

TRANSNATIONAL LAW AND FEMINIST LEGAL THEORY

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I. INTRODUCTION

‘[N]o one term can serve as foundational, and the success of any given analysis that centres on any one term may well be the marking of its own limitations as an exclusive point of departure.’ Butler, 1993, 240

Feminist legal theory (FLT) has enjoyed a life span of over three decades. It has established itself as an authoritative and dynamic legal theory project that is both descriptive as well as normative. Taking as a fact that women experience discrimination based on gender, sex and sexuality, it deploys a specialised gendered analysis of the law tasked with alleviating and redressing the situation of women. FLT has expanded from a niche subject to one that has contributed to different areas of the law, extending conversations on gender, sex and/or sexuality, domestic and familial relationships, and workplace discrimination as well as informing legal and policy reforms on property

rights, as well as access to state benefits. It has also influenced the content and direction of social, economic, and political ideas. Its strength lies in its malleability and interdisciplinary approach. FLT has also transcended the boundaries of the nation state and a preoccupation with domestic matters. Its unique approach migrates into transnational legal concerns such as migration and refugee issues, trade and economics, peace and conflict, development, neoliberalism and the environment.¹

There is no consensus amongst feminists about the possibility of ‘change through law’ or the extent to which women can participate and exercise power within the constraints of the law or the relevance of gender difference in law.² While there are several different approaches that have characterized feminist legal thought - often narrated as a history of three waves of feminism and the differences between radical, liberal, socialist, cultural, and postmodern feminism³, it is not possible to clearly demarcate and categorize these approaches as entirely distinct and separable. Furthermore, they do not account for the ways in which FLT has emerged in different

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¹ Crawley, *Refugee and Gender*; Da Silva, ‘Mapping Territories of Legality’; Bhabha and Shutter, *Women’s Movements*; Ackers, *Shifting Spaces*.

² Referred to as ‘the difference debate’ in Goldstein, *Feminist Jurisprudence*; Some advocate across-the-board gender equality with no special treatment for women: Williams, ‘Equality’s Riddle’; and others insist that gender equality cannot be equated with sameness, but demands the recognition of and adaptation to gendered realities and difference: Kay, ‘Equality and Difference’; and other scholars are interested in new critiques of liberal, dominance, and cultural feminism emphasizing the dangers of gender essentialism and stressing the huge diversity among women: Chamallas, *Introduction to Feminist Legal Theory*; and Baer, *Our Lives Before Law*.

³ Chamallas, *Ibid*, labelling three strands of feminist legal theory.

historical and political contexts. Legal feminism also marks out several pathways to achieving its disparate goals, some of which may, at times, conflict. Thus, FLT does not present a clear-cut metatheory or grand narrative on gender. As Davis and Munro have argued, it may be more useful to understand FLT as ‘a network of ideas and concepts which crystallize or recede according to context and strategy.’⁴ Rather than ‘doing gender’ *per se*, FLT pays attention to the work that gender does within a given setting. This includes the ways in which power is distributed partly through the interaction of gender with a range of social economic and political arrangements such as religion race, class, nationality and sexuality, at the local as well as international levels.⁵

At the same time, some key ideas and concepts of FLT challenge a conventional understanding of law as a state-based, formal, objective, hierarchical and determinate mechanism.⁶ These include for example, challenges to law’s preoccupation with liberal individualism and the rational subject which assumes the liberal legal person as de-historicised de-contextualised, stripped of particularities and genderless. Various trajectories of FLT expose how this subject is invariably masculine, white, heterosexual, able-bodied and non-pregnant.⁷ FLT has also challenged and de-naturalised the private/public distinction. This refers to the view that the private sphere, such as the family, is natural and beyond state intervention. FLT reveals how law is

⁴ Davies and Munro, ‘Introduction’ 15.

⁵ Ibid.

⁶ Conaghan, ‘Reassessing the Feminist Theoretical Project.’

⁷ Hunter, ‘Deconstructing the Subjects of Feminism’; Nedelsky, *Law’s Relations: Scales, Legal Feminisms*, 4; Smart, ‘The Woman of Legal Discourse’; Gear, ‘Sexing the Matrix,’ 44; Finlay, ‘Breaking Women’s Silence in Law’, 892; Davies, *Delimiting the Law*, 72; Naffine, ‘Who are law’s persons?’

implicated in creating and maintaining this distinction in ways that are inherently political and that sustain power differentials, gender stereotypes and the division of labour in the home⁸. It has also effectively challenged law's claim to be an objective external, neutral truth, by exposing law's capacity to aggravate inequalities, produce exclusions, and exacerbate oppressions.⁹ These critiques reveal how the modalities of power sustain and perpetuate the central components of law, highlighting the gendered nature of law and how law produces the gendered subject¹⁰

The relationship between FLT and transnational law (TL) is significant both historically and currently. TL accepts the idea that the world is an interactive planetary system. It looks beyond traditional modes of governance limited to an interplay between law and discrete nation state entities to non-territorial, cross border, norm-setting regulatory and governance frameworks that deconstruct the law-state relationship.¹¹ It demonstrates the significance of the overlap between spheres of law, politics and society and illuminates the connection between practice and normative arrangements to enhance our understanding of the relationship of law to globalization. The discussion directs attention to transnational processes, interactions and flows, and new sets of theoretical, historical, epistemological and even philosophical questions posed by transnational realities. As Zumbansen states transnational is a method of law and legal theory that 'must be seen in the context of a vibrant interdisciplinary discourse

⁸ Olsen, 'Constitutional Law: Feminist Critique of the Public/Private Distinction'; *ibid.*, 'The Family and the Market: A Study of Ideology and Reform'; Fudge and Cossman, 'Introduction: Privatisation, Law and the Challenge to Feminism.'

⁹ Finlay, 'Breaking Women's Silence in Law'; Davies, *Delimiting the Law*.

¹⁰ Naffine and Owens, (eds.) *Sexing the Subject of Law*; Smart, 'The Woman of Legal Discourse.'

¹¹ Zumbansen, 'Transnational Legal Pluralism.'

about the status and role of law in an increasingly inchoate, globe-spanning web of regulatory regimes, actors, norms and processes.¹² More broadly, it ‘presents an important opportunity to reflect on law and its connections with ongoing investigations into local and global forms, institutions and processes of governance.’¹³

At the same time, TL is not a new concept. It has been a marked feature of the postcolonial world ever since the advent of western colonialism and imperialism.¹⁴ As a governance project, its contours and features have shifted and altered over time, as the political, economic and cultural encounters between East-West, North-South, inform but do not exactly replicate themselves in current neoliberal agendas. TL remains as much a part of the political, religious and cultural tensions of the postcolonial/neo-colonial present as it was a part of the colonial and imperial past.¹⁵ Gender has remained integral to this project, whether in the context of re-inscriptions of arbitrary colonial partitions,¹⁶ the articulations of newly formed nation-states emerging from decolonization,¹⁷ or, in the current targeting of gendered ‘Others’ against which Europe seeks to defend itself from and define itself against.

In this chapter I examine the relationship between TL and FLT. My approach is to work with the broadest understanding of FLT as a network of concepts and ideas related to gender, sex and sexuality and their relationship to law and the transnational governance project discussed above. This relationship provokes a series of challenging questions: What is at stake for FLT when understood through the framework of

¹² Zumbansen, ‘Transnational Law, Evolving’, 900.

¹³ Ibid. at 901; cf. *ibid.*, ‘Defining the Space of Transnational Law’, 307.

¹⁴ Anghie, *Imperialism, Sovereignty and the Making of International Law*.

¹⁵ For example, see Bhabha, *Nation and Narration*; Gregory, *The Colonial Present*;

¹⁶ Mitra, ‘Affective Histories and Partition Narratives.’

¹⁷ Boehmer, *Stories of Women*.

transnational governance? In attempting to bridge the local and global / inside and the outside, how is law's relationship to matters of gender, sex, and sexuality understood in the intersections of local and global? Has the globalization of gender, sex and sexuality analysis been empowering for women, or has it emerged as another bureaucratic, transnational governance project that has reproduced existing gender, sexual and cultural norms rather than disrupting or transforming them? What are the specific historical and political trajectories advanced by FLT in the transnational context and how do they influence understandings of gender, sex and sexuality and the work that these concepts do in law?

Given the exponential growth of FLT and the broad reach of its inquiries, I will not undertake a full mapping of this relationship. Instead I provide a snapshot of the ways in which the domestic and global speak to one another through a discussion of the concepts of gender, sex, and sexuality and how these have come to be understood in women's human rights. First, I set out how the concepts of gender, sex and sexuality have been taken up in FLT, which in this overview, include the post-structural, queer and postcolonial feminist critiques of these concepts.¹⁸ I then examine how these concepts have unfolded in the arena of women's human rights and the outcomes of such encounters. I specifically examine how gender, sex and sexuality align with global governance, illustrating my argument through a discussion of women's human rights campaigns against violence against women (VAW) and the over-privileging of sexuality as the primary site of women's oppression. Not only have these campaigns at times produced impoverished understandings of agency and resistance, they continue to reproduce women, especially third world women as victimized, vulnerable and in

¹⁸ Cf. the chapter by Dipika Jain and Oishik Circar (in this volume).

need of male or state protection, or both.¹⁹ These campaigns have also witnessed an increasing alignment of the feminist legal project with the state, in which 'solutions' to VAW have mainly taken the form of carceral measures and a general tightening of the sexual security regime in accordance with national and cultural imperatives.²⁰ This argument is demonstrated in the legal responses to the December 2012 Delhi gang rape as well as the sexual assaults that occurred in Cologne on New Years' Eve in 2015 that I discuss below.²¹ At the same time, and as I argue in the final segment of this chapter, this carceral vision is embedded within a neo-liberal paradigm that views VAW as an obstruction to women's participation in the market. Gender, sex, and sexuality are tamed and disciplined through market processes, with the global market epitomizing the desired coalescence of subjectivity, choice and economic agency, crucial variables in the calculus of women's emancipation and empowerment.

II. FLT AND GENDER, SEX, SEXUALITY

The central tools of FLT, gender, sex and sexuality are subject to much debate which often challenges the prevalent assumptions on which these categories are based in law. These debates interrogate the biological determinism that informs the sex-gender category. For example, gender dualism is the idea that there are only two distinct genders: male and female and gender hierarchy is the assumption that women

¹⁹ Kapur, 'The Tragedy of Victimisation Rhetoric.' Crenshaw, 'Demarginalising the Intersection between Race and Sex'; On agency and victimization, see, Abrams, 'Sex Wars Redux.'

²⁰ Kapur, 'Gender, Sovereignty and the Rise of the Sexual, Security Regime.' Farris, *In the Name of Women's Rights*.

²¹ For a more elaborate discussion and implications of these cases for women's human rights advocacy see Kapur, *Gender, Alterity, and Human Rights*, Chapter 3 (forthcoming).

are naturally weak, vulnerable, the property of and entirely dependent on, men, who are their protectors, breadwinners, and saviours. Other debates involve sex as a natural, physiological and stable category and sexuality as essentialised and presumptively based on reproductive heterosexuality.

Women have historically been considered as naturally inferior to men without agency or autonomy and treated as objects of law rather than subjects entitled to rights. FLT has struggled to dislodge sex or gender from the vice grip of defining what is real, authentic or natural which has reproduced gender stereotypes and invited protectionist responses in law. It has however, been largely successful in articulating gender as a social construction, and exposing how law is gendered in both procedural and substantive terms with a differential impact on women. This understanding has set the stage for bringing feminist challenges to a broad range of laws relating to the family, marriage, sexual violence and harassment. However, these interventions have not adequately challenged gender dualism nor disrupted understandings of sex as natural and physiological. Even in the deployment of gender as an analytical category that pays attention to the historical materialism that has shaped this category, there remains a constant risk of falling into the biological traps that render gender as fixed and frozen. These tensions remain central to debates in FLT and have also unfolded in the transnational space.

Similarly, a specific form of sexuality, that is, reproductive heterosexuality, has been overtly valorised and essentialised in law as superior, 'natural', and desirable. All deviations from this norm have been relegated to inferior, 'unnatural' or an 'abnormal' status. The idea of sexuality as socially constructed emerged primarily in the writings of radical-dominance-power feminists like Catharine MacKinnon.²² Her

²² MacKinnon, *Towards a Feminist Theory of the State*; Dworkin, *Pornography*.

central argument is that the differences between men and women are instituted by an exercise of power through sexuality that is entirely defined and dominated by men, where women are subordinated, oppressed and disadvantaged through male dominance. Gender is thus a product of the way in which sexuality is constructed as a form of power, quite specifically through the patriarchal oppression of women and their sexuality. In terms of law, this argument not only holds that the very culture and substance of law is gendered, but also that notions of neutrality and objectivity are in fact based on male experiences and a male point of view. In this perspective, sex, that is, the body, is treated as the primary site for female subordination and viewed as an ever-available, easily accessible terrain for all modes of ideological, social and cultural inscription. As a result, advocacy strategies have been directed almost exclusively towards combatting sexual violence, including rape, pornography, sexual harassment and prostitution²³.

Critiques

Several feminist critiques have further troubled the sex-gender category that continues to be based on gender dualism, and positions sex as physiological and natural, as well as the idea of sexuality as the central site of women's oppression. A significant early critique initiated over two decades ago by Judith Butler, interrogated the overly deterministic position of radical/dominance/power feminists that conflated sexuality and gender and limited the possibility of theorizing sexuality outside of gender difference.²⁴ Butler's work theorized sex not as the natural manifestation of the body's

²³ Edwards, *Violence Against Women under International Human Rights Law*; Dworkin, *Woman Hating*.

²⁴ Butler, *Bodies that Matter*, 239.

innate physiological drives but as a discursive and cultural production made existent in and through the modality of gender.²⁵ Butler cast the givens of gender into a new mould: as performance, a set of conditioned re-enactments that are simultaneously a constant re-experiencing of meanings socially attached to it.²⁶ Gender is thus a scripted construct, a seemingly predictable yet equivocal apparatus through which sex is *produced* and rendered as fixed and incontrovertible, that is, as ‘pre-discursive’, ‘natural’ and ‘normal’.

Drawing on Foucault’s notions of disciplinary and regulatory power, Butler argues that sex operates as a regulatory norm that ‘produces the bodies it governs.’²⁷ Through a ‘stylized repetition of acts’ that congeal over a period of time, gender is an effect of discourse and performance.²⁸ And normative effects of this performance are reproduced through repetition, reiteration and exclusion. This argument rejects the distinction between sex as natural and sexuality or gender as socially constructed. Instead, sex is a product of the discourses concerning gender and sexuality as well as the impossibility of exercising agency outside of these sets of discursive practices.²⁹

Relating this argument to the specific context of law, Margaret Davies argues that neither sex nor gender is natural.³⁰ Rather than referring to the idea of law as gendered, she refers to the law as sexing and hetero-sexing its subjects, thus marking a move away from the sex-gender distinction and identifying its heteronormative moorings. These positions are resonant with Foucault’s critique of the understanding

²⁵ Butler, *Gender Trouble*; Butler, *Bodies that Matter*.

²⁶ Butler, *Bodies that Matter*, 140.

²⁷ Butler, *Bodies, Bodies that Matter*, ix. See also Foucault, *The History of Sexuality*.

²⁸ Butler, Judith, *Gender Trouble*, 40.

²⁹ Butler, *Gender Trouble*, 148.

³⁰ Davies, ‘Taking the Inside Out.’

of political power primarily in terms of sovereignty exercised by the various components of a nation-state. He argues that this account of the functioning of power disguises the minute and intimate ways in which it is deployed – its ‘capillary’ operations that infiltrate the personal and include the actual constitution of the subject.³¹

Subsequent developments in queer theory have sought to bring a fuller challenge to the concepts of gender, sex and sexuality to create space for more polymorphous and pluralistic genders, sexes, and sexualities.³² This position argues that these concepts are fractured and contingent. It puts into question male and female gender dualism, and fully disengages sex-gender from its biological moorings. Efforts to envisage the sex-gender binary as a fully social category and to dislodge the naturalised and universalised hegemonies in which this binary has been and continues to be embedded, seek to push back against protectionist representations and responses that are built on gender, sexual as well as cultural stereotypes. The reconceptualising and reimagining of the entire category of sex-gender as fluid, fluctuating, and shape-shifting, rather than based on gender dualism and always already asymmetrical is crucial for several reasons. It confronts the tenacious hold of biological determination as an explanation for women’s subordination, opposes the constant re-emergence of protectionist and paternalistic responses to women, and understands how gender, sex and sexuality operate as technologies of power. However, these re-imaginings have found little traction in the international legal arena and in women’s rights advocacy. Biological explanations persist that not only restore gender dualisms and reinforce gender stereotypes, but also ensure that several categories of people who do not adhere

³¹ Foucault, *Discipline and Punish*; Foucault, *The History of Sexuality*.

³² See for example Sedgwick, *Epistemology of the Closet*. Halperin, *One Hundred Years of Homosexuality*; Butler, *Gender Trouble*; See also Stychin, *Law’s Desire*.

to or fall into the rigidly defined categories of gender, sex and sexuality are excluded from protection.³³

Specific cultural, racial and religious understandings of gender, sex and sexuality also underscore transnational governance. These are revealed explicitly in postcolonial feminist critiques that have similarly outlined how male and female bodies have been overwhelmingly understood within legal discourse as naturally different and have also been consistently displaced onto a First World-Third World divide.³⁴ Colonial understandings of the gendered 'Other' were constructed through the equation of tradition and antiquity with primitiveness and libidinal aggression, a perspective central to the colonizers' moral judgments about the native subject and his treatment of women³⁵ This equation reinforced civilizational differences and an inscription of the cultural superiority of the West that continues to be highly potent in the postcolonial era. It is a relationship in which non-European societies continue to be treated as objects of knowledge to be reconstituted through various techniques, including law, and made comprehensible to the West. Liberal definitions of colonial masculinity, femininity, culture and historical difference, and liberal postulations of what and who constituted the universal subject persist in this relationship.³⁶ These arguments were

³³ Otto, 'Towards Rethinking the Sex/Gender Dualism,' 204; Rothschild, *Written Out*. Also see Puar, 'Terrorist Assemblages' 79-114, on how queer interventions have also produced their own set of cultural and racial exclusions.

³⁴ Kapur, 'Tragedy of Victimization Rhetoric.' For examples of critique on how queer theory is also implicated in ignoring matters of race see Barnard, *Queer Race* ; Dhairyan, 'Racing the Lesbian, Dodging White Critics.'

³⁵ Ibid, 'Tragedy of Victimization Rhetoric'; Lugones, 'The Coloniality of Gender.'

³⁶ For example, Katherine Mayo, an American feminist, discussed the treatment of women in India, arguing that it justified the denial of self-rule to Indians: Mayo,

deployed to facilitate the continuation of colonial rule through gender as well as to manage and regulate the native population. Civilizational achievement, especially, the treatment of native women by native men, became a necessary prerequisite to legal entitlements and other state-bestowed benefits.³⁷

Liberal imperialism carried forward the mission of Empire as a disciplining and civilizing tool through which gender, sex, and sexuality were sutured together as key sites for structuring the contest between the colonial power and the native subject. Colonial bids to outlaw harmful cultural practices to save the ‘brown women’, were as much about establishing the civilizational and cultural supremacy of the West as they were a justification for denying self-rule to the backward and/or barbaric native subject.³⁸ This pursuit keeps on informing the sex-gender binary in women’s human rights advocacy in the contemporary period. In the postcolonial moment, critics have addressed how liberation is advanced through the discourse of liberal democracy and plays out specifically within the context of women’s human rights and a global feminism informed by the ‘moral superiority’ of what is largely characterized as an Anglo-American geopolitical discourse.³⁹

The governance work being done by gender in TL since the period of the colonial encounter, where economic global expansionism was not only coupled with a civilizing mission but also a rescue mission, continues to inform the postcolonial present. Contemporary gender advocacy remains an intervention in existing normative and historical arrangements, including dominant racial, religious and sexual norms. The

Mother India; On the production of colonial masculinity, see for example, Sinha, *Colonial Masculinity*, 82.

³⁷ Dhawan, ‘Affirmative Sabotage.’

³⁸ Spivak, *A Critique of Postcolonial Reason*, 287.

³⁹ Grewal, *Transnational America*, 152.

critiques posit that hierarchies of gender and sexuality are mediated through cultural, racial, and civilizational discourses. Interrogating the idea of pre-existing subjectivities awaiting liberation through the liberal paradigm of gender and sexuality rights, exposes two trends. First, how human rights discourse is implicated in the construction and inscription of these very identities, and second, how cultural and civilizational hierarchies continue to inform women's human rights advocacy and materializes as transnational governance.⁴⁰

These critical positions have drawn attention to the structural biases embedded human rights generally. These critiques ultimately advocate two propositions. An overall restructuring of the parameters of TL to further accommodate women's rights, rather than to struggle for greater inclusion within the skewed existing arrangements; and to shape interventions that can resist collusion with abusive power structures while supporting the development of new understandings of state responsibility.⁴¹ However, challenging the foundations of transnational legal arrangements and their modes of operation is no easy task and efforts to do so continue to meet with considerable resistance. This chapter seeks to illustrate how, in the contemporary moment, transnational encounters with gender, sex and sexuality, have not necessarily produced outcomes that are empowering for women. A protectionist approach towards women coupled with a biological determinism and dualistic understandings of gender has remained intransigent in TL. While this approach remains prevalent in relation to

⁴⁰ Nilsen and Roy, *New Subaltern Politics*; Roy, *New South Asian Feminisms*; Chitnis and Wright, 'The Legacy of Colonialism.'

⁴¹ Bunch, 'Opening Doors for Feminism: UN World Conferences on Women'; Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law,' 644.

several issues that pertain to women's rights, including gender equality,⁴² the focus of my discussion is on the campaigns against violence against women pursued in women's human rights advocacy.

III. 'TRANSNATIONAL' GOVERNANCE FEMINISM AND CAMPAIGNS AGAINST VIOLENCE AGAINST WOMEN

In the international legal arena women's rights have been pursued largely within the logic of campaigns confronting violence against women (VAW).⁴³ The critical moment came at the 1993 Vienna World Conference on Human Rights, when the human rights community came to recognize that violence against women in the home or private sphere should be subject to human rights scrutiny.⁴⁴ The Declaration on the Elimination of Violence against Women stressed the significance of eliminating VAW, including 'all forms of sexual harassment, exploitation and trafficking in women, the elimination of gender bias in the administration of justice and the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism.'⁴⁵ While the 1994 Cairo Conference on Population and Development, the 1995 Beijing World Conference for Women, and the adoption of the 1999 Optional Protocol to the Convention for All Forms of Discrimination against Women, have been important milestones for women's human rights, sexual violence against women has received the most attention. The privileging of sexual violence in anti-trafficking

⁴² Rosenblum, 'Unsex CEDAW'

⁴³ Bunch, 'Women's Rights as Human Rights.'

⁴⁴ World Conference on Human Rights, June 14-15, 1993.

⁴⁵ Ibid. 19, para 38.

interventions,⁴⁶ the drafting of the Rome Statute,⁴⁷ armed conflict and the focus on wartime rape,⁴⁸ gender, peace and security initiatives,⁴⁹ not only risks obscuring the myriad challenges that women's experience outside of sexual violence as well as the structural and systemic aspects of these experiences, they also put into question how interventions on gender are stagnant.

The primary focus of women's rights on violence, that is supported by states, continues to reinforce stereotypical, essentialist understandings of gender, sex and sexuality. Women continue to be represented as one-dimensional, primarily as victims. This attention on sexual violence and its consequences is an outcome of what Janet Halley describes as 'governance feminism' that has sought to quell feminist dissent and establish its own radical feminist universalism.⁵⁰ It is an approach that wants to focus all efforts on pursuing the eradication of the 'universal' male subordination of all women and highlighting the global war on women through sexual violence. Dominant in international and human rights circuits, governance feminism, or what I term as '*transnational*' *governance feminism*, maintains the idea that gender operates along the binary of man/woman, male/female, masculine/feminine; that it is committed to a theory of subordination, where woman/female/feminine are subordinated to men/male/masculine; and that feminists carry a brief for women, femininity,

⁴⁶ Bernstein, 'Militarized Humanitarianism meets Carceral Feminism'; Chuang, 'Rescuing Trafficking from Ideological Capture.'

⁴⁷ See Halley, 'Rape at Rome'; Halley, 'Rape in Berlin.'

⁴⁸ McGlynn and Munro, *Rethinking Rape Law*; Gardam, 'A New Frontline for Feminism.'; See also, Buss, 'The Curious Visibility of Wartime Rape; Engle, 'Feminism and its (Dis)contents.'

⁴⁹ Heathcote and Otto, 'Rethinking Peacekeeping, Gender Equality.'

⁵⁰ Halley, *Split Decisions*. Halley, 'Rape at Rome.'

female/feminine gender.⁵¹ In this description, then, the gender category ‘woman’ remains distinct, stable and closed. As discussed, the sex-gender category presumes a dualistic understanding of gender, male and female, as well as a hierarchy, in which men, male, masculine, are dominant and women, female and feminine are subordinate. As I argue, gender advocacy based on representations of gender as a fixed, stable category and on an axiomatic male-female binary invites remedies and responses that have little to do with promoting women’s rights or securing women’s empowerment.

Women’s groups and human rights groups have not sufficiently confronted the fact that their advocacy, like other modalities, is embedded in transnational legal orders with a distinct governance dimension. These are increasingly focused on criminal justice, law and order, tightening of the state security apparatus, policies and protocols which justify restrictions on women’s rights and regulate and discipline sexual conduct – all undertaken in the name of ‘protecting’ women. There is little attention paid to the economic, military, and political agendas that are left out of these engagements and a simultaneous silencing of subaltern and dissenting voices that have challenged the narrowing forms of justice and their incorporation into global governance structures and hegemonic institutions.⁵²

Furthermore, such gender interventions fail to take account of the genealogy of gender and how it has historically served the political ends of imperialism and colonialism through the discursive construction of the powerless and victimized Third World woman. They function largely with reference to an Anglo-American feminist tradition, that invariably erase the particular cultural formations and colonial histories

⁵¹ Halley, *Split Decisions*, 17-18

⁵² Halley, ‘Rape at Rome’; Bernstein, ‘Militarized Humanitarianism meets Carceral Feminism.’

around gender that constitute the ground upon which rights are deployed and through which rights must be procured. It is in fact the valorisation of a hegemonic contemporary global (read American) feminism that in the international legal arena has consolidated around the issue of violence against women and the victimized, specifically ‘Third World’, woman’s body. This history in part explains the dominance of the script of violence in women’s rights advocacy globally. The foregrounding of violence helps make the case for categorising women as victims who are unfree and require saving and empowerment. It is an approach that has contributed to the reaffirmation of the dualistic heteronormative categories of gender and sexuality, strengthened the policing of these categories and displaced them onto a First World-Third World divide.

The reproduction of these binaries has justified the establishment of security regimes and militaristic interventions that have increasingly come to frame women’s human rights, where the threat of hostile, unintelligible, irrational ‘Others’ serves as a justification for the imposition of modalities of unfreedom, exclusion and the intensification of the ‘us and them’ divides. Within this arrangement women’s rights succeed in its universalist project, especially when its discourse coincides with the linked parameters of securitization and imperialistic ambition, as well as the neo-liberal market that I discuss towards the end of this chapter.⁵³

The Current Optics of TL and FLT: Two narratives

Transnational governance feminism finds literal manifestation in the international as well as domestic legal regimes where gender is regulated, disciplined and managed in ways that do *not* necessarily liberate women. The sexual and cultural dichotomies that permeate the narratives of nation-states deeply inform and influence

⁵³ Orford, ‘Feminism, Imperialism,’ 282.

the vocabulary of gender rights advocacy as evident in two highly publicized events involving sexual violence. Through these local and domestic responses, gender is fused into the global in ways that are both powerful and troubling.

At the end of December 2015, hundreds of women were sexually molested during New Year's eves celebrations near the main Cathedral and central train station in Cologne. Headline news splashed around the world suggested that men of Middle Eastern or North African appearance had carried out most of the assaults. These allegations made the attacks a turning point in Europe's highly fraught debate on the refugee crisis that was occurring at that time.⁵⁴ It specifically led to a serious critique of the German Chancellor Angela Merkel's open-door policy that allowed over one million refugees fleeing from conflict zones, mainly Syria and Iraq, to enter the country⁵⁵. While only three of the fifty-eight men ultimately charged as suspects were actual refugees, the racial origins of the perpetrators, who were mostly non-white, non-German citizens, was immediately conflated with Islam and raised hysterical xenophobic charges, represented in sensational headlines and slogans such as the 'Islamic Rape of Europe,' or 'Rape refugee.'⁵⁶

Given that sexual violence against women rarely triggers this level of alarm or even interest in Europe, including in Germany, the question that arises is whether it was

⁵⁴ Richards, 'Cologne Attacks.'

⁵⁵ Connolly, 'Germany toughens rape laws.'

⁵⁶ See 'Polish Magazine Creates Horrific Anti-Migrant Propaganda.' Available at <http://www.carbonated.tv/news/polish-magazine-creates-horrific-modern-day-antimigrant-propaganda>; Zakaria, 'The Rapist Refugee as Germany's Boogeyman' on how the German far right is repackaging xenophobia as outrage over women's rights, 5 February 2016 available at < <http://america.aljazeera.com/opinions/2016/2/the-rapist-refugee-as-germanys-boogeyman.html>>.

the nationality and religion of the attackers rather than the horrid treatment of women that was more at stake? The dominant narrative, supported partly by the media, took the form of an iteration that sexual violence is a crime usually committed by ‘Others’ – ‘non-white’, ‘non-European’, ‘Muslim’ men, originating from elsewhere. This familiar orientalist discourse that underpinned colonial rhetoric is coupled in the contemporary period with an Islamophobia that is rife in Europe, that has flourished ever since 9/11, and been strengthened by the subsequent terror attacks in major Western European cities. The failure to acknowledge that violence against women is not perpetuated solely by ‘Others’, or the fact that Western liberal democratic states are themselves thoroughly implicated in triggering the current mass migrations into Europe through its involvement in bombing Syria is an instance of how the solutions to the problem – in this case, combating the perceived threat through bigotry and carcerality – can miss the point altogether and, in the process, do more harm. In response, the German national parliament enacted reforms in which MPs backed stricter rape laws that included making the lack of consent of the victim central to the definition of the crime⁵⁷ At the same time the law reform also makes possible the prosecution of entire groups for a sex crime, regardless of whether any individual in the group is involved in the crime, under the new category of ‘grouping.’ The provision is specifically intended to address the events that occurred in Cologne, and puts a powerful tool in the hands of authorities by making it easier to deport migrants who commit sexual offences.

In a contrasting case, thousands of Indian citizens of all ages and backgrounds marched in protest against the brutal gang-rape and murder of Jyoti Singh Pandey, a 23-year-old medical student, and a vicious assault on her male companion, in a moving bus on the Delhi streets on the night of 16 December 2012. The sadistic event triggered

⁵⁷ Connolly, ‘Germany toughens rape laws.’

national and international outrage, with the protestors demanding an end to the culture of pervasive sexism and violence against women.⁵⁸

At one level, the protests signalled a deep anger as well as exhaustion with a profoundly misogynistic culture that enables women to be ogled, groped, molested, stalked, threatened, bullied and harassed while traversing public space, using public transport, or while otherwise outside the home pursuing everyday activities. Thus, the protests were a defiant demand for the recognition of women's rights not only to public safety, but also to bodily integrity and sexual autonomy. The protests also vociferously confronted the entrenched understanding of women's rights as located exclusively within a familial framework and an outdated notion of 'Indian womanhood'. This refers to a cultural archetype and historical assumption that all Indian women should unswervingly align with the classical image of the female as perennially self-sacrificing, obedient, malleable, dutiful, honourable, heterosexual, marriage-oriented and, most importantly, chaste.⁵⁹ The protests provided a thorough challenge to and repudiation of calcified conventional understandings of 'Indian womanhood' and its accompanying stereotyped assumptions about female and male, femininity and masculinity. Holding aloft placards that declared: 'I am not just your mother, daughter, sister or wife. I am a citizen. I demand equal rights', some demonstrators overtly distanced themselves from the customary perceptions of what it means to be subject to the 'Indian cultural values' that have shackled women's freedom.⁶⁰

However, in terms of law, the government responded by enacting a series of

⁵⁸ Desai, 'Gendered Violence and India's Body Politic.'

⁵⁹ Shandilya, 'Nirbhaya's Body.'

⁶⁰ For some more nuanced and complicated analyses see Krishnan, 'Rape, Culture and Sexism in Globalising India.' Lodhia, 'From 'Living Corpse' to India's Daughter.'

reforms directed exclusively on reforming the criminal law, including enacting the death penalty for rape leading to the death or maiming of the victim, and strengthening the law enforcement machinery as well as surveillance on public transport. It refused recommendations to criminalise marital rape, as well as to repeal colonial and Victorian provisions dealing with the outraging of a woman's modesty and chastity, reflecting a dominant nationalist view that equates Indian women's virtue with the 'honour' of the nation itself.⁶¹ The new legal reforms were aimed primarily at enhancing security; left intact gender dualisms; and reinforced intractable gender stereotypes where women are seen as passive and vulnerable, as victims and as subservient repositories of 'Indian culture', and where men dominate as either patriarchs, perpetrators, protectors or custodians⁶². A slew of measures intended to restrict women's mobility and freedom were also promoted at the local and state levels, based on the allegations that the 'flaunting' of women's sexuality through personal practices such as Western clothing and Western patterns of sociality were 'inviting' rapes.⁶³

At the same time, the protests represented a sharp shift in the direction of a neoliberal political rationality that is increasingly characterising and shaping the terms of gender within India as well as within the global context and international legal arena. Jyoti Pandey's desire to become an educated professional, reflected the aspirations on a working class Indian woman making a valid, hard-earned place for herself within a

⁶¹ The government largely ignored the recommendations of a committee constituted shortly after the Delhi rape, to repeal the marital rape exception in the IPC and also sought to address gender outside of the constraints of familiarity and through rights to bodily integrity and sexual autonomy: see Verma, Seth and Subramaniam, *Committee on Amendments to Criminal Law*.

⁶² Kapur, *Erotic Justice*.

⁶³ Ghosh, 'Delhi Gang-Rape.'

sexist national order that is now also linked to a global economic order marked a significant moment in the inscription of a new generation within the neoliberal schema of gender. Pandey was an embodiment of the aspirations of millions of such women.

The Cologne and Delhi appalling episodes of sexual violence exemplify how gender in the context of women's human rights advocacy, have come to be articulated through discourses on nationalism, cultural identity and values, race, security, neo-liberalism, sexual surveillance, and are displaced onto a First World-Third World, 'us' and 'them' divide. Moreover, gender continues to be equated with woman, used to reproduce women's victimization and invite protectionist responses based on gender stereotypes. Despite decades of women's rights advocacy, gender, sex and sexuality have unfolded into transnational legal arenas in ways that have produced less freedom and greater sexual surveillance. They have further entrenched essentialist understandings of gender, sex and sexuality. Quite specifically, the interventions or responses to the Cologne and Delhi violence, are evidence of the inexorable shift in the direction of *less* socio-sexual freedom for women, *increased* regulation of gender and *more* vigilant surveillance of women's sexual conduct as well as of the undisciplined 'Other' presence. In the process attention is diverted from the broader economic, political and military projects that inform these shifts and in these two episodes we see how responses to gender play out across geo-political, religious, and racial divides.

The discussion on Cologne and the Delhi assaults and subsequent responses, makes evident how the optics of a progressive political project can coalesce exclusively around understandings of gender with effects that are not necessarily progressive. The translation of women's rights into a security discourse informed the interventions by various state and non-state actors in the 'Delhi rape' case, justified the closing of various European borders, and at times the violent barring of refugee entry by border

guards as part of the highly racialised and paranoid response to the Cologne assaults. The spate of measures promoted at the local and state levels reaffirmed dominant gender and sexual norms, and failed to address the broader structural causes that serve as a trigger for VAW.

Despite the problematising of the categories of gender, sex, and sexuality in contemporary critical scholarship discussed above, a *transnational* analysis reveals how women's rights advocacy has continued to operate along the fraught sex-gender binary, prevalent gender dualisms, and reproductive heterosexuality. The persistent efforts of some feminist critiques to rework the sex-gender arrangements have been unable to shift the advocacy beyond conventional understandings of sex as incontrovertibly bound to the imperatives of biology and anatomy and gender as based on essential differences between men and women. Similarly, the unmasking of how colonial strategies, historically and nationalist framings in the contemporary moment have refused to interrogate the structural formation of gender vis-à-vis reformist interventions on behalf of 'native'-victim women, has not shaken laws commitment to a sex-gender binary that remains embedded in biological determinism and its accompanying racial, cultural, and civilizational underpinnings.

IV GENDER AND RIGHTS IN A NEO-LIBERAL CONTEXT

The concentration of women's rights advocates on sexual violence and victimization has been partly produced by the state's selective engagement with feminist ideas, as well as a carceral vision that includes the strengthening of law enforcement mechanisms and border controls. At the same time, the state's appropriation of gender advocacy to strengthen the security apparatus clearly serves the state's priorities, which are directed towards establishing social and political stability –

partly to ensure that the market performs efficiently and optimally. In the guise of protecting women and protecting the right to free choice, state and market forces collude to ensure the political and economic regulation of the citizen-subject. The emergent narrative is a description of how the deployment of stable solidified understandings of gender serves other larger projects of empire, neo-liberalism and the free market.

The categories of gender, sex, and sexuality are thus being partly managed and controlled via a powerful, pervasive, and aggressive neoliberal political rationality that is not confined to economic transactions but extends and disseminates market values to *all* institutions and social actions.⁶⁴ This mode of governance identifies power as arising from multiple sources and as not located exclusively within a sovereign state that operates in a top-down manner. In this arrangement the market demands for efficiency and stability are partly pursued in and through legal discourse – the latter consciously applied as a normalizing mechanism, through which citizens are rendered recognizable or non-recognizable, variously able, less able or unable to function as economic units. Differential participation in the market becomes the primary index for determining human worth and value, and for the bestowing of entitlements. And law is deployed to establish a society of control largely through carceral means that are designed to suppress those unruly, undesirable, illegal subjects who can, threaten the prosperity, stability and viability of the neoliberal enterprise.

Interestingly, the market is harnessing gender to advance the neoliberal economic project, in ways that continue to reproduce gender and gender categories as normalized, naturalized and stable. This process remains problematic, as ‘gender’ remains a noun – a static object of attention- rather than a performance that is

⁶⁴ Brown, *Undoing the Demos*.

normatively reproduced and reinforced. Gender essentialism operates together with the formulaic assumption that women are also always inherently vulnerable, as well as victims in need of rescue and protection from predatory men. This distorted logic is primarily offered as a solution within the context of sexual violence, soliciting and implementing interventions that conform to the normative gender script. Such approaches are not useful for women's empowerment in general, nor do they equate with justice for those who have been criminally violated. Reproducing these normative arrangements inevitably facilitates ahistorical, decontextualized and universalist accounts of gender, and effectively forecloses any possibility of change in the existing patriarchal gender and sexual arrangements.

The increasingly utilisation of carcerality by state actors has become a central feature of neoliberal governance to manage the civic insecurities and contradictions being produced in these neoliberal times. Interventions on gender are used to justify state or state-supported interventions that are directed at security, imprisonment and on identifying and executing through criminal law the 'solutions' to social 'problems'. The burden of responsibility for the overall welfare of vulnerable citizen-subjects is shifted away from the state, which is complicit in producing the existent environment of insecurity and predation, yet absolves itself through providing and operating the technologies of increased control over citizens' lives.⁶⁵ In this process, there is no disruption of prevalent sexist norms, which in part explains why so little has changed

⁶⁵ See for example Munro, 'Violence Against Women, 'Victimhood' and the (Neo)Liberal State' (who addresses how the focus on domestic violence in the UK, which is a reality and many women's life, deflects attention from the violence experienced in women's lives through neo-liberal governance as well as how the criminal law has become the central mechanism for responding to women's experiences of sexual violence).

with regards to the lack of public safety for women in ‘developed’ Germany or ‘underdeveloped’ India, despite several decades of women’s human rights advocacy.

The foregoing observations of the encounters of gender with the global, suggest that the narrow traditional views of gender and gender-based practices have neither shifted nor expanded. In fact, these encounters can be read as illustrating that the dominant heteronormative, heterosexist gender arrangements which are based on discrete categorizations of man-woman, male-female, masculine-feminine are largely left intact. Nor does it seem that they have disrupted the conservative projection and patriarchal glorification of female sexuality as ever virtuous, righteous, passive and vulnerable. The latter justifies the immuring of women within the deadening space of what are assertively affirmed as either (European) superior civilizational values or (Indian) cultural values. Rather, it appears the interventions have served to restrict rather than protect women from sexual violence and have increasingly subordinated women’s rights issues to a security discourse that results in a strengthening of the idea that women, especially Third World women, are always vulnerable and in need of state or male protection. These interventions reflect the ways in which the mobilisation of gender in transnational spaces is not necessarily progressive.

Meanwhile, the resort to the criminal law as the primary tool by which many women’s rights advocates and states have engaged with issues of gender, has not resulted in the empowerment of the powerless. It has instead resulted in the strengthening of law enforcement and border controls and the adoption of stringent sentences for sex crimes,⁶⁶ and in the process severely restricted women’s freedom under the pretext of ensuring women’s public safety and respect, national honour and integrity and civilizational and racial superiority, or any of the former. The

⁶⁶ Bernstein, ‘Carceral Politics.’

strengthening of the state's security apparatus has not in turn generated any rational public debate on sexism, prejudice and inequality. Instead the logic for such a move has been largely propelled by market demands for an economic environment of continual stability, efficiency, and hence, the need for greater policing. Crises around issues of gender, sex and sexuality are handled through the deployment of state mechanisms and judicial mechanisms, often in collusion with conservative ideologues and institutions. These interventions serve to reinforce existent political, social and economic hegemonies, rather than empower disenfranchised women who pursue rights in the search for recognition, action, and inclusion.

V. CONCLUSION

The exponential increase in security, sexual surveillance and law and order partly through gender rights advocacy has witnessed an increased alignment of feminism with the state and augmented the muscular power of the state to regulate and discipline the sexual behaviour of its citizens in the direction of less rights, increased surveillance, and more constraints on freedom. The state uses crisis, such as the Cologne and Delhi sexual assaults, to extend the reach of the criminal law into women's personal lives and intensify its powers of regulation and surveillance. Moreover, it does so by building on the existing legal edifice and without any scrutiny of the normative assumptions on gender, women's vulnerability and lack of autonomy which are embedded in the notion that women's bodies are repositories of 'national honour' and integrity. These interventions on gender, sex and sexuality align with, rather than challenge global governance, gaining traction in its institutional and normative architecture. They use local events to set up the 'Other', such as the migrant or Muslim or sexual subaltern as threatening to the liberal paradigm, and develop interventions to

expel, or severely restrict their access to the liberal space of `universal` human rights.

This chapter demonstrates how the ideas and concepts of FLT invite closer attention and that the limitations of gender may become a point of departure for understanding the ways in which it is pursued in TL. This discussion provides an account for the work that gender does beyond its niche in feminism and the local. Such accounts may reveal how the support for gender may have little to do with advancing women's rights and empowerment, and more to do with legitimating discriminatory transnational governance – whether through the modality of a civilizing mission or colonial knowledge project, as in the past, or in service to neoliberal economic forces or right-wing political agendas in the contemporary moment. It is through such tracing of the current discourses and instruments of gender and law that the transnational effects of FLT and its limitations as a progressive project can be more fully understood and addressed.

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