

FEMALE (?) KNOWLEDGE, NORMATIVITY AND LEGAL INTERPRETATION

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In her recent articles, Maria Drakopoulou has traced the historical development of the feminist legal discourse (Drakopoulou 2000a; 2000b; forthcoming article). Her approach to the topic is theoretically challenging and resistant to generalizations. However, one prominent strand of her work concerns the development of the relation of female knowledge to legal subjectivity.

In her writings, the rise and the fall of the female knowing subject go hand in glove with the evolution of the general epistemological streams. The epistemological shift in the early modern era, the rise of Cartesian thinking, produced the distinct and transcendent 'woman,' i.e. a female knowing subject (Drakopoulou 2000a, 57-63), the basis for current modern feminist theorizing and legal politics. Nevertheless, it became clear gradually that the subjectivist epistemology causes major problems for the very possibility of the normative female knowledge and the feminist political project. (Drakopoulou 2000b.) Today, due to the insoluble problems caused by the fictitious idea of a coherent and universal 'woman's voice' or 'female experience' inherent in this epistemological foundation, the women's legal project has finally reached its emancipated limits. (ibid. 220-21).

Confronting these problems, Drakopoulou (2000b, 221) invites her readers to turn away from the discussion of the possibility of the 'female' knowing subject, and searches for claims of ontological female truth of the law's oppressive nature (e.g. questions of how do I, as a particular privileged woman, know how law oppress (all) women, and who – I or 'other' women excluded from the western heterosexual privileged female class – should have the definitional power over the inherent criteria of 'ought'/'sollen.'). Instead of this, Drakopoulou opts for the following: '...(f)or a reading of law in terms of sexual difference, and develop ruses and tactics for disturbing the meaning of the legal text to reveal its patriarchal ancestry – the sex/gender system upon which law is founded.' (ibid.)

Drakopoulou elaborates on her ideas of the new direction of feminist legal thinking in her (forthcoming) article entitled, *Of the Founding of Law's Jurisdiction and the Politics of Sexual Difference: The Case of Roman Law*. In this article, she

exposes the gendered nature of the foundational moment of the Roman law by examining the untold story of the creation of the masculine legal space, and the mode and the time of feminine being (ibid.). According to this analysis, the creation of the free Roman Republic, a free citizen and the law was conditioned on a rape, the denial of the public mode of female being, and the death of women. In the ancient legends, violence against women, 'as law's jurisdictional acts' (ibid. 18), had a symbolic meaning. But the author argues that the legends of the separation of positive law and woman, and law and sexual violence, have materialized in the patriarchal structures of the legal system. These structures are resistant to any changes that would challenge the justification for the exclusion of different feminine voices. (ibid. 20.)

I would like to continue the discussion of the theoretical prospects, and political dimensions of the new path of feminist legal thinking that Drakopoulou suggests. Firstly, I ponder whether the intellectual constraints of the modern epistemology caused by the universal epistemological claims based on particular human experiences, could be avoided when struggling for 'ought.' Very tentatively, I suggest that this may be possible if we rethink the relationship between politics and law (which simply means, for me, the rejection of the belief in a politics-free space of law) and tear down the imaginary boundaries around the subject while analyzing the process of knowledge production (subject/object distinction) and imputation of legal responsibility (doer/deed distinction).

Of course, the idea of 'a woman's experience' as a universal and singular truth is just as naive as are (gender-neutral) universal knowledge claims in general. Despite this, I argue that giving up the struggle for concrete, normative benefits for (contingently and strategically constructed groups of) women because of these theoretical problems may increase their danger of becoming excluded, again, from the hegemonic legal discourses. According to my understanding, the intertwining systems of power relations produce men and women who are differently situated in socio-cultural geopolitical spaces. As an analytical starting-point, I assume (e.g.) that a Western, white, heterosexual middle-class woman may be entrusted with much more social power and opportunities than a homosexual, socio-economically poorly situated African-American man is –depending, of course, on the situation in question. Despite this, I am not yet ready to give up the notion of 'a woman' as a politically useful strategic concept nor as a theoretical analytical category before making sure that variously situated women (groups of women) have equal opportunities to participate in the (re)production and re-evaluation of tradition-bound legal knowledge. According to my understanding, women working within the field of law and politics still need to work on this project. For this reason, I want to spend some time pondering whether or

not we could find ways of doing politics under the common nominator of a woman beyond the modern epistemology and dividing lines between law and politics. I examine these questions, especially, in the context of the imputation of legal responsibility and legal interpretation.

1. Legal and political discourses penetrating subjects

To imagine a legal space penetrated by non-foundational discursive politics, I first attempt to deconstruct the boundaries around the duplicated subject of law (Nousiainen 1997). In the beginning of this imaginary trip, I reject the Kantian structure which is adapted as an intellectual basis for the criminal responsibility in modern legal systems. The demarcation disappears between the transcendent legal subject and empirical subject needed in the modern process of imputation. In a similar vein, the boundaries are deconstructed between the empirical subject and the object of knowledge, as well as the transcendent barriers between the doer and the deed.¹

As Kelsen (1968, 179) points out, the legal order is interested in the deeds and relationships between the essential elements of legal norms – neither the ‘doers’ nor relationships between subjects. Kelsen (ibid. 183) says that the legal subject is dispensable in describing the functions of the legal system. The idea of the legal subject only facilitates the presentation of the functioning of the legal order. For him (ibid. 182), legal relationship is constructed between the deeds described in litigation and the delicts understood as actions. Legal norms are primary elements of the *modus operandi* of the legal order – the subject itself is not interesting (ibid. 182-188). The legal subject therefore is conceived of as encompassing a complex unity of rights and obligations imputed to the deeds of a human being (ibid, 187). The legal subject is a problem of which factors in various situations create the unity referred to as subject (ibid. 188). Thus, legal subjects seem to be contingent constructions – without a core identity or a soul (Kelsen 1937)² – created by a normative power.

¹ From the epistemological point of view, the rejection of the demarcation of the knowing detached subject and the object of knowledge found in the external reality means, of course, that objective knowledge of the reality distinct from subjective values and personal interpretative repertoires cannot be achieved. Knowledge would be understood as diverse discursive cultural modes, as processes of cultural constructions, different practices with the aid of which the world is made intelligible. (Butler 1990; Foucault 1972).

² I owe my gratitude to Samuli Hurri for bringing this article to my attention.

According to Kelsen (1968, 109, footnote 24), human actions are determined by the causality of nature. Kelsen also rejects the Kantian idea of the freedom of will which is based on the transcendent practical reason as a basis for the imputation of legal responsibility. The intelligible person, the thing in itself, as a site of freedom, is an empty fiction because we cannot know anything about it (ibid.). It thereby also follows that the phenomenon of the *ding an sich* is determined by the laws of causality. The freedom of will is an equally empty fiction because it is, as an empirical phenomenon, unknown for us. The concrete, 'real' site of imputation of legal responsibility is an empirical human being. As a consequence, Kelsen considers freedom to mean that a person *is* the end of the imputation of norms (ibid. 109). I interpret Kelsen's conception of the freedom of will as an ironical imitation of the ostensible 'original' freedom, which reminds me of Judith Butler's theorizing of the identity formation. However, one major difference in their approaches is evident at the outset. For Butler (1990), the possibility for resistance of discursive power is crucial in subject formation and doing identity politics, whereas Kelsen (1968, *passim*.) constructs legal subjects as passive objects of normative power, e.g., as objects of legal imputation without active intentional agency in the legal sphere.

Both Kelsen (1968) and Butler (1990) reject the distinction between the doer and the deed. The doer is constructed in and by deeds. For Butler (1990, *passim*.), subjects are not socially determined but produced through negotiations by various forms of social power. Social power shapes identities but, at the same time, identities are negotiated by the repetition of deeds and practices (ibid.). Furthermore, the ways in which normative power structures are repeated within social interaction are important and very political. In this theoretical context, a foundational legal subject with stable and fixed characteristics will be transformed into the problem-setting of how to reiterate and negotiate contingent legal subject positions without core identities that are not based on the freedom of will (modern foundation of the moral responsibility of the legal subject) nor on caring subjectivity (an alternative feminist characterization of the specificity of the female core identity based on the fundamental sex-difference).³

One important question remains: what was the function of the legal subject in the paradigm of modern legal theory? Why *did* we need the separate legal subject in law at the outset? The answer seems to be: we needed it for the imputation of the legal responsibility. Nevertheless, do we necessarily need to construct the core identity, the fiction of the transcendental, universal and free/caring moral personality in order to

³ See Gilligan (1982) about the ethic of care and Drakopoulou (2000b) about its influence in the development of the feminist legal theorizing.

impute legal responsibility to a person? I tentatively suggest that the answer may be 'no.' In order to elaborate on my ideas further, I shall first present Judith Butler's (1990) model of the political agency. Her theoretical elaboration is important to me because Tuija Pulkkinen's (1998) approach to the moral capacity and responsibility, which I will refer to later in my paper is based on Butler's theory.

2. Political subjects and legal interpretation

According to modern legal positivism (e.g. Kelsen 1968), legal and political spheres are clearly separated. The time of political agency chronologically precedes law, and in the process of institutional recognition (often in a parliamentary setting), normative demands ('ought') will be transformed as a valid state of law ('sein'). The mode of modern political agency highlights the problematic dialectic of emancipation and regulation. There is also an insoluble tension between the (empty) promise of the enlightenment concerning the equality of all people under the law and the exclusive transformation of the legally marginalized needs of a group of people to recognized and legally relevant ones (Boaventura de Sousa Santos 2002; introduction). This political tension paves the way for Kelsen's (1968, VI) and Drakopoulou's (2000b, 220-21) inclination to focus on the non-normative/apolitical aspects of law.

The time and mode of political agency looks very different in Judith Butler's (1990) political identity theory. Butler (*ibid.*) deconstructs the idea of the core identity, and she understands identities as signifying practices. She criticizes the Western system of representations and the modern subject and gives up the idea of the pre-discursive self. She asks how language constructs culturally intelligible human beings and what kind of representations of gender is culturally recognized or unrecognized (forbidden)? Furthermore, how do practices of signification work? Finally, how do rules regulate the formulation of epistemological discourses?

Interestingly, when examining the texts by Butler, Kelsen and Drakopoulou, the question of what kind of politics we want to discuss turns out to be most central – as an explicit inquiry into the ways in which identity politics could be done (Butler 1990), as an implicit problem, which defines the field of legal scientific analysis (Kelsen 1968), or in the form of the chosen analytical categories of the discourse analysis (Drakopoulou; forthcoming article). According to my interpretation, the question posed by Butler (*ibid.*) concerning the ways in which politics could or should be done, substitutes for the question of how I know the law.

Butler (ibid.) invites us to abandon the idea of ‘language...(as an) exterior instrument into which I pour a self and from which I glean a reflection of that self ‘ (ibid. 183). Butler argues that conceiving of language as an exterior medium is a strategy of domination and a signifying practice of (re)production of the binary relation between ‘I’ and ‘Other’ (ibid.). As a lawyer, I am interested in how Butler’s theorizing could be understood in the context of the application of the law, and the administration of justice.

At first glance, I find it very difficult to imagine how the Butlerian political ‘resistance’ as a way of performing identity or agency should be understood in light of our legal systems currently in operation. On a more concrete level, I try to figure out how to translate this postmodern talk into the context of the imputation of criminal responsibility and its political implications in legal interpretation.

Pulkkinen (1998, Chapter 8), who heavily draws on Butler’s theory, rejects the core identity as a basis of moral responsibility and turns the whole problem-setting upside-down. Pulkkinen asks why we should think that the capacity for moral action should be anchored in a core identity, in some foundational basis (ibid. 213). Pulkkinen (ibid.) assumes a moral capacity which is (re)constructed in cultural repetitions as performativity. For her, moral responsibility as being cultural based is no less stable than morality based on the core identity (ibid.). Pulkkinen states that human beings are marked and (re)shaped by culture, so there is no way for an individual not to adopt it and still be a person (ibid.).

This theorizing by Pulkkinen invites me to imagine the imputation of the criminal responsibility as a process in which the core of the problem is no longer based on a defendant’s *mens rea*, as separated from his/her deeds. Instead, the responsibility would be constructed in the discourses circulating in court rooms, in the discourses which are regulated by the rules of negotiations about different interpretations.

In this theoretical framework, the judge can no longer be seen as an abstract and detached authority who applies the law but as one morally and politically responsible actor in the discursive reiteration of legal power. A judge is therefore one of the actors in the process of negotiations of signification – one of the actors, all of whom are entrusted with the political power of the language. According to my understanding, this formulation is consistent with Kelsen’s (1968) idea of the judge’s in the legal order. For him, judges are not hierarchically superior authorities with autonomous power, but objects (‘subjects of obligation’; subjects obligated to apply the law, Kelsen 1968, 178-179) equally subordinated by normative power.

In the theoretical context elaborated with the aid of Butler (1990), Kelsen (1968) and Pulkkinen (1998), the distinction between facts (or empirical subjects) and

norms (or legal subjects) is not meaningful. I assume facts and norms as intertwined, and legal judgments as productive political acts. According to Kelsen (1968, 370-71), legal scholars should avoid giving interpretative recommendations for the content of law because all legal interpretation is politics. Instead, legal scholars should reveal all the possible meanings of a legal text (norm) consistent with formulations of words. Kelsen (ibid. 366-67) criticizes the traditional view whereby legal scholars can find the one right answer to each legal problem with the aid of the correct method of legal interpretation. For Kelsen, this is self-deception because the choosing of the mode of legal interpretation is about politics, not about rationalization (ibid. 367-68). Following Kelsen (ibid.), I also assume that there is no value-free way of deciding how the framework of a norm should be filled. In other words, there is no political neutral way to decide what the 'right' method of legal interpretation is.

To summarise, I suggest that the imputation of legal responsibility is not a reflection of an intentional state of guilty mind of a moral person (defendant). It is rather a never-ending political process in which normative discourses are reiterated and negotiated. For me, the imputation of criminal responsibility is a product of discursive negotiations of power which is inscribed on the bodies of legal subjects under scrutiny. As a result, for me, legal interpretation and application of the law are always political actions which repeat and reproduce normative power.

3. Conclusion

In conclusion, I would like to return to the very beginning of my discussion. Drakopoulou tentatively suggests that the analysis of legal texts in terms of sexual difference is a substitute for the political struggles of the normative benefits for women. In her article *Of the founding of law's jurisdiction...* (forthcoming), she examines the sexually differentiated nature of the concept of jurisdiction by exploring the separation of legal from non-legal. Drakopoulou analyses 'the very acts of separation themselves and the consequences their performance effects' (ibid. 1). Drakopoulou continues by stating that 'these consequences are not, however, measured at the level of the individual before the law or evaluated in terms of the implications they have for the construction of legal subjectivities or national and political identities' (ibid. 1-2).

I suggest that the implications of choosing analytical categories in terms of which legal texts are read should be examined further because of the consequences these decisions may have for the construction of legal subjectivities. In addition, I understand legal interpretation (e.g. the interpretation of norms) as a form of the

political struggle involving the legal recognition (e.g.) of women and the strategic choosing of the conceptual categories is equally important in this context. As an example, let us imagine the scene in a Finnish criminal trial where an alleged rape committed by a black woman against a white woman is under scrutiny. The non-heterosexual ethnic setting of the case may challenge the adjudicator's pre-understanding of the crime while analyzing the legal relevance of the defendant's defence concerning the alleged racism and the heterosexual nature of the (ostensibly gender-neutral) Finnish rape law.⁴ These interpretative moments of the essential elements of rape – e.g. sexual intercourse defined by sexual penetration – are 'the' moments of intersectional politics: in order to respond the questions of (1) which factors in various situations create the unity called 'legal subject' (Kelsen 1968, 188) and (2) how to reiterate and negotiate the cultural-based moral responsibility (Pulkkinen 1998, chapter 8) in the context of criminal law, the adjudicator should ask himself/herself which rules condition our ways of making the social world, e.g., the social phenomenon of sexual violence, intelligible. If (s)he, however, accepts his/her personal world-views and interpretative repertoires at face-value, without critical self-reflection, (s)he is using violent political power.

Thus, following Butler (1991, *passim.*), I assume that analytical categories define the rules that regulate the possibilities of knowledge and agency, and that these rules are not neutral politically. For her (*ibid.*), the analytical distinctions themselves (e.g. sexual difference) regulate signifying practices. In this theoretical context, the questions of how one should read legal texts, and especially, how to avoid the violent and exclusive use of linguistic analytical categories, are of great political significance.

In this paper, I have contrasted the stable characteristics of the Kantian moral subject (i.e. autonomy, separateness and free will) and the Kelsenian contingent construction of the legal subject (i.e. the various factors which in various situations create the unity called subject). Thus far, I have not found any reasonable way to formulate a coherent and productive interpretation of the relationship of a subject and the law without using exclusive analytical categories. The violence of the chosen frameworks manifests itself, e.g., in a reading of the Kantian subject structure, which is furthered in terms of sexual difference, and which produces contested gendered knowledge of the legal subject (e.g. interpretations according to which autonomy, free will, and separateness are masculine psychic characteristics). In a similar vein, in the Kelsenian model, the recognition of the factors which create the unity referred to as

⁴ See The Penal Code of Finland chapter 20, sections 1 and 10.

subject seems to be impossible without choosing a wider, analytical framework which directs the analysis at the concrete level.

Finally, even if the non-normative discourse analytical reading that Drakopoulou (forthcoming article) suggests does not directly engage in the discussion of 'the Subject,' it does assume sexual difference as an analytical concept which, in her aforementioned article, turns out to be regulated by heterosexual logic. In sum, I suggest that independent of whether one wants to engage in the discussion of the possibility of a woman's point of view, concepts as elements of one's personal interpretative repertoires necessarily directs one's ways of making sense of subjects in legal discourses. Assuming that all legal interpretation – be it normative or non-normative from the point of view of modern legal theory – is inherently political in its very nature, one should be ready to make the best use of the strategic potential of the chosen analytical categories.

Bibliography

- Butler, Judith: *Gender Trouble. Feminism and the Subversion of Identity*. Routledge 1990.
- Drakopoulou, Maria: Women's Resolutions of Lawes Reconsidered: Epistemic Shifts and the Emergence of the Feminist legal Discourse. *11 Law and Critique 1* (2000a), 47-71.
- Drakopoulou, Maria: The Ethic of Care, Female Subjectivity and Feminist Legal Scholarship. *8 Feminist Legal Studies* (2000b), 199-226.
- Drakopoulou, Maria: Of the Founding of Law's Jurisdiction and the Politics of Sexual Difference: the Case of Roman Law", forthcoming (2005).
- Foucault, Michel: *The Archeology of Knowledge and the Discourse on Language*. Pantheon Books 1972.
- Gilligan, Carol: *In a Different Voice. Psychological Theory and Women's Development*. Cambridge. Harvard University Press 1982.
- Kelsen, Hans: *Puhdas oikeusoppi*. WSOY 1968.
- Kelsen, Hans: The Soul and the Law. In *1 The Review of Religion* (1937), 337-360.
- Nousiainen, Kevät: Interfaces of Law. In *K. Tuori, Z. Bankowski & J. Uusitalo (eds.): Law and Power: Critical and Socio-legal Essays*. Deborah Charles 1997, 99-118.
- Pulkkinen, Tuija: *Postmoderni politiikan filosofia*. Gaudeamus 1998.
- Santos, Boaventura de Sousa: *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*. Butterworths 2002.