COMENTÁRIO

WOMEN, MEN, EVERYONE IN BETWEEN AND BEYOND: A REACTION TO SERENA VANTIN'S CONSIDERATIONS ON CATHARINE MACKINNON'S LEGAL FEMINISM

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Serena Vantin's paper "Considerations on Legal Feminism from Catharine MacKinnon" discusses MacKinnon's feminist take on law, especially her strong defense of law as a strategy for fighting patriarchy and the centrality of her substantive notion of equality as the absence of hierarchy.

I want to react to Serena Vantin's paper and contribute to the discussion she proposes by taking up these two aspects of MacKinnon's dominance theory to question the idea brought forward in Serena Vantin's article that "unlike other personal characteristics, sex receives a sort of emblematic priority in the construction of social reality and its hierarchies."

As a lawyer, I strongly agree with MacKinnon about law's potential to contribute to the construction of an equal society and the emancipation of people currently in a position of social subordination (If I didn't, I would certainly have given up teaching law long ago).

Law is a *locus* of power in contemporary western societies and, as such, cannot be ignored by feminism. Feminists must work *within* the legal system (which doesn't mean this is all feminists can or should do).

There are risks involved in this strategy, however. The greatest risk is accepting fundamental patriarchal notions embedded in the law's most basic structures. The question, therefore, is how to use the law to fight social hierarchies without reinforcing them in the process.

One of these fundamental embedded patriarchal notions is gender itself. This realization is at the basis of MacKinnon's idea of equality as the absence of hierarchy: "if gender is an inequality first, constructed as a socially relevant differentiation in order to keep that inequality in place, then sex inequality questions are questions of systematic dominance, of male supremacy" (MACKINNON, 1987: 42).

However, if gender is a social construct by which the subordination of one social group – women – is created and perpetuated, then accepting gender in terms of the

opposition of men and women ties the feminist fight against oppression to terms imposed by the dominant social group.

One aspect of gender that defines its role in creating gender hierarchy is its bipolarity, the opposition of men and women, which is also a social construct: "sex, in nature, is not a bipolarity; it is a continuum. In society, it is made into a bipolarity" (MACKINNON, 1987: p. 44).

The bipolarity of gender obscures so much that is important. It creates hierarchies within subordinate groups because the opposition between men and women does not consider that not all men are part of the dominant social group and that not all women experience subordination in the same way. That is something intersectional feminism has made very clear (CHAMALLAS, 2013, 93-103).

Therefore, it's not enough to acknowledge that the law has no neutrality or objectivity. It is necessary to investigate that which is presented as neutral. The so-called gender-neutral standard in law is not only male but also white, heterosexual, cisgender, wealthy, with no mental or physical disabilities, etc. So that considering women as *the other* in relation to that group of men means white, heterosexual, cisgender, wealthy women with no mental or physical disabilities, etc.

MacKinnon is aware that legal standards presented as universal are not only male but also include the top of other existing social hierarchies (MACKINNON, 2020: 214-215), but fails to draw the necessary consequences from this fact. The essentialism of her dominance theory has often been pointed out by critics (CHAMALLAS, 2013: 98-99) (HARRIS, 1990) (CAIN, 1989-1990).

MacKinnon (1982: 520, n. 7) aspires to "include all women in the term 'women,' in some way, without violating the particularity of any woman's experience." What all women have in common, despite their various contexts, is, according to MacKinnon, the fact that they are all measured by male standards: "it is very different to be 'nobody' as a Black woman than as a white lady, but neither is 'somebody' by male standards."

As Angela Harris puts it (HARRIS, 1990: 585), MacKinnon's work relies on the idea that "a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience."

However, this cannot be done. As Harris points out (1990: 595), by considering the differences in women's experiences as a question of context or magnitude, "white women quietly become the norm, or pure, essential woman."

The same can be said about other characteristics of groups of women, which do not mirror the dominant, white, wealthy, heterosexual, cisgender, etc., man that is the standard.

Therefore, accepting the construction of gender as an opposition between men and women – considering whom the male standard represents –works to reinforce many different systems of oppression operating simultaneously.

This is where MacKinnon's dominance theory risks being neutralized by patriarchal law.

However, can we, as lawyers, avoid the patriarchal binary construction of gender while working within legal systems that adopt it? Probably not always.

Not only is gender a dichotomy deeply rooted in law, but concrete legal action always involves real individuals (or groups of individuals) whose interests demand careful consideration of legal strategy. For a lawyer, it is unethical to compromise a client's chances of winning a case just to make a point.

Nevertheless, the subversion of the patriarchal construction of gender embedded in law can sometimes be compatible with solid legal strategy. This possibility should always be considered and explored by lawyers willing to use the law to achieve substantive equality.

I want to illustrate how giving up binary gender categories in law could make a positive difference in the battle for substantive equality with the example of the right to marry someone of the same sex, a case recently decided by the Brazilian Constitutional Court (*Supremo Tribunal Federal – STF*).

The social battle for same-sex marriage in Brazil played out through an indirect strategy in the Judiciary. Instead of pursuing the legalization of same-sex marriage directly, Brazilian homosexual couples centered their strategy on having same-sex domestic partnerships recognized as families for legal purposes. This was done through a series of individual lawsuits that gradually extended spousal rights to same-sex couples over the course of many years. Finally, in 2011 the Brazilian Constitutional Court recognized same-sex domestic partnerships as families under the law (MOREIRA, 2012: 1003).

Roughly five months after that, the *Superior Tribunal de Justiça – STJ*, which is the highest court in matters of federal law, based on the 2011 ruling by the Constitutional Court on the domestic partnership case, ruled that a lesbian couple who appealed after having a marriage license denied by a lower court had the right to get married. After that, there was a period of confusion among civil marriage officiants about whether the court ruling should apply to all same-sex couples wanting to obtain a marriage license or whether it was necessary that every single couple file an individual lawsuit to get a court permit to marry. This situation was finally settled in 2013, when the National Justice Council (*Conselho Nacional de Justiça – CNJ*), which is an agency responsible for the administrative supervision of the judicial system, issued a norm

determining that civil officiants must not refuse to perform same-sex marriages (PÜSCHEL, 2019: 662).

Thus, the indirect strategy was successful. In Brazil today, same-sex couples have a right to marry, just as heterosexual couples do. However, it was a long, costly way that possibly resulted in making the right to marry a same-sex partner vulnerable to backlash (PÜSCHEL, 2019: 664-665), while the only reason why same-sex marriage was legally impossible was that people are assigned a gender at birth which is then used by the law to give them legal rights and duties. Had (binary) gender not been a legally relevant aspect of a person's legal existence, there would not have been any trouble in marrying any couple of individuals.

We must also remember that lawyers can play an important role not only in a court of law but also in drafting statutes. One way to fight for substantive equality while at the same time refusing a binary gender system is to replace references to "men" and "women" in legal texts with relevant aspects of the individuals, situations, or relations concerned instead of doing it according to binary gender categories.

For instance, a statute regulating the use of contraceptive methods can refer to "individuals with a uterus" instead of "women", as defended by Cunha, Buzolin *et al.* (2022: 5), based on the theoretical work of Alda Facio (2009), for rewriting a bill currently being discussed in the Brazilian Congress. Considering that the object of the regulation is surgical and non-surgical contraception methods related to individuals able to get pregnant, this wording encompasses all individuals concerned by the bill, including transgender men. It is more inclusive and accurate than the term "woman" while avoiding the hierarchy-creating gender dichotomy.

These examples show how limiting the binary gender system is and how letting go of it can open the way for the inclusion of the interests of all social groups submitted to the dominance of the white, heterosexual, cisgender male standard.

In short, instead of trying to establish if gender is more fundamental than other aspects in creating hierarchy in society and the law, we should take the cue from Queer Theory on this matter, shift the focus away from identity and directly onto dominance, without the mediation of binary gender constructions (CHAMALLAS, 2013: 224).

The goal of feminism must be that no individual is considered less valuable because of the group(s) they belong (or are perceived to belong) to, which, after all, is the essence of substantive equality according to MacKinnon (MACKINNON, 1987, p. 41-42).

This seems to be the suggestion made by Angela Harris (1990: 612), when she states that "as feminists begin to attack racism and classism and homophobia, feminism will change from being only about "women as women" (modified women need not apply), to being about all kinds of oppression based on seemingly inherent and unalterable characteristics."

I don't mean to deny that binary gender categories are a social and legal reality. Still, it is essential to keep in mind that feminists are fighting for emancipation, not for the preservation of gender categories. This means that, ultimately, the important thing is to be a feminist, not a woman. Not in patriarchal terms. Not if it means contributing to the oppression of different groups of women and other marginalized social groups.

REFERENCES

CHAMALLAS, Martha. *Introduction to Feminist Legal Theory*, 3rd ed., New York: Wolters Kluwer, 2013.

CAIN, Patricia A. Feminist Jurisprudence: Grounding the Theories, 4 *Berkeley Women's L. J.* 191 (1989-90).

CUNHA, Luciana Gross; BUZOLIN, Lívia Gonçalves; RODRIGUES, Ana Catarina Pereira; GONÇALVES, Cristiana Maria Grillo; GIACOMELLI, Carolina; OLIVEIRA, Andreia Celia Silva de. *Reescrita feminista de Projetos de Lei*. Grupo de Estudos de Direito e Gênero – FGV-SP, forthcoming.

FACIO, Alda. Metodologías para el Análisis de Género del Fenómeno Legal. In: Santamaria, R. A.; Salgando, J.; Valladares, L. (Ed.). *El Género em el Derecho: Ensayos Críticos*. Equador: Ministério de Justicia y Derechos Humanos, 2009.

HARRIS, Angela P. Race and Essentialism in Feminist Legal Theory, 42 *Stan. L. REV*. (1990), p. 581-616.

MACKINNON, Catherine A. Difference and Dominance: On Sex Discrimination (1984). In: *Feminism Unmodified*, Cambridge: Harvard University Press, 1987, p. 32-45.

MACKINNON, Catherine A. Equality. *Daedalus* v. 149 n. 1 (2020), p. 213-221.

MACKINNON, Catherine A. Feminism, Marxism, Method, and the State: An Agenda for Theory. *Signs*, v. 7 n. 3 (1982), p. 515-544.

MOREIRA, Adilson José. We Are Family! Legal Recognition of Same-Sex Unions in Brazil. *The American Journal of Comparative Law*, v. 60 n. 4 (2012), p. 1003-1042.

PÜSCHEL, Flavia. Same-Sex Marriage in the Brazilian Supreme Court: The Risk of a Regressive Turn. *Novos Estudos – CEBRAP*, v. 38 (2019), p. 653-665.