COMMODIFYING CARE WORK: GLOBALIZATION, GENDER AND LABOUR LAW

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Feminists legal scholars are becoming more conscious of theoretical debates about how 'labour' is conceived and about how 'law' is understood. A distinctively feminist approach to labour, one which extends the boundaries of the field beyond paid work to unpaid caring labour, has developed (Rittich 2002b), and feminist approaches to law have moved from an instrumentalist to a more complex approach that recognizes the normative, institutional and discursive dimension of law and its dynamic and contradictory relationship with the social.

Drawing on feminist labour law literature, I will argue that it is crucial to broaden the scope of labour law in two ways. The first is to expand the material domain of labour law so that it includes the processes of social reproduction, which include both immigration and unpaid work in the household. Feminist labour law scholars have emphasized the importance of including caring labour, whether paid or unpaid, in the domain of labour law, and they (we) are at the forefront of grappling the specific dynamics governing affective or embodied labour. The second is to expand labour law's scale so that it is no longer unquestionably identified with the territory of the nation state. The partial de-territorialisation, the recognition that labour law operates beyond the boundaries of the nation state, challenges feminists, and other labour law scholars, to develop normative foundations for labour law that are not confined to narrow conceptions of national citizenship. Simultaneously, by expanding the

The paper begins by explaining how taking gender seriously results in an expansive conception of labour that includes social necessary and often, but not always, unpaid reproductive labour. This section focuses on the debate surrounding on the 'commodificaton' in order both to illustrate the need to expand the conception of care to include body work and to show how global relations of inequality are involved in the construction of global care chains. In the next section, the emphasis shifts to examining how feminists theorise law. The paper concludes by summarizing the key achievements

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of feminist engagements with labour law that have attempted to broaden the scope of the discipline.

Taking Gender Seriously: Broadening the Conception of Work

Women's precarious position in the labour market is inextricably bound up with the gendered division of labour in the family. Feminists writing about labour law tended to conceive of gender as the social process by which significance and value is attributed to sexual difference through symbols, concepts and institutions (Fudge 1997: 253). They drew upon the work of feminist historians, some of whom were influenced by postmodernism (Scott 1986). According to this view, gender discourses naturalize sexual differences through family relations, sexuality, state institutions and work practices that organize procreation and maintain the population (Lerner 1997, Scott 1986). Labour markets, because they 'operate at the intersection of ways in which people make a living and care for themselves', are bearers and reinforcers of gender (Elson 1999: 612). Joan Williams (2010) noted that the beauty of the market is its ability to transmit socially created preferences efficiently, including those pertaining to racial and gender norms, for example.

Gender is both material, in the sense that it is crucial to how work and families are organized and human life is reproduced in the short and long term in any society, and cultural, in that gender signifies values that permeate society. What the concept of gender does is provide an explicitly historical, relational and dynamic understanding of how inequality in the labour market is configured, refashioned and challenged. A feminist-inspired gender analysis explicitly recognizes that gender is a socially constructed relationship and, thus, departs from feminist standpoint theory that treats women's experience as an ontological and epistemological touchstone. A gender analysis is sensitive to how gender relations change over time and to how gender is intertwined with other social relations such as age, class and race, for example.

Feminist legal scholars have deployed the concept of gender to probe the permeable and changing boundary of what counts as work. They have focused in particular on the relationship between paid employment and family. Conaghan (2005: 19) claims that a 'focus on the operation of the work/family dichotomy in labour law offers a window through which to (re)view and (re) consider labour law's fundamentals.' She challenges traditional labour law theory's emphasis on disciplinary unity and coherence, and calls instead for an approach that draws on feminist standpoint theory that incorporates the postmodern insight that labour law does not have a unitary subject but one that is fluid and fragmentary (ibid: 36). She endorses a critical and reflexive theoretical stance that advocates surveying 'the field from a marginalized point of view' (ibid: 35). Conaghan argues that 'labour law is beset by boundaries' that rest on

> dichotomized pairing of concepts hierarchically positioned in relation to one another: public/private; work/family; paid/unpaid; employed/unemployed; formal/informal economy; typical/atypical workers; standard/nonstandard work; regulation/deregulation; citizens/aliens, to name but a few (Conaghan 2005: 38).

The problem with these boundaries is that they create hierarchies and exclusions. A crucial disciplinary boundary for labour law has been that between work and family or paid and unpaid labour. These boundaries are profoundly gendered. Thus, Conaghan

(2005: 40) warns '[u]nless, and until, labour lawyers confront the full consequence of the gender division of labour in terms of effective and entrenching inegalitarian work relations, any project of progressive transformation through labour law is likely to founder.'[1]

Recent labour law scholarship has sought to widen the ambit of the field of labour law beyond employment to cover the labour market more generally (Fudge 2011a). This expanded conception of labour law's domain, which has been driven by the breakdown of the standard employment relationship, is congruent with recent feminist labour law scholarship, although, generally, most labour law scholars have not adopted a feminist approach to understanding the labour market. The concept of social reproduction, which is drawn from political economy literature, has been used by feminists to illuminate the significance of women's unpaid labour for the functioning of labour markets. 'Social reproduction' refers to the social processes and labour that go into the daily and generational maintenance of the population. It also involves the reproduction of bodies and minds located in historical times and geographic spaces. It 'includes the provision of material resources (food, clothing, housing, transport) and the training of individual capabilities necessary for interaction in the social context of a particular time and place' (Picchio 2003: 2). Social reproduction is typically organized by families in households and by the state through health, education, welfare and immigration policies (Fudge 2011a). It can also be organized through the market and through voluntary organisations such as churches. Production and reproduction are highly gendered. However, as Rittich (2002b: 129) notes, 'there is nothing natural or inevitable about the boundaries between productive and reproductive activity or the ability of different parties to pass on or absorb greater or lesser parts of the costs of production'.

Traditional accounts of work and labour law have ignored all of the unpaid domestic work, overwhelmingly performed by women, that is involved in maintaining living spaces, buying, and transforming the commodities used in the family, supplementing the services provided to family members by the public and private sectors, caring for people and managing social and personal relationships. Feminists have emphasized how the gendered division of paid and unpaid work has negative distributive consequences for women (Rittich 2002a). Some have claimed that 'the reconciliation of paid work to unpaid care is arguably the most pressing problem currently facing labour law', and have argued for the need to shift the emphasis from the employment rights of carers to the provision of caring rights for those who engage in paid work (Busby 2011: 1). However, in doing so, feminists have been careful to caution against an 'institutional and political preoccupation with family-friendly policies', and instead to broaden the focus to appreciate the extent to which the gender contract has been destabilised (Conaghan 2005: 40, see also Fudge 2005: 266). Feminists have also observed that the

[1] Similarly, Rittich (2002b:124) observes

> had there been serious engagement with the situation of women in the labour market, it seems highly unlikely that the world of production would have been defined as it is, and the intersection of unpaid work and market work would have been placed beyond the concerns of labour.

instability in the current gender contract presents an opportunity for a more egalitarian division of reproductive and productive labour.

While many feminist labour law scholars have begun to stress the importance of unpaid care work and rights for care providers in order to achieve substantive equality for women in the labour market, other feminist labour law scholars, such as Vicki Schultz, for example, continue to emphasize the significance of paid work to the good life and women's equality. Although Schultz (2000) agrees that it is vitally important to create society-wide mechanisms in order both to allocate the costs of household labour and to enable people to realize their preferences, unlike other feminist labour law scholars, she does not acknowledge the limits to the commodification of care (Busby 2011, Fudge 2011a, 2011c). Referring to work of the economist Jean Gardiner (1997), Linda McDowell (2001: 460) has argued that 'those aspects of domestic provision that entail the giving of care are particularly resistant to commodification as the relations of exchange are not susceptible to monetary evaluation.' Moreover, another economist, Susan Himmelweit (2013), draws upon William Baumol's (1965, 1993) analysis of sectors in which labour is not only an input but also an output, such as health care and education, to argue that there is little scope for raising productivity while retaining the quality of care. Since in these sectors it is not possible to substitute capital for labour or to introduce technological improvement, when wages are rising, the cost of care will rise more than other goods and services. The use of migrant workers is one strategy to reduce the costs of care. However, as Himmelweit notes, 'the effects of rising wages and hence care costs vary across different sectors of care provision' with the likely result 'inequality in access to affordable care becoming a major issue in many high income countries' (Himmelweit and Land 2007).

Shultz's sensitivity to the institutional contexts in which household work is valued and individual choices are realized does not fully appreciate the distinctive features of caring activities. Care is more than a task that can be performed in exchange for wages; it is embedded in personal relationships of love and obligation, and is a crucial part of identity formation (Fudge 2011a: 132). Treating care work as work, that is, as a socially necessary activity that is a matter of obligation and initiative, rather than women's natural role, results in a profound reconceptualization of labour law (Fudge 2011a: 132). I have argued that

> in societies that value paid employment as the primary path to 'citizenship', treating unpaid care work, the socially necessary labour predominantly performed by women, as a matter of social or family law, and not labour law, reinforces the idea that such work is not only a woman's natural role, but also that in the social hierarchy it is of lower value than paid employment (Fudge 2011a: 136).

Moreover, it is important to acknowledge the economic limits to the whole-sale commodification of care labour in high-income countries. A feminist reconceptualisation of labour law requires scholars to comprehend that the relations of social reproduction are as important as employment relations (and productive relations more generally) for individual development as well as viable and sustainable societies. The conflict between the competing demands of employment and social reproduction cannot be resolved through the wholesale commodfication of care.

The commodification of caring labour has been characterized as the new Wollstonescraft's dilemma - does it strengthen or weaken the gendered division of labour

(Lister 1997)? This dilemma is particularly acute in the current era of globalisation. Feminist political economists have argued that gender inequalities are constitutive of contemporary patterns of intensified globalisation, and that gender differences in migration flows often reflect the way in which gender divisions of labour are incorporated into uneven economic development processes (Herrera 2008: 94). They have emphasized the connection between migrant care work, globalisation and the privatization of social reproduction. They note that many of the women who leave the South to work in the North are temporary migrant workers who do not enjoy either the right to become permanent residents in their host country or the right to circulate freely in the labour market. Given the basic gender division of labor in destination countries, women migrants are often restricted to traditionally 'female' occupations - such as domestic work, care work, nursing, work in the domestic services and sex work - that are frequently unstable jobs marked by low wages, the absence of social services and poor working conditions (Antonpoulos 2008: 38).

Arlie Hochschild (2000: 131) coined the term the 'global care chain' to refer to 'a series of personal links between people across the globe based on the paid or unpaid work of caring'. Global care chains are transnational networks that are formed for the purpose of maintaining daily life; these networks comprise households that transfer their caregiving tasks across borders on the basis of power axes as well as employment agencies, governments and their departments, and other agents, institutions and organisations (Orozco 2009). Ann Stewart (2011) combines the notion of global care chain with a feminist relational framework of ethics of care to explore the relationship between gender, justice and law in a global market. She notes that commodifying care work may solve the care crisis in the North at the expense of creating a care crisis in the South (see also Fudge 2011b, 2011c). Global care chains exemplify the globalisation of services.

Stewart adds an important fillip to the global value chain analysis – the concept of body work. Body work is defined by Carol Wolkowitz (2006: 8) as 'the paid work that takes the body as its immediate site of labour, involving intimate, messy contact with the (frequently supine or naked) body, its orifices or products through touch or close proximity'. Stewart (2011: 21) employs the concept of body work instead of that of care work because the former term 'helps to diffuse some of the constructed differences between sex and care work and highlights instead the social relations involved in provision'. Moreover, body work extends beyond affective-oriented care work to more mundane physical tasks that comprise domestic (or household) labour. The benefit of the term body work is that it allows for an analysis of different types of paid care work that is sensitive to the different statuses of care work – those closer to the messiness of the body have a lower status. It also 'captures the range of power inequalities that emerge when such work is undertaken in the Global North consumer economies by migrants (predominantly women) from poorer economic' (Stewart 2011: 22).

Building on Hochschild's (2000) conception of the global care chain, which captures the 'series of personal links between people across the global based on the paid and unpaid work of caring', Stewart extends the value chain analysis to body work so as to link the geographic location of where the 'service' is produced to governance issues. She explains that at the same time as the General Agreement on Trade and Services (GATS) within the World Trade Organization is 'trying to facilitate the restructuring of

care services as commodified services so that they can be traded on the global market,' international crime conventions are creating new categories of migrants such as the trafficked migrant, who is most commonly associated with the sex trade (Stewart 2011: 31). The effect of these different regulatory regimes is to reinforce and create different kinds of body work that are associated with particular gender (and racialized) identities that are located along a hierarchy of subordination and exploitation.

The globalisation of services helps to create a new international division of immaterial labour. 'Immaterial labour' is a term coined by Michael Hardt and Antonio Negri (2001: 290) to describe labour that 'produces an immaterial good, such as a service, a cultural product, a knowledge or communication'. They identify three forms of immaterial labour: the first involves industrial production that has incorporated information technologies; the second is analytic and symbolic labour involved in computer and communication work, which can either involve creative manipulation or be routine; and the third is affective labour that has traditionally been regarded as women's caring work. Not only are these 'categories infused with class relations,' they are profoundly gendered (Kelsey 2008: 189). The gender-saturated nature of immaterial labour is particularly true of 'affective' labour, which is associated with women and care.

Global care chains illustrate the shift from industrial to immaterial, especially affective, labour, and expose 'the conceptual limitations of labour law within the present context of globalisation' (Stewart 2011: 312). The first limitation is the territorial scope of labour law (Mundlak 2009), which is starkly revealed by migrant labour (Williams 2002). In this context, the precarious migrant status of migrant workers undermines labour rights and standards initially for migrant workers and, in the longer term, for all but those few workers whose credentials and skills are officially recognised and valued (Fudge 2011d).

> The second conceptual limitation of labour law is its
> failure to recognize fully the changed nature of the labour relations that occurs when caring is performed in the market through relationships that are personalised, less time bound and conducted in 'private' workplaces. As a result, the conditions in which the content - 'affect' - is performed can result in more extraction of the workers' labour than is acceptable (Stewart 2011: 313).

Feminist political economists and labour law scholars have argued that not only do global care chains illustrate the ways in which unequal resources are distributed globally (Hassim 2008: 397), they also reveal the gendered nature of this inequality. Thus, they claim that it is not possible to consider gender equality in a comprehensive manner without considering global redistribution (Hassim 2008, Stewart 2007).

From Law as Instrumental to Law as a Gendering Practice

Feminist labour law scholarship no longer law as a neutral tool or instrument that can 'solve' the problem of women's inequality. Nor do most feminists accept the positivist tenet that law can be understood as autonomous from society (Lacey 1998: 9). Feminist labour law scholars appreciate that law has both institutional and normative dimensions. Law is an important site for the production of discourses that play a powerful role in shaping consciousness and behaviour. Some feminists consider law to be a gendering practice, which constitutes 'male' and 'female' subject positions and

contributes to identity formation. According to Conaghan (2000: 363), '[w]ithin such a theoretical framework, law is relocated as one of a range of practices through which gender is acquired, a *process* of which gender and gender differences are an *effect*.' Conaghan and Rittich (2005: 3), for example, consider how the terrain of work is legally constituted and regulated though the creation and deployment of distinctions such as public and private, work and family, production and reproduction. Rittich (2002a, 2002b) is also attentive to the distributional consequences of gender at work. Other feminists emphasise the coercive force of law that distinguishes it from other discourses (Fudge and Cossman 2002: 5).

Recently, Grabham (2011) has focused on how legal technologies and texts, such as adjudication and case reports, create discourses and subjectivities that result in a specific understanding of flexibility at work in which women's labour is seen as infinitely elastic. She elucidates how legal networks of actors and texts orient themselves in time, and she cautions against prevailing conceptions of work-life balance that condemn women to precarious work and require women to adapt to employer-driven flexibility.

Other feminist legal scholars have broadened the notion of law beyond standard legal texts and officials to regard it as a system of enacted norms that operates outside of the 'official' state legal system (Lacey 1998: 9). Stewart (2011: 61) adopts a 'strong' legal pluralist account of law, which assumes that there are multiple forms of ordering beyond state law that govern legal subjects. Focusing on the impact of globalisation on legal discourse, she emphasises the extent to which law is porous and how it interacts with other social fields. Stewart treats law as a system of thought or discourse rather than a system of rules, and, thus, she identifies one of the tasks of feminist labour law scholars as mapping the relationship between 'interpenetrating legalities' that operate at a number of scales from the local, through the regional and national, to the transnational and international.[2] She also recognises that legal discourses are not stable, but are constantly changing.

Most contemporary feminist labour law scholars accept legal pluralism, at least in the weak variety, and recognise that discourses of legality are deeply entwined with other social discourses.[3] They also recognize that legal discourses have a distinctive relationship to the state. Moreover, by and large, feminist labour law scholars accept that that law has no 'essential' meaning; although there are structural and institutional biases, there are contradictions in law that can be exploited with a view towards contesting existing gender roles and relations. The challenge is to developed nuanced accounts of law that are not confined to the nation state, while, at the same time, appreciating the specific power of legality, which is its close proximity to both justice and coercion, and harnessing this view of law with the overall goal of redressing women's material inequality and discursive difference.

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[2] Stewart (2010: 61) refers to Melissaris (2004), who, in turn, refers to De Sousa Santos (2002).

[3] Weak pluralism accepts the centrality of state law, but recognizes the existence of customary and Islamic law in post-colonial contexts. Strong pluralist recognise multiple forms of ordering that are not dependent upon the state (Stewart 2010:60-61).

Conclusion

The erosion of the standard employment relationship, the male-breadwinner and female housewife gender contract, the vertically integrated firm and the hegemony of the nation state have created a crisis for labour law as its norms have been weakened and its ability to protect workers has been undermined. Despite a flourishing feminist labour law scholarship that challenges the traditional boundaries of labour law, it has proven difficult to move gender from the margin to the centre of the discipline. As Conaghan and Rittich (2005: 2) note, 'while virtually all labour regulation strategies are necessarily shaped and informed by encounters at the boundaries of productive and reproductive realms, labour law fails to acknowledge or take account of this in large part because of the lack of conceptual apparatus to identify and chart such encounters.' Feminists have long claimed that women's location in the labour market should be addressed as a moral matter of substantive inequality; now we are also arguing that it is a conceptual necessity to attend to the specificity of women's paid and unpaid work in order to understand how labour markets operate. Excluding unpaid care work from the scope of labour law is an example of what the philosopher Elizabeth Anderson (1999: 311-312 footnote omitted) characterizes as a 'perfect reproduction of Poor Law thinking, including its sexism and its conflation of responsible work with market wage-earning.' Feminist labour law scholarship is now at the forefront of the discipline in reconceiving the material scope of labour law to include all of the processes that make up the labour market, including social reproduction (Fudge 2011a, Stewart 2011).

Moreover, feminist legal scholars who concentrate on global care chains are challenging the nation state as the appropriate frame of labour law and the methodological nationalism (Wimmer and Schiller 2002) with which it is associated. Public policies in developed countries that emphasise increasing women's employment rates without simultaneously stressing the obligations of men to engage in care activities are likely to perpetuate global care chains in which women from poor countries migrate to richer countries to perform care work (Fudge 2011c, Stewart 2011). Such policies not only reinforce the gendered nature of care work, they perpetuate global inequality. More generally, Lucie Williams (2002: 95) has argued that 'privileging nation-state waged work as the site for redistributive politics ignores and devalues the needs and concerns of millions of low and non-waged workers in a globalized economy.' It is also important to broaden the focus on care beyond the affective dimension and attend more to the menial aspects of care work in order to challenge deeply embedded racialized hierarchies in how different types of care work, such as domestic work, are treated.

And finally, feminist labour law scholars are questioning whether the traditional normative basis of labour law, which is to mediate the unequal power relations between employers and employees, provides sufficient grounding for the discipline. Some, like Stewart (2011), are drawing upon the ethic of care, which is based on relationship and connection, rather than on individualism, to ground normative positions. Others, like Nicole Busby (2011) and Fudge (2011), are turning to modified versions of the capabilities approach (Nussbaum 2000, Sen 1999), to provide the conceptual tools for a robust understanding of substantive equality.

Feminists have insisted that care work in particular and body work more generally are not simply women's issues, but matters of social responsibility and global justice. It is

crucial for labour law to take social reproduction more seriously. Recent books (Busby 2011; Stewart 2011) suggest that the care genie has escaped the labour law bottle law. However, there is more work to be done. Understanding the role and characteristics of immaterial and affective labour as labour markets globalise, challenging the binary opposition between male and female in order to convey and appreciate the full array of sexualities and gender relations (Chapman 2005, Conaghan and Grabham 2007), and attending to the nuanced and contradictory roles of legal institutions and discourses, and how they interact with other forms of social-ordering discourses, are some of the intellectual and political tasks remain to be tackled.

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