WORK AND GENDER IN THE LAW CURRICULUM

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INTRODUCTION

The construction of the law curriculum in our Law Schools is a crucial matter in the project of engendering the law so that it delivers justice.

Inevitably the law curriculum presents a categorisation, or conceptualisation, of the law. The imposition of these categories is significant in a double sense. The world, including the law, exists for us only through categories. These categories comprise our world. They bring order to an otherwise incomprehensible and unmanageable chaos. For us to be able to engage with the world, it must be reduced to manageable categories. However, the categories which divide and construct the world do not exist independently of human community. Furthermore, the power to impose categories upon the world is a creative act which simultaneously constructs the creator as a subject in the world. In the past the law has been the creation of men not women. And in the law women have been constructed as objects not subjects. The process of curriculum reform is thus an opportunity to create ourselves, women, as subjects in the law in a double way.

Because the construction of the law and the world through the imposition of categories is so important, I will devote most of my attention to this issue. I will, however, also briefly address three other related points — the importance of always seeing the law in its social context, the issue of resources in the new curriculum and a methodology for teaching and learning in the new curriculum.

CATEGORIES AND THE LAW OF WORK RELATIONSHIPS

The present categories within the law curriculum operate in such a way that women, their work and work relationships are not only invisible, but also subordinated. Where women are acknowledged in the law the images are stereotypical and always set against a male norm, so aptly described by Margaret Thornton as "benchmark man".[1] The material consequences of this in the world are very real, preventing a recognition and an acceptance in law of a diversity of work relationships where all might express and develop their talents.

One of the immediate tasks of curriculum reform is, therefore, the need to examine critically the categorisation and conceptualisation of work relationships in the law in order to re-think them in a way that recognises women as subjects (or persons) rather than objects (or property) in their work relationships. This is a process which must occur at every level of the law curriculum.

The "Law/Not Law" Distinction

We are of course dealing with a curriculum for law — not philosophy, politics, economics or sociology. But we can better understand the distinctiveness of our own discipline if we also engage with other disciplines. This enables us to reflect on law from a range of perspectives. The idea that the disciplines remain separate and unconnected, in the sense that they have nothing to say to one another, is no longer, if it ever was, tenable. The prevailing positivist conception of our discipline tries to suggest otherwise. It suggests that the law is, that the law exists only in judicial decision or statute and that there is no need to look elsewhere. This "law/not law" divide imprisons us, keeping us internal to and, therefore, uncritical of this narrow conception of the law: we can never see it from the outside, let alone question the existence of

the supposed boundary between that which is law and that which is not.

It is, I would argue, impossible to engender the law without a broadening of our perspectives. To take one example regarding work relationships from philosophy. The conception of the free, independent, individual holding property in *his* work and able to grant or withhold consent in the formation of work relationships defines the worker in law. This worker is created, at least in part, in the writings of the seventeenth century philosopher, John Locke.[2] The characteristics with which John Locke endowed this individual supported the emergence of the worker who could operate in the "free market" of the "liberal" state. This worker was distinguishable from the servant, the one who had been the property of the master in feudal times. The relationship of this new individual to *his* work was everything: it explained the concept of private property and provided the whole foundation for the economic edifice of the liberal-capitalist state.

The more recent philosophical/political insights of works such as Carole Pateman's *Sexual Contract*[3] interrogate this conceptualisation of the worker. Pateman asks what is the distinction between a slave, a worker (a wage slave?), and a woman (a wife?)? Answering this question is fundamental in developing a just law of work relationships and a law that takes account of women as subjects and not mere objects or property. A critical engagement with the philosophic and political culture and traditions of western society can do much to enhance our understandings of the way the subject of law has been created as male.

This is only one example — there are many others and from many other disciplines. I could as easily have referred to the work of feminist economists, such as Marilyn Waring in *Counting for Nothing*,[4] who have exposed "what men value and what women are worth" and thus enabled us to understand better the construction of the economic world in which the law operates. The process of reaching out to other disciplines in order to comprehend the way the world has been created and the alternate ways in which it might be constructed is never ending. In this process we must have the courage to explore beyond those disciplines which we perceive as closest to our own, for perhaps we have most to learn from those areas of knowledge with which we are the least familiar and which appear the least accessible to us.

The Public/Private Distinction

The law purports to be concerned only with work relationships that are paid for in the public sphere of the marketplace. The separation of the so-called "public" and "private" spheres and their independence from each other is one of the most significant categorical divisions in legal thought. Its influence on the law's conception of the work relationships of women has been profound — and its impact is evident throughout the curriculum.

Feminist legal scholars have shown the illusory nature of this so-called divide and the interdependence of the two sides of the dichotomy. In the maintenance if that division there is a symbiotic relationship between the law and the world.[5] The now infamous Harvester judgment[6] helped create the worker as a male breadwinner, but also assumed that he was supported by a wife who was responsible for the unpaid work in the home. Women received less for their work in the marketplace and so their active participation there was discouraged. The legacy of this judgment continues down into the present. In many female dominated industries the construction of work through the awards of the various Industrial Commissions has actively encouraged women to take up "atypical" forms of work, such as part-time or casual work. This construction of "atypical" work as women's work continues the assumptions that women are economically dependent on men and responsible for work in the home.

Employment Law, Labour Law and Industrial Relations Law, subjects familiar in the law curriculum, are concerned exclusively with work and industry in the marketplace. This work, and hence law, has remained largely the domain of men. Its central characters have been male. Trade unions, the privileged representative of its workers, have expressed men's voice. Even the case and text books which dominate the curriculum reflect a male world.[7] Yet women often do perform paid work in the marketplace. Here the public/private dichotomy has been even more invasive. Women's work in the paid workforce has often reflected their unpaid domestic work. This work has been classified as unskilled,[8] something women do naturally. In this work women have frequently been isolated and hence rendered even more vulnerable. Outworkers in the textile industries or child-care workers, for example, are poorly paid and have little opportunity either of establishing the value of their skills against a male norm or of taking advantage of the protective mechanisms the law has in place, such as unfair contracts legislation.[9] Perhaps the greatest

impact of the categorisation of the law into the supposedly separate "public" and "private" spheres has been the denial that much of the work women do perform is in fact work at all.

Law of Work Relationships/Law of Other (Non Work) Relationships

At present paid work relationships are the subject of employment, labour and industrial relations law. Within the law curriculum these subjects are secluded, insulated, from the law of all other, by definition non-work, relationships. However, work relationships are often the subject of these "other" areas of law — areas such as tort, property and trusts law, family law, taxation and social security law. The isolated way in which we treat subjects within the curriculum has had notable consequences for the way women, their work and work relationships are viewed in the law.

The caring work of women in the so-called private sphere of the home is invisible to the law — either because it is treated as not work at all or because it is rendered valueless. In tort, the assumption of the highest courts that a woman's caring work is simply part of the "mutual give and take" of marriage[10] continues to construct women as subordinated to men through marriage. This assumption is contrary to all the empirical evidence which tells us that, in terms of work in the household, it is women who give and men who take.[11] Even in those areas, such as *family law*, where statutes have directed the courts to take account of "home-making contributions", decisions of the courts in assessing the relative contributions of husband and wife to a marriage invariably still accord more prestige, more skill, more value to the work of men and discount the unpaid work which women do.[12] There is a cumulative effect to all these decisions in the law and in society — so that it becomes assumed that women's primary role is to perform this unpaid work.

The construction of women as unpaid workers in the private sphere of the home is further supported by other legal structures, such that the participation of women in paid employment is determined by this social reality. I have already mentioned the role of the law in the construction of women's paid work. The overwhelming number of "atypical" workers — that is casual, part-time, temporary or home-based workers — are women and this results expressly from the construction of the workplace through awards and other industrial agreements which assume that this work suits women's needs, including their responsibility for unpaid domestic work.[13]

Other areas of law are also relevant here — *social security law* for instance. Women with children who do not live in a "marriage like" relationship supported by a man are often dependent upon the "male" state. Statistics show that the vast majority of sole parents are women.[14] Social security payments remain low so as not to operate as a disincentive to seeking paid work. The level of benefit may be supplemented by a small amount of income — thus encouraging some part-time or casual work in the paid labour market. The combination of unpaid and paid work is a fine balance again determined by the law, but one which shows that the social and legal reward for work in the home is inferior to all else.

The legal system also ensures that "atypical" work is to the advantage of men. To illustrate this I would like to draw attention to one of the fastest growing areas of work at present — so called "self-employment". This work is often organised through a corporate structure involving members of the family. The law has no difficulty in recognising that a person can bear the dual identity of company director and employee.[15] Thus the law will recognise a formal employment relationship between a corporation which has a husband and his wife as shareholders and directors when this same couple perform all the work services that the corporation provides. The intimacy of the relationships is here no barrier to the law's recognition of the work relationships. In the small family company it is not uncommon for the wife to take on the clerical or administrative work in relation to the business. In this position the woman/wife is usually subsidiary and subordinate to the man/husband in a double way. Her paid work is derivative from and dependent upon the exercise of his skills, his work. Her paid work responsibilities in the company are also generally less onerous in terms of hours than his so that she is "free" to perform her unpaid work duties in the home as well. The organisation of work in this way is then financially rewarded through the taxation/corporate system and generally to his advantage. That is, the net monetary and other rewards for his work are greater when they are structured in this way than they are if he is merely an employee of a corporation to which he is a stranger. We know this also because of the way the family court deals with such cases where these relationships have broken down. The value of the contributions of the woman, in both her paid and unpaid work, rarely have any prospect of matching those of the man. If the relationship does not break down and

come before the Family Court the law has no concern with the internal regulation of the work relationship within the family company- it is relegated to the private arrangement of the parties, and, therefore, risks being simply the domination of the powerful over the powerless.

Categories and Concepts Within the Subject Areas (Labour Law) of the Curriculum

The primary conceptual apparatus for viewing work relationships in law is contract. The law's general refusal to recognise the requisite "intention to create legal relations" within the family is part of the structuring of the invisibility of women's unpaid work. The public/private divide is shown again to be deeply problematical. Furthermore, the very concepts and categories of Labour Law are being revealed as increasingly unable to respond to the changing structures of the modern workplace. This is just at a time when women are moving into the paid workforce in increasing numbers. The changing structure of the paid workforce is also a result of the manipulation of the categories and concepts of the law by the most powerful elements of society.

Some specific examples will be of assistance here. First, the law identifies the contract for work as a wages-work bargain. When a worker is employed on a "casual" basis the law conceives the relationship between the employer and the employee as one that is comprised of a series of contracts — rather than one over-arching relationship. As a result of this many of the rights and benefits which accompany employment and are based on continuity of employment are denied to casual employees — even where they have worked for the same employer for twenty years. Women are the ones most likely to be disadvantaged by this conceptualisation, for it is not unknown for women to be employed for many years, in some cases up to twenty years, on a so called "casual" basis.

Secondly the law has traditionally viewed work relationships as two party arrangements created by a wages-work bargain. Increasingly modern work arrangements do not fit this pattern. With temporary and agency workers there is a tri-partite relationship, where the worker performs work for a business, the business pays the agency and the worker is paid by the agency. Labour law is conceptually unable to accommodate such a relationship within its existing category of "employee". These relationships have been declared to be *sui generis* — which means the workers are denied the protection of employment statutes. Of course this does not only affect women but the conditions of women's work in these situations means that they are more vulnerable — and hence damaged more by the rigidity of the law's concepts.[16]

LAW IN CONTEXT

While we need categories with their boundaries and limits in order to be able to operate in the world, categories are never real, true or fixed. The task of the law curriculum reform is not to reflect, or incorporate any perfect, objectively real category. The task is not simply one of creating new or different categories to replace the old. In work relationships the categories of law were very different only a short time ago, when the law of domestic relations covered what we now know as family law and labour law, and the position of women then was little different to what it is today.

The curriculum must be one that encourages and develops an inquiring and critical mind. It must be one that defeats the notion that the law is fixed, separate from the community in which it operates. Law exists always in a context — there is no such thing as law separate from context. In understanding the law of work relationships we must see the dialectical relationship between law and context. I am here referring to law and context as separate only to try and capture the momentum that is there both between them and in them together.

The curriculum needs incorporated into it the materials which will enable us to understand the present reality of women's working lives, to see what the present law means, that is how it operates in the lives of men and women, and to envisage the way it might be changed.

RESOURCES FOR A NEW CURRICULUM

From the above I hope it is apparent that there needs to be a far greater diversity of resources and analyses to found a law curriculum which will respond to issues of work and gender. There is, in this sense,

no shrinking from the size of the task which is posed by the feminist critique of the law.

At present we inhabit a legal culture wherein the forces of positivism have encouraged the view that law is something separate from every other aspect of life — and from every other discipline. It is a culture which is hierarchically organised and consequently the primary focus for teaching the law has been judicial decision and statutes as interpreted by judicial decision. While I am not suggesting that these are unimportant I am suggesting that there are many other resources which can be just as significant in our teaching and learning the law of work relationships.

First, there are many other formal decision making bodies which determine the law of work relationships — and these are often of enormous significance, certainly in terms of the numbers of people affected by their decisions. Some of the obvious institutions here are the various federal and state industrial relations commissions and the equal opportunity commissions. Access to the decisions of these bodies is often difficult. Much of the information, the law, is privatised and remains inaccessible because the results of conciliation hearings, the main process for resolving many workplace disputes, often remain confidential between the parties. However, despite this and perhaps because of it, it is especially important to include a consideration of processes such as conciliation in the curriculum.[17] The drift to privatisation of collective work relationships through enterprise bargaining also poses further difficulties of access to and knowledge of the law as regulation is no longer centrally controlled by the industrial commissions.[18] With these problems it can seem far easier to leave these issues out of the curriculum altogether. The proliferation of sources relevant to law beyond judicial decision and statute also has monetary impacts and the constraint imposed by the budgets of law libraries is another pressure on the incorporation of these resources into the curriculum.

Most importantly, in order to critique the law, "to ask the woman question", there must be some way of reaching and knowing something of the great diversity which is the working lives of women. As lawyers we are rarely engaged in the kind of empirical work that gives an insight into the reality that is women's working life. But the work is done in other disciplines and we must engage with that work if we are to understand the gendered nature of the law. In Australia one of the strongest impacts made by women has been in the bureaucracy, the tradition of "the femocrat", and there is published through various government departments, such as the Office for the Status of Women, or through Women's Advisers, or agencies, such as the Affirmative Action Agency, the Work and Family Unit of the Department of Industrial Relations and the Human Rights and Equal Opportunities Commission an enormous amount of material that details much useful information for the law curriculum. Even the somewhat drier statistical offerings of the Australian Bureau of Statistics can be of great assistance here.

All this might suggest that we should also be looking at more diversity in our own research. As I said above few of us are engaged in strict empirical work — but it is no doubt there to be done. We do have very considerable qualifications that can bring much to this type of work — and where we lack the skills the possibility of collaborating with someone from another discipline or practitioners offers the promise of overcoming handicaps.[19]

A Methodology for Teaching and Learning in the New Curriculum

A teaching and learning methodology which best encourages a critical and inquiring mind must be one that understands that the law is not a fixed set of doctrines but the process of forging justice in human relationships. In this sense there is no place for the mere transmission of information but the demand to develop an environment in which students develop the skills necessary to continue their education as a life long process.

The multitude of factors which can influence the development of an environment that fosters this deep learning are too complex to attend to here.[20] For myself, I have found it most useful to organise classes in a way that requires the students to work together in groups of up to ten. The entire class can be brought together from time to time for a lecture which draws together the larger themes which are explored, but for the most part the students work together in their allocated groups through a set of critical questions and problems in relation to some identified materials. The groups meet as often as they wish without their teacher in "untutored" sessions preparing for discussion classes with their teacher. These "untutored"

sessions reinforce the idea that learning is a process of collective and individual inquiry in which students bear as much responsibility as the teacher. The group system ensures that students from a range of different backgrounds work together in co-operation and support each other in their learning. In such a system there can be no reliance on the teacher as an "authority figure". Teaching in this way can be more demanding in terms of hours than the traditional lecture/tutorial or seminar method depending on the number of groups in a course. But the "untutored" groups virtually doubles or more the effective teaching time in the course and so even in times of diminishing resources for teaching it is a style of teaching which can be very attractive.

CONCLUSION

In conclusion, I would like to emphasise again that I think the task for curriculum reform then is not simply one of creating new or different categories to replace the old. The task for the law curriculum is to encourage a certain open questioning. The process of thought which the curriculum must encourage is one which is continually alert to the limitations of any boundary, the interplay of both sides of the conceptual border and the possibilities of constructing alternative ways of thinking — always. In our teaching this requires a critical reflection, a discomfort with the certainties, a confidence to venture into unknown. They are elements I consider the essentials in any tertiary law curriculum.

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 (1995) 6 *Legal Educ Rev* 183.

1 M Thornton, Introduction: The Cartography of Public and Private, in M Thornton ed, *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995).

2 See especially Second Treatise, ch V, Two Treatises of Government, in P Laslett ed, *Cambridge Texts in the History of Political Thought* (Cambridge: Cambridge University Press, 1988).

3 (Cambridge: Polity Press, 1988).

4 (Wellington: Allen & Unwin Port Nicholson Press, 1988). For a more recent contribution to this literature see C Beasley, *Sexual Economyths* (Sydney: Allen and Unwin, 1994).

5 See especially L Bennett, Legal Intervention and the Female workforce: The Australian Conciliation and Arbitration Court 1907–1921 (1984) 12 *Int'l J Soc L* 23; *E* Ryan & A Conlon, *Gentle Invaders: Australian Women At Work* (Australia: Penguin Books, 1989); and R Hunter, Women Workers and Federal Industrial Law: From Harvester to Comparable Worth (1988) 1 *Austl J Lab L* 147.

6 *Ex parte HV McKay* (1907) 2 CAR 1.

7 For a critique of this see R Hunter, Representing Gender In Legal Analysis: A Case/Book Study In Labour Law (1991) 18 *Melb UL Rev* 306.

8 See, for example, L Bennett, The Construction Of Skill: Craft Unions, Women Workers and The Conciliation and Arbitration Court (1984) *L Context* 118.

9 *See* L Bennett, Women, Exploitation and the Australian Child Care Industry: Breaking The Vicious Circle (1991) 33 *J Indus Rel* 20; R Hunter, The Regulation of Independent Contractors: A Feminist Perspective (1992) 5 *Corp Bus LJ* 165; *RJ* Owens, The Peripheral Worker: Women And The Legal Regulation Of Outwork in M Thornton, *supra* note 1, at 40–64.

10 See for example *Fenton* v *Van Gervan* (1992) 175 CLR 327.

11 *See* M Bittman, *Juggling Time: How Australian Families Use Time* (Canberra: Office of the Status of Women, Department of the Prime Minister and Cabinet, 1991).

12 *See* R Graycar, Gendered Assumptions In Family Law Decisions (1994) 22 *Fed L Rev 278.*

13 For a fuller account of this see RJ Owens, Women, "Atypical" Work Relationships And The Law (1993) 19 *Melb UL Rev* 399.

14 Australian Bureau of Statistics, Cat No 4113-0, *Women In Australia* (Canberra: AGPS, 1993) ch 2.

15 *Lee* v *Lee's Air Fuming Ltd* [1961] *AC* 12.

16 See Hunter, *supra* note 7.

17 For a discussion of this see H Astor & C Chinkin, Teaching Dispute Resolution: A Reflection and Analysis (1990) 2 *LER* 1.

18 See RJ Owens, Law and Feminism In The New Industrial Relations, in I Hunt & C Provis eds, *The New Industrial Relations In Australia* (Sydney: Federation Press, 1995) 36–67.

19 The work of R Hunter & A Leonard, *The Outcomes of Sex Discrimination Cases* (Melbourne: Centre for Employment and Labour Relations Law, Working Paper No 8, 1995), is a good illustration of the possibilities here.

20 An excellent book that addresses these issues fully is M Le Brun & R Johnstone, *The Quiet (R)evolution: Improving Student Learning In Law* (Sydney: Law Book Company, 1994).