

THE ASHGATE RESEARCH COMPANION *to* FEMINIST LEGAL THEORY



Edited by

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The Ashgate Research Companion to Feminist Legal Theory

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ASHGATE

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THE ASHGATE RESEARCH COMPANION TO
FEMINIST LEGAL THEORY

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The *Ashgate Research Companions* are designed to offer scholars and graduate students a comprehensive and authoritative state-of-the-art review of current research in a particular area. The companions' editors bring together a team of respected and experienced experts to write chapters on the key issues in their speciality, providing a comprehensive reference to the field.

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M. Cardwell (eds), *The Regulation of Genetically Modified Organisms* (OUP 2010); 'Sustainable Development, Major Groups and Stakeholder Dialogue – Lessons from the UN' in D. French (ed.), *Global Justice and Sustainable Development* (Martinus Nijhof 2010); and a co-edited collection (with J.B. Boer, A. Benidickson and A. Herman Benjamin), entitled *Environmental Law and Sustainability After Rio* (Edward Elgar 2011).

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Editors' Introduction

Margaret Davies and Vanessa E. Munro¹

Landscapes of Feminist Legal Theory

While feminism as a philosophical, political and critical approach has a far longer history, as a distinct scholarly contribution to *law*, feminist legal theory (FLT) is now well over three decades old. Those three decades have seen consolidation and renewal of its central concerns as well as remarkable growth, dynamism and change. This Companion aims to celebrate the strength of feminist legal thought, which is manifested in this dynamic combination of stability and change, as well as in the diversity of perspectives and methodologies, and the extensive range of subject matters, which are now included within its ambit. It provides an authoritative and scholarly review of contemporary feminist legal thought, and seeks to contribute to the ongoing development of some of its new approaches, perspectives and subject matters.

The specificity of feminist *legal* thought is that it engages in a sustained and critical way with legal concepts, legal theory, legal practice and areas of substantive legal doctrine. But while law provides the central site and stimulus of analysis, the 'legal' in FLT is clearly not intended to imply any kind of bright line separating law from other areas of social and political life: indeed, the nature and uniqueness of the 'legal' is itself questioned by feminist (and other critical) thinkers. As a result, FLT remains – akin to other forms of feminist theory and practice – intrinsically interdisciplinary in its methods and approaches. As the chapters in this collection repeatedly demonstrate, insights from philosophy, political theory, sociology, psychology, ecology, human geography, anthropology and a vast array of other fields of knowledge are strategically deployed in feminist engagements with the law, and the fluidity of the relationship between legal mandate and social interaction is routinely insisted upon.

In substantive terms, feminist legal scholars have, over the years, engaged with a rather long list of subjects. Equality, public participation, sexual and other forms of violence, family relationships, working conditions and other aspects of the material lives of women have, for example, long been at the core of feminist legal thought. So too have the various frameworks of rights which at the very least constitute an official endorsement of the idea of gender equality, and which have been heralded by some commentators as offering the potential for radical transformation of the ways in which law mediates prevailing gender–power relations. But over its lifespan to date, feminist legal theory has extended its reach, and is now engaging with an extraordinary range of others areas, including the regulation

¹ The editors would like to thank Katie Cruz for her invaluable help in formatting the chapters included in this collection.

of health, the environment, war, development, taxation and migration. Though it is not possible in any one collection to fully do justice to the breadth of contemporary feminist legal scholarship, we hope – through the chapters that follow – to provide some insight into its diversity and scope.

There has also been an increasing reorientation away from an exclusive focus upon national states and their domestic concerns towards a more global consciousness, where lines of engagement and tension cross geo-political boundaries. As demonstrated in this collection, this has resulted in a feminist legal theory which, while remaining attentive to national jurisdictional concerns, also looks beyond these horizons to a complex terrain of multiple, intersecting political dynamics and issues. The ways in which the rise of economic neoliberalism, which has been promoted by powerful economies as well as by agencies such as the World Bank and International Monetary Fund, has impacted upon the formal and informal regulation of women's daily lives has, for example, been explored. So too, the current preoccupation with, and politicization of, flows of people as refugees, migrants, or trafficked 'victims' has been examined, set against a context in which international borders are increasingly fluid, the disparities between developed and developing nations are acute, poverty is feminized and drivers for displacement (such as war or famine) are prevalent. The consolidation of (and recent crises within) the European Union, as well as the development and instantiation within national jurisdictions of regional human rights frameworks, have also drawn the attention of contemporary feminist legal theorists beyond the domestic level.

Over time, moreover, not only have the doctrinal areas of concern to feminist legal theorists and the reach of their application expanded, so too the theoretical concepts and debates which circulate through their analyses have become increasingly complex. Whatever form it takes, feminist thought is centrally about the modalities of power which produce gendered social existence – whether power is located in law and state, in discourse, ideology, cultural practices, material life, micro-interactions or, more commonly these days, a coalescing of all of these factors. But a large number of intersecting concepts and analytical tools have been brought to bear upon this analysis of power in its myriad forms. Within the legal sphere, feminists have especially critiqued the individualistic focus of law and its limited conception of agency, the public/private distinction, the pervasive assumption of legal neutrality, the ethics of rationality and the foreclosure of an ethics of care, and the assumption that social change is pursued most effectively through law reform. Indeed, such conceptual debates have provided the theoretical building blocks of feminist legal thought and are iterated in various forms throughout feminist research. Yet, the ways in which these critiques have been developed, the relative scope for change through law that has been envisaged, and the extent to which women are capable of exercising power within the constraints of patriarchal privilege have been contested among feminists. In consequence, while it was once possible to see the broad contours of, and differences between, radical, cultural, socialist, liberal and postmodern feminism – and many of the chapters in this book address or allude to this recent history of feminist ideas – it is no longer easy to categorize feminist approaches in a clear-cut way. While the analysis offered by these 'strands' of feminism remains important and influential, feminist thought is now increasingly a network of ideas and concepts which crystallize or recede according to context and strategy. Grand theory, including a thoroughgoing postmodernism, is arguably in retreat and within feminist legal theory there has been a growing – and now embedded – recognition of the ways in which distributions of power are determined by the interaction of gender with other axes of social and economic differentiation, including race, sexuality, nationality, socio-economic status and religion.

Feminist legal theory, then, is now comprised of complex histories and many lines of interdisciplinary engagement. It is applied and conceptual, international and local, as well as self-questioning and linked into the dynamics of social and political change.

This Book

Within this complex terrain, the aim of this Companion is, as far as possible, to provide a comprehensive and authoritative review of current research and new developments in the area of feminist legal theory. Bringing together contributors from a range of jurisdictions and legal traditions, the chapters provide a concise but critical review of existing theory in relation to many of the core issues or concepts that have animated, and continue to animate, feminist legal thought. In this context, of course, the boundaries that distinguish the 'legal' from the 'social' and 'political' are porous and artificially constructed, and many of the chapters reflect upon the interconnections between feminist critique of law and broader social domains, as well as interdisciplinary synergies.

The Companion is divided into three parts, dealing with 'Theory', 'Concepts' and 'Issues'. While the strong thematic currents which run through feminist legal thought, and the fact that general theory, key concepts and particular legal issues are mutually constitutive, means that there is no watertight logic that separates these three parts, the division is designed for pragmatic purposes to reflect at some level a movement from the more general to the more particular. The first part addresses theoretical questions which are of central significance to law, but which also connect to feminist theory at the broadest interdisciplinary level. These chapters consider theoretical debates over liberalism, materialism, freedom and agency, the jurisprudential framing of feminist legal theory, and feminist legal knowledge construction. Meanwhile, the 'Concepts' part draws on general feminist theory, but with a more specific focus on theoretical issues arising in legal contexts. These include the way race and racism is dealt with by law, multiculturalism, gender and sexuality, religion, and the conceptualization of equality. Finally, the 'Issues' section considers a range of more applied areas of substantive legal controversy, for example in relation to citizenship, human rights, violence against women, marriage and labour rights. The chapters in this section illustrate in specific settings the theoretical concerns raised in Parts I and II, and pose new questions of those theoretical approaches in a way that brings this collection, and indeed the feminist enterprise, full circle.

The Chapters

Part I

The first part of the book explores some of the large theoretical questions which characterize feminist legal theory – the nature of the individual, the role of law, the need to understand material circumstances, freedom, power, agency and knowledge construction. All of these chapters engage with the struggles of legal feminism in finding a path (or paths) through the complicated terrain of contemporary gender–power relations, and the role of law in their creation and perpetuation. Undoubtedly, many of the complications arise because of our intense awareness that theory itself is inevitably inadequate to the feminist project: as

Helene Cixous said, it is a 'dangerous aid' because it solidifies our thought and allows us to advance our understanding, but it is always an approximation which can be falsified (Cixous 1994: 4). There is no 'model' which provides a satisfactory approach to the many imperatives of feminist engagement with law. Instead feminists have found a multitude of pathways to follow in pursuit of these sometimes quite disparate goals, which include reimagining law without reinventing it, reconnecting feminist theory and activism, promoting a female-centric law without essentializing the 'female', valuing the material in dialogue with the discursive, and understanding agency in a world of constraint.

Feminist legal thought therefore tackles the gendered nature and practice of law, and its differential effects, from a variety of angles. Nonetheless, some foundational themes have emerged over the years and many of these are considered in the first chapter, by Rosemary Hunter. Hunter's chapter addresses the elements of the liberal legal system, surveying in the process features of feminist critique which remain fundamental even after some decades of scholarship. At their simplest, these elements are the legal person and the role of law. Although technically an abstract entity which can take a number of practical forms, the person has been imagined in nearly every legal context as socially masculine: 'rational, autonomous, self-contained, self-possessed, self-sufficient, and formally equal before the law' (Hunter, this volume). Liberal law is conceptualized in a similarly unhelpful way for women and its central distinction – public-private – perpetuates precisely those values associated with the liberal and masculine person. Hunter's chapter highlights very clearly the tension between feminism's many efforts to critique and reformulate both elements of liberal legalism, with law's own resistance to any deep conceptual change.

As Hunter illustrates, liberal law's focus on abstract reasoning and an abstract person leads to its dissociation from women's lives and their relationships, and the need to challenge this along a number of fronts. It is ironic, then, that in some quarters feminist theory itself, under the influence of postmodernism and poststructuralism, became detached throughout the 1990s and beyond from the material lives of women. Joanne Conaghan's chapter challenges the over-emphasis on textuality, which was one factor leading to the displacement of materialist analysis in feminist theory and more broadly. Conaghan's chapter surveys the various meanings of materialism and in particular highlights what is undoubtedly a resurgence in materialist thought, emphasizing its ongoing concerns with physical matter, with the nature of the human, and with the economic conditions which are such a vital constituent of social life and its inequalities. She argues that it is important to develop an approach which is neither entirely materialist nor discursive, neither modern nor postmodern, as 'these are simply two sides of an intellectually contrived divide' (Conaghan, this volume), but rather 'hybrid', and attentive to the 'entanglement' of humanly-constructed meanings and material reality.

The challenge of moving beyond simple theoretical binaries is also explored, though from a different angle, by Nancy Hirschmann in her chapter on freedom, power and agency. Hirschmann opens with the compelling claim that 'freedom is arguably the central theoretical question of feminism' and that 'it has lain at the heart of feminism since its inception' (Hirschmann, this volume). She continues by illustrating in detail the complexity of the idea of freedom in a world of constructions and constraints. For instance, contemporary feminism sees women as produced as subjects within a gendered and patriarchal world, rather than as pre-existing beings who are simply socialized by a biased set of cultural messages. By contrast, traditional concepts of freedom draw on a much simpler notion of the subject – one who is 'naturalized and unified'. In consequence, feminism has re-evaluated

how freedom operates and what agency is, and in particular how it operates in a context where power is not just about restraint, domination or manipulation, but also about the production of subjectivity and the already-constrained contexts of agency. Hirschmann considers in particular the example of domestic violence, which brings into sharp focus the many practical complexities of exercising agency within a highly constrained context. She finally emphasizes the need to develop theoretical positions which can interact with legal and policy reforms in such a way as to enhance freedom and agency in such circumstances.

And finally in Part I, Margaret Davies' chapter explores the ways in which feminism challenges law's constructions of truth. Distinguishing between several types of legal truth – substantive, jurisprudential and declaratory – she argues that feminism has been very successful at challenging some but not all modalities of legal truth. Feminists have successfully deployed standpoint epistemology and empirical methods to contest narratives about women and gender which have been imported unquestioningly into the courtroom and other legal contexts. Nonetheless, like Rosemary Hunter, Davies points out the resilience of 'the truth about law', that is, that the central legal mythology of what law is remains remarkably static. Davies completes her chapter with some thoughts about alternative ways of understanding law, which might be drawn from socio-legal thought and legal anthropology.

Part II

Whereas the chapters in the first part of the book address feminist legal thought at a very broad level and open up some large questions about subjectivity, freedom, knowledge and materiality, those in Part II focus on more specific themes, in particular questions of identity and difference, which intersect with a number of legal doctrinal areas. The first chapter by Elsie Bonthuys sets out the terrain of equality theory and law, while the subsequent four chapters each focus upon racial, religious, cultural and sexuality-based differences in women's identities and the ways in which these complexities have been addressed by law and by feminist theory.

Equality has been a foundational as well as a highly problematic notion for feminism. As Bonthuys explains, although rhetorically persuasive, the liberal notion of formal equality has been very difficult both practically and theoretically: it can lead to endless debates about the nature of the similarities and differences according to which equal treatment is measured; it often results in simplistic accounts of difference which neglect race, culture, sexuality, and other matters; and it can obscure the social and economic sources of inequality. Even expanded emphasis on substantive equality, which brings out the sources and nature of disadvantage in concrete settings, can have limitations. As Bonthuys charts, this has led some feminists to argue for the adoption of strategies to supplement the notion of equality, such as models based in social justice and welfare-oriented reforms, which endeavour to ensure full inclusion and participation, and an improvement of women's socio-economic status.

Sharon Cowan's chapter considers the foundational ideas of sex, gender and sexuality as they have been theorized within feminism. Cowan traces in detail the theory which has conceptualized and problematized these terms and which has offered sometimes quite startlingly different views about the relationship between them. From the familiar and analytically powerful sex/gender distinction emphasized by second wave feminism, through a number of key theorizations of sexuality by Catharine MacKinnon, Adrienne