-based norms which comprise our everyday existences.

Secondly, in looking at law from the perspective of the legal subject, we disrupt the conceptuality of law, and expose gaps in it. To speak of a 'concept' of law, or even of several concepts, erases the non-conceptual empirical facticity of law experienced in its everyday manifestations. As Adorno stated, 'the concept does not exhaust the thing conceived' (Adorno 1973: 5; cf Cook 2005). Legal theory has tended to fetishise the concept of law, presuming that individual events, people, interactions and so forth can and must be understood within the identity/unity created by the concept. The philosophical (and legal) obsession with fitting objects into a finite conceptual structure obscures the material and experiential nature of law. While practical legal thought may have some justification for such an approach, there is no excuse for legal philosophy to be so constrained: 'Philosophical objects can only be grasped where philosophy does not impose them' (ibid: 13, cf 149). Looking at law from the perspective of the subject helps to undo this theoretical imperialism and promotes a somatic, dynamic, and somewhat particularistic understanding of law.

Thirdly then (and getting to the point of why this is of interest to feminists), the fragmented perceptions, experiences, practices and interactions of legal subjects bring diversity, materiality and alternative logics into the interior of our image of law. This image of legal diversity is eschewed both by conventional legal images of coherence and predictability as well as by some feminist and critical discourses which emphasise hegemonic inclusion (masculinity, heterosexuality, whiteness) and exclusion (female, LGBTI, and non-white identities). I am not arguing that claims of exclusion in specific contexts are wrong because clearly they are nearly always well-grounded. Generalising this pattern of exclusions to the point where we say that law is 'masculine', 'white' and

'heteronormative' – claims I have often made myself – is more complicated theoretically, but also often justifiable as long as we are not claiming that these are *necessary* characteristics of law. Outsider perspectives are in this way often regarded as alternative narratives about law, narratives beyond law and critical of it. However, looking at law from the perspective of subjects and expanding it to incorporate all types of legally-affected practices may bring diversity and the experience of exclusion into the interior of a social understanding of law comprised of contradiction and contestation.

And finally, reorienting our perspective of law towards its actual material existence in everyday contexts allows us to perceive the essentially performative nature of law and the prefigurative potential of feminist legal politics. From the conventional point of view, law is an institutionalised set of practices which can be described and understood as a basically static theoretical object with its own reasonably definable limits and identity. As I have indicated, this is a comfortable and useful understanding of law, one which lawyers need to rely upon unquestioningly. On the other hand, (and extending Kelsen somewhat) it is possible to see this image as a fiction made plausible by everyday performances of law in an endlessly diverse range of situations and with an endlessly diverse range of possibilities for change. Feminist legal politics can and does draw upon these possibilities by prefiguring different narratives about law, and it is important to see these not as extra-legal experiments but as integral to the dynamic reconstruction of law in its culture, practices, institutions, and identity.

Conclusion

It is difficult to see law as radically diverse when it so often seems to speak with a single voice and from a very limited range of perspectives. Activist events such as the Women's Court and Feminist Judgments Project help to bring alternative narratives into our view of legal doctrine and thereby expose the potentialities of law to express difference. They remind us that law is a process made of decisions, actions, choices, relationships and values, and not simply a set of abstract or hypostatized doctrines. In my opinion, it is possible to broaden such insights to the idea of law, eschewing images of totality in favour of an altogether more grounded, material, and open-ended understanding of law.

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