'WE EXIST, BUT WHO ARE WE?' FEMINISM AND THE POWER OF SOCIOLOGICAL LAW

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Abstract In this article the author revisits Carol Smart's 1989 publication *Feminism and the power of law*. She engages with Smart's main claims by way of a number of other thinkers. Following Marianne Constable's description of contemporary American legal thought as socio-legal, the author tentatively considers if it could be argued that some strains in contemporary legal feminism that adopted a sociological method resulted in a similar absence of justice that concerns Constable. Smart's caution against the development of a feminist jurisprudence is critically analysed with the benefit of hindsight. Drawing on Deleuze and Guattari, Foucault and Goodrich, the author tentatively considers the becoming of a feminist jurisprudence as a minor jurisprudence.

> What we most lack is a belief in the world, we've quite lost the world, it's been taken from us. (Deleuze 1995, 176)
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> Sociology takes social creation to be the whole of what is and will be. (Constable 1994a, 589)

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Introduction

Carol Smart argued in *Feminism and the Power of Law* for feminism to decentre law. In the article below I revisit her claim and ask to what extent feminism has succeeded in doing that. In light of events of the past decade that have brought to the fore more claims pertaining to

women's rights and international and regional conventions creating gender machineries to address the position of women through law and legal mechanisms, one might seriously doubt if law has been decentred at all. In fact, one can ask if law has not become ever more present in the lives of women.

The question of whether law has been decentred or not has been raised by almost every contribution to this special edition. I would like to shift the focus slightly in considering this question and ask after another aspect that Smart warned against in 1989, namely the possible dangerous liaison between law and the social sciences (for example Smart 1989, 47 and 70). I would like to address Smart's warning in light of Marianne Constable's (1994) argument on the extent to which modern law has become a sociological law. My concern is to ask whether and if so to what extent that which Smart warned us against many years ago has been realised. Constable, drawing on Nietzsche's *Twilight of the Idols* (1968), argues that developments of modern law amounted to the call for justice to disappear and to be superseded by empirical data and statistics – Constable of course focuses on the US experience and we should consider to what extent experiences for example in the UK, Canada, Australia and South Africa have been similar. However, my sense is that even though Constable addresses the development of US legal theory as becoming social-legal, she also reflects on broader developments in legal modernity. A broader concern for me is the influence of the social sciences distinguished from the humanities and the extent to which legal theory, also feminist legal theory, in general, engages with the former and not the latter. Following Smart and Constable, my question is whether some examples of feminist theory too have become trapped and ensnared by the socio-legal, to its own detriment. I am not claiming that this is true of all feminist engagements, there are of course notable exceptions.[1]

[1] Drucilla Cornell's ethical feminism since the early 1990's has been an example of feminist legal theory that disclosed possibilities for the development of a feminist jurisprudence (1991), (1993), (1994). See the volume on her contribution Heberle (2011) as well as her contribution to *feminists@law* 2011. See also amongst others Davies (2011); Drakopoulou (2000a and b); Aristedoumou (2000) and Douglas and Gatens (2011).

We need to take account of the fact that the insistence of feminists on grounding all theory and research in women's experience benefited from and also contributed to the development of social-legal approaches to law, and ultimately to law's being socio-legal. However, Constable, in following Nietzsche's description of the 'end of history', draws our attention to what is lost in law's becoming socio-legal: that we are left with a nihilism, the search for justice forgotten. As feminists, we should consider our own response to this nihilism, or what Max Weber has called the 'disenchantment' with the world (Weber 1946).

I would also like to reflect on and reconsider Smart's position against the development of a feminist jurisprudence. Taking her insistence on feminists doing work at a conceptual level, I ask whether a feminist jurisprudence would not be doing exactly that, engaging with feminism and the power of law at a conceptual level. My tentative question is the following: if we go along with Constable's claim of modern law amounting to a sociological law, and accept that feminism has become socio-legal to some extent, could more engagement by feminists with a feminist jurisprudence possibly have prevented this?[2] In addition, Smart's understanding of what a feminist jurisprudence could mean should be questioned. For her, a feminist jurisprudence would have amounted to a unified theory of law. I question this claim and consider possibilities for the becoming of a feminist jurisprudence with brief reference to Deleuze and Guattari's (1987) notion of becoming woman/ becoming minor. I also engage the notion of an "ethics of discomfort" as used by Michel Foucault in an essay titled "For an ethics of discomfort", in which he recalls Merleau-Ponty's insight of "never be[ing] completely comfortable with your own certainties" (Foucalt 2007, 127).

Foucault served of course as inspiration for Smart's 1989 investigation. He quite aptly warned against the limits of sociological knowledge and research. The effect of feminism being socio-legal must be considered – to what extent have we allowed the normative claim

[2] As noted above (footnote 1) there are examples of exactly this kind of work.

of justice to be overtaken by meticulous counting, statistics, questionnaires, maybe exactly as ways to escape the discomfort that Foucault urges us to accept and live with and live in.[3] As feminists, we should ask ourselves what world are we left with, and who are we?

The article unfolds as follows: I briefly recall what I regard as Smart's main arguments in *Feminism and the Power of Law* and briefly put forward Constable's argument. I then reconsider Smart's claim against a feminist jurisprudence and tentatively consider the becoming of a feminist jurisprudence as a "minor jurisprudence" (Goodrich 1996, 1-8) accepting an 'ethics of discomfort' that might be able to sidestep the complacency of grand theory.

Feminism and the Power of Law

> The feminist movement (broadly defined) is too easily 'seduced' by law and even where it is critical of law it too often attempts to use law pragmatically in the hope that new law or more law might be better than the old law. (Smart 1989, 160)

Carol Smart asks us to what extent "feminists succeeded in expressing a fully gendered world view?" (1989, 1). Even though there was a production of books and courses focusing on women and law there was no 'major reconceptualisation' (1). She sought a feminist project beyond the limits within which we work (1). Her main argument in her1989 book was to investigate how law exercises power and how it disqualifies women's experience. She drew from Michel Foucault's theory of power and his insight into knowledge as a form of the exercise of power in order to examine what is problematic about legal knowledge (2-3). Her concern was to show how legal knowledge disqualifies other forms of knowledge, especially

[3] As also noted above I am not claiming that this is true of all feminist engagements. However, my concern is the possible effect that the insistence on empirical proof may have on a feminist concern with justice. Underlying this as noted is the concern with the extent in which law and legal theory have been influenced by the social sciences rather than the humanities.

feminism. To be slightly pre-emptive, the concern that I raise below, following Constable, is the extent to which socio-legal knowledge presently disqualifies all other forms of knowledge, including non-sociological feminism. Smart was cautious about the development of a feminist jurisprudence because it might end up to be an acceptance of the given legal framework, "the parameters already laid down by law and positivist social science" (3). The question that I consider below in response to Smart is why she could not consider the possibility of a feminist jurisprudence being otherwise. But of course her claim that feminism always concedes too much by accepting law's terms in order to challenge law (5) is today as strong and valid as it was when she wrote the 1989 book.

What might it mean to decentre law? Smart pushed for feminists to consider non-legal strategies, not resort to law, not to be engaged only in policy proposals but to be engaged in scholarship (5), feminist jurisprudence, for her, meant affirming the idea that law should play a special role in ordering everyday life. In order to resist the hegemony of the legal order law must be "tackled at the conceptual level". (5) Law's claim to legal knowledge as the only truth makes non-legal knowledge suspect, with the result that all experience must be translated into legal form to receive any acknowledgement. Smart was opposed to legal formalism's claim of law as "a unified discipline that responds only to its own coherent, internal logic." (12) She introduced the term 'juridogenic' as a way of conceptualising the harm that law may generate as a consequence of its operations (12).

Smart referred to Foucault's analysis of power that locates law as part of the "ancien regime" / old power that was being colonised by the discourses of discipline. (13) However she argued that we must be aware of instances where law exercises a form of power which is parallel to the development of power associated with scientific knowledge (14). It is precisely in this observation that Smart, to my mind, made a powerful prediction of law's development to a sociological law and where I connect her with Constable. Smart foresaw that law, instead

of being overtaken by social scientific knowledge, thereby giving up its power, might rather expand its power by incorporating social-legal knowledge. A concern that I want to raise here is if, and to what extent, some feminist engagement with law, instead of decentring law, has accepted a socio-legal law, that is, an even more powerful and ever expanding law. Wouldn't more conceptual engagements by feminists, even if these entailed (or maybe *because* they entailed) an engagement with a feminist jurisprudence, possibly have been able to counter the power of law by drawing also on the humanities?

Smart, drawing on Mary Jane Mossman, identified the three main elements of traditional legal method that exclude other ways of approaching law (20-23): 1) boundary definition where certain matters are seen as being outside of law; 2) what should count as relevant; 3) a certain way in which case analysis is done. Mossman wanted women to be attentive to

> [T]he use of legal sources from below ... allow[ing] empirical evidence about women's lives greater influence on the law. So law would become more responsive to the "real" rather than its own internal imperatives. In this way she envisages law and the social sciences coming closer together and a greater role for the women's movement in influencing law (23-24).

This is of course Constable's concern, how the turn to the 'real' is detrimental to the search for justice (1994b, 625). We could consider also the extent to which a sociolegal method mirroring traditional legal method similarly excludes alternative approaches. Smart also discussed Stang Dahl's (1987) project on focusing on government administration rather than law, thereby displacing the power of law. She noted, however, that the strategy employed by Dahl had to be evaluated within its own context and that it was probably not of similar use in other contexts (Smart 1989, 25).

Smart's chapter on rape deserves a special mention, as her description of masculinity, patriarchal culture and phallogocentrism as the main problems of how law responds to rape remains apt (26). Her observation on how the turn to forensic medicine contributed to the rape trial becoming a "sexual spectacle" should be noted (40). She also showed insight into the dangers of what she calls the 'psy' disciplines in reforming rape laws: "But even if such a reform were possible, it would mean that women would be saved from the law only to be surrendered to the psy complex" (47). Smart doesn't make the connection explicitly, but this was of course Foucault's warning against the new disciplines. In the chapter on 'Law, power and women's bodies' she notes that sociology as a discipline is reluctant to acknowledge the materiality of the human body (90). Law in contrast to sociology is interested in human bodies. Smart refers to how law sexualised women's bodies and we can recall Mary Joe Frug's description of the law's terrorisation, sexualisation and maternalisation of women's bodies (Frug 1992, 1045). Given the broader argument of this article I am interested in what happens to women's bodies under a socio-legal law - to what extent, by accepting the 'real' and by employing empirical methods, are feminists countering the power of law, and ultimately countering masculinity, patriarchy and phallogocentrism?

In the concluding section, Smart, by way of summarising her main argument, asked for "a deeper understanding of law in order to comprehend its resistance to and denial of women's concern" (160). For her, by accepting the androcentic standard (a combination of masculine requirements and positivistic requirements) we accept masculine standards, we talk law's language, employ legal methods and submit to legal procedures (160). She contended that even though law reforms benefit some women "all reforms empower law" (161). Smart wanted us to note the juridogenic nature of law - the harm caused by law. For my purpose here, her observation that the power of law would be enhanced by new disciplines - by extending law into new terrains created by new technologies (for example, reproductive

technologies), is significant (162-163). She suggested the idea of a 'refracted' law (what critical theorists might call indeterminacy) as a way of opposing the unifying claim of formalism. Her ultimate claim was that feminism should be focused on the power of law rather than law reform (164).

> Law cannot be ignored precisely because of its power to define, but feminism's strategy should be focused on this power rather than on constructing legal policies which only legitimate the *legal forum and the form of law*.' (165, emphasis added)

'A History of an Error'

> Sociology – whether as science or as interpretation, as law or as philosophy speaks the truth of positive law in the language of belief and appearance, the language of 'legitimacy', 'values', 'norms', 'distribution', and 'policy' – from which 'justice' and the 'true' world disappear. (Constable 1994a, 588)

Marianne Constable (1994a, 551-590. See also Munger 1994, 605-608; Sarat 6-9-624), traces the development of twentieth-century legal thought through Nietzsche's history of metaphysics. Nietzsche in *The |Twilight of the Idols* (1968, 40-41) tells the story of "How the 'real world' at last became a myth", a 'History of an error' – the story of how what Nietzsche calls the 'real' world (what we would probably call the true/ abstract world) of ideals disappeared to be replaced by an 'apparent' (what we might call the phenomenal/ material) world. Nietzsche identified six stages: Platonism; Christendom; Kant; Positivism/ Utilitarianism/ Rationality and finally the phase in which the world of ideal has been abolished and replaced by an apparent one. But for Nietzsche, with the abolition of the 'real'

we also abolished the 'apparent', with nihilism as result (Nietzsche 1968, 40-41; Constable 1994a, 552). Constable for her part then distinguishes between six phases in modern legal thought: first a phase of virtue that is followed, second, by one of divine/ natural law and, third, by one of moral law; where after, fourth, positive law and then a shift to social policy and distributive justice come to the fore. The abolition of the 'real' is completed in the fifth phase in favour of the apparent world.

> For philosophers and researchers, for those who live in a society that accepts such truths, law becomes what sociology knows it to be: the norms (in their double sense) of a population; the management of risks and interests; the policies enforced by officials in the context of belief in justice of state violence or, in other words, positive law. (1994a, 588)

In phase six, Constable notes that critical scholars acknowledge the collapse of the distinction between is/ ought and reality/ appearance (Constable 1994a, 588). The question that she urges is, "what remains … what world is left?" (588). In a response to her critics she explains that, for her, Nietzsche can help us to think about the complicated character of current relations between law and science and highlights that, for her, justice is what is at stake (Constable 1994b, 625). She argues that contemporary law more and more relies on what we know by way of sociological research and that this results in the disappearance of justice. For her, justice is that aspect of law that traditionally has made law to be something other than an imposition of force of will (Constable 1994b, 626). She does not seek to reject all empirical study or deny the importance of law and society work, but asks if there is a way to think law in present time other than through the sociological understanding of structure and/ or agency (Constable 1994b, 628). Through Nietzsche, she repeats that the question is not, what should

socio-legal scholars do, but, rather, what world remains? I return below to Constable's suggestion.

A Becoming of Feminist Jurisprudence

> What interests me isn't the law or laws (the former being an empty notion, the latter uncritical notions), nor even law or rights, but jurisprudence. It's jurisprudence, ultimately, that creates law, and we mustn't go on leaving this to judges (Deleuze 1995, 169).

I referred to Smart's warning against the quest of a feminist jurisprudence above. Reflecting on the possible positive aspects of an engagement with a feminist jurisprudence, she suggested a move away from law reform and adding women to a concern with issues like legal logic, legal values, justice, neutrality, and objectivity (1989, 66). For her, '[t]he promise of a fully integrated theoretical framework and political practice which will be transformative, unlike the partial or liberal measures of the past which have merely ameliorated or mollified women's oppression', and a feminist jurisprudence that could put forward 'a general theory of law which has practical applications', held potential (66). Feminists of the time, regarding legal reform as a waste of time, uncomfortable with teaching traditional method and logic and frustrated with the impotence of legal practice to respond to women's needs, were enticed by the notion of a feminist jurisprudence. However, for Smart this search could turn out to be a false quest.

She feared that a feminist jurisprudence would fall in the trap of accepting the androcentric standard and centering law (68). Smart wanted to prevent another grand theory being set up, an abstract theory devoid of the 'realities of women's lives' (69). She carefully considered the possibility of an engagement of theory with women's experience, as was

offered by 'praxis', an idea derived from Marxism (69-70). Although the idea could be useful to provide a reference point from where to view the world, she noted that

> [T]here is a significant difference between a concept of praxis which entails the possibility that experience (practice) can feed into theory and vice versa and the assumption that it is possible to construct a methodology from the experiential which will reveal an absolute truth or rigid theory. It is one thing to argue that theorizing is always in process because of conditions of experience (practice) and modes of understanding experience are always changing, it is quite another to argue that on the basis of what we know now we can identify the inaccuracies of other theories whilst presuming a correctness which is infinite. (70)

Smart then continued to take issue with Catharine MacKinnon's project of constructing one of the grand theories of feminism, feminism unmodified, based on her understanding of dominance. However, she insisted that she was not opposed to theory or theorising, but against grand theorising. Responding critically to Lahey's rejection of theory, Smart contended that we "cannot simply rely on experience as if it were a concrete reality which merely needs to be exposed thereby circumventing the problems and difficulties of intellectual work" (72).

Reflecting on Smart's opposition to the search for a feminist jurisprudence more than two decades after the publication of *Feminism and the Power of Law,* my sense is that her view should be read within the context of eighties feminism that indeed resulted in grand theorising. Her project of decentering law and exposing how law rejects all other forms of knowledge as inferior urged an emphasis on women's experience. However it is clear that she also strongly supported an engagement with theory and with conceptual thought. Although

she considered praxis as a possible way of combining theory and experience that could result in political action, she was cautious of how this could disclose ways for grand theorising. One response to Smart's reluctance to seek a feminist jurisprudence is to say that her view of a feminist jurisprudence providing a fully integrated legal framework and a general theory of law was misguided, because there is probably a slim chance for such a project not resulting in another grand theory. But, also drawing from Constable, my concern here is the extent to which some versions of feminism resulted in a kind of grand theorising, because of law's development into a socio-legal law and ultimately by taking up the social-legal project. Below I tentatively argue for the becoming of a feminist jurisprudence that does not stand in the tradition of grand theorising, but is engaged in a continuous becoming.

Deleuze and Guattari in *A Thousand Plateaus* (1987) suggest Virginia Woolf's style of stream of consciousness writing as an illustration of a new mode of becoming (Buchanan and Colebrook 2000, 1). Distinguishing between a 'molar' and a 'molecular' politics - the former being concerned with female identity as such, the latter with the questioning of that very female identity as such - they argue for feminist politics as double movement (2000, 1). The molar politics designates a political movement with a firm "ground, identity or subject" (1). The molecular provides space for the 'mobile, active and ceaseless challenge of becoming' (1). Any assertion of woman as a subject must not duplicate or simply oppose man, 'but must affirm itself as an event in the process of becoming' (1-2).[4] I am employing

[4] What exactly the implications of these assertions of Deleuze and Guatari are for woman's becoming have been discussed and debated widely (see generally Buchanan and Colebrook 2000). Claire Colebrook (2000, 2) engages with the implications by raising two divergent responses. On the one hand their notion of becoming-woman could be regarded as "a final recognition of the function of feminism" and as recognition of feminism's aim of not only wanting "to redress wrongs within thought, but to think differently" (2) On the other hand it could be perceived as a 'domestication and subordination.' (3) The influence of Deleuze on feminism raises two broad questions: the first questions the value of a philosophy that does away with the subject; the second is concerned with becoming-woman as being used once again for something that will benefit men, male reason. (10-11) Colebrook mentions two important notions to keep in mind when evaluating becoming-woman: the risk of following Deleuzian thought and the result of thought becoming nomadic. (11) The implication of the Deleuzian influence in feminist theory could result in thinking "new modes of becoming – not as the becoming of some subject, but a becoming towards others, a becoming towards difference" and a becoming through new

'becoming' here particularly in the sense of the becoming of a feminist jurisprudence. The notion of a double movement might prevent Smart's fear of grand theorising – at the heart of becoming lies a ceaseless challenge, a continued modification. For Deleuze the difference between minorities and majorities is not their size, but that a majority is defined by "a model you have to conform to: the average European-male city dweller for example … A minority, on the other hand, has no model, it's a becoming, a process" (Deleuze 1996, 173). A feminist jurisprudence inspired by the notion of becoming does not stand in the tradition of grand theory, of law, socio-legal law and jurisprudence as major, but rather in what Goodrich called a 'minor jurisprudence', describing it as "one which neither aspires nor pretends to be the only law or universal jurisprudence" (1996, 2). For him a minor jurisprudence stands in the guise of 'a challenge to the science of law and a threat to its monopoly of legal knowledge.' (1996, 2). Focusing on the history of minor jurisprudences we find 'rebels, critics, marginals, aliens, women and outsiders who over time repeatedly challenged the dominance of any singular system of legal norms.' (1996, 2). For Goodrich a reflection on these could disclose a variety of alternative jurisprudences. My interest is to support feminist jurisprudence as such an alternative or minor jurisprudence.

'An Ethics of Discomfort'

> Each person has his or her own way of changing or, what amounts to the same thing, of perceiving that everything is changing. In this regard, nothing is more arrogant than wanting to impose one's law on others. (2007, 122)

Foucault, in a reflection on the work of the French journalist, Jean Daniel, takes up an issue that seemed to be of particular concern of leftist politics, namely the positioning of the left,

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questions.' (12) See also Conley (18), Braidotti (156) and Grosz (214) in Colebrook and Buchanan (2000). See also Braidotti (1994) and Grosz (1995) and Gatens (1996).

the identity of the left begging the question, "We exist, but who are we?" (2007, 126). Foucault, following Merleau-Ponty, supports the notion of 'an ethics of discomfort' meaning that we can never be comfortable with 'who' we are. Constable, discussed above, refers to followers of Nietzsche who, like Foucault, challenge the sociological world, "daring themselves to think what is most forgotten and covered over in the taken-for-granted social and sociological character of the modern world" (Constable 1994b, 629). How to counter the particular nihilism of modernity as revealed in contemporary legal thought?' (Constable 1994b, 632). For Constable, the response has to entail "accepting the finitude of beings who reason our finitude – and not … relying on or seeking additional metaphysical principles and solutions" (637). She notes that this pursuit might be a 'discomforting' one for socio-legal studies. The idea of an 'ethics of discomfort' is consistent with ceaseless becoming and with the acceptance of finitude. Foucault's words below could in my view be taken up in the search for a feminist jurisprudence as alternative or minor:

> Never consent to be completely comfortable with your own certainties. Never let them sleep, but never believe either that a new fact will be enough to reverse them. Never imagine that one can change them like arbitrary axioms. Remember that, in order to give them an indispensable mobility, one must see far, but also close-up and right around oneself. One must clearly feel that everything perceived is only evident when surrounded by a familiar and properly known horizon, that each certitude is only sure because of the support offered by unexplored ground. The most fragile instant has roots. There is here a whole ethics of tireless evidence that does not exclude a rigorous economy of the True and the False, but is not reduced to it either. (2007, 127)

Conclusion

The aim in this piece was to reflect on Smart's *Feminism and the Power of Law* after more than two decades and to ask to what extent the things that she argued for have been realised, but, more important, to what extent her insight about feminism and its relation to law has been shown to be true and ultimately how she contributed to feminist theory and maybe, against herself, to feminist jurisprudence. I highlighted what, for my purposes, are Smart's most important claims in the book. At the heart of Smart's project was to show the problematic relationship between feminism and law, how feminism and feminists always stand back, allowing the law to take over. Unfortunately, with some exceptions, my sense is that this claim should be taken as seriously today as then. Feminism and law might appear to be on equal footing particularly because many feminists willingly embraced law, legal reform and (women's) rights as a valid methodology. However my concern is whether feminism again is conceding too much.

By following Constable, I also tentatively made another point, that the adoption of a socio-legal approach by some feminist work might have resulted in a stronger liaison between law and feminism, thereby confirming Smart's warning that law's engagement with sociology might result in a more powerful law that could be even more detrimental to the feminist ideal of justice. I recalled Smart's warning against the quest for a feminist jurisprudence and considered why she might have misconceived what feminist jurisprudence should and could be. I considered the becoming of a feminist jurisprudence as a minor jurisprudence – a way of considering feminist engagement with law as complex, and always tentative, constantly questioning, standing in the guise of an ethics of discomfort. Smart, even though she did not support the 1980s search for a feminist jurisprudence, by insisting on a conceptual engagement with law and taking theory seriously, in her own way contributed to the beginnings of the becoming of a feminist jurisprudence.

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