



## Book Reviews/Revue bibliographique

### ***Sexual Divisions in Law*, by K. O'Donovan, London: Weidenfeld and Nicholson, 1985. Pp. xii, 242. £8.95 (softcover), £16.95 (hardcover) in the U.K.**

When a particular way of seeing is analysed, what was accepted as natural is made strange. Part of that strangeness is the realisation that beneath the accepted order of life lie hidden power relations.<sup>1</sup>

Katherine O'Donovan's book, *Sexual Divisions in Law*,<sup>2</sup> is an analysis of a "particular way of seeing" ideas about the relationship of women to men as reflected in the law. In part, it is a description of the distinction made by law between the sexes; it is also a significant effort to probe more deeply the underlying theories and rationales for law's differential treatment of men and women.

The central theme of the analysis is the division in western societies between public and private, and the correspondence between this societal division and that between men and women. The book is presented in three sections. Part one explores the philosophical dimensions of the public/private dichotomy, particularly for the liberal tradition, and the consequences of law's non-intervention in the private sphere, especially the family:

The elaboration in legal discourse of a private domain ... as 'not the law's business' has inevitably led to non-intervention in domestic life. Legal ideology views the private as a domain 'in which the King's writ does not seek to run, and to which his officers do not seek to be admitted'. One implication is that those confined to the domestic sphere [mainly women] need not look to law to rectify any power imbalance resulting from the division of labour.<sup>3</sup>

O'Donovan's carefully researched analysis of the legal conventions of feudalism which prescribed different and lesser rights for women than for men, and her account of the continuing lack of "personhood" for women in

<sup>1</sup>K. O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicholson, 1985) 59.

<sup>2</sup>The book's title refers to divisions by sex; however, O'Donovan's comments more often concern legal divisions by gender. She explains the difference as follows: "My use of the terms 'gender' and 'sex' in this book should be clarified. Gender denotes legal, social and economic distinctions that follow from biological difference. Sex denotes the biological classification of human beings into two categories. I am aware that in using these terms I am also creating dichotomies, but the distinction between social and biological is crucial to the book's argument." (*Ibid.*, at xi.)

<sup>3</sup>*Ibid.*, at 11.

the transformation from feudalism to capitalism, represent a significant scholarly contribution about legal developments which enhance an understanding of social and economic changes in recent centuries. In her view, the increasing role of law through public regulation of marriage and divorce, and support for children, among other things, helped to create a new family form. Yet, even though "patriarchal powers may have been reduced" in the new nuclear family, "the husband still [heads] the family unit".<sup>4</sup> In this context, the law's non-intervention does not mean an absence of power:

Rather than intervene directly to regulate family relations publicly, the state delegates its power and authority to the husband. His role is to control what goes on within the family in private.<sup>5</sup>

In the second Part, O'Donovan presents a wide-ranging and quite challenging account of both the law's role in practice in defining sex/gender, and the nature of legal regulation in "private spheres" such as marital property, contracts and violence; "public spheres" such as taxation, social security, and pensions; and the boundaries between private and public such as contraception, abortion, and sexuality. In this Part, her analysis encompasses historical as well as contemporary ideas. Her success in weaving a sustained critique through a myriad of single instances ("a mass of confusing and contradictory legal rules and decisions"<sup>6</sup>) is a major achievement. Her conclusion on the law in practice mirrors that of her theoretical analysis in Part one:

The law's role ... is active, despite its absence from the personal. For it constructs gender ideologies and identities for the private as well as public structures which determine the relationship between the sexes.<sup>7</sup>

In the third and final Part, O'Donovan offers two chapters which confront the potential for law reform in the public and private spheres. She examines recent and proposed law reform measures which seek to ensure equality for women with men in the public sphere, and analyzes techniques for bringing the equality principles of the public sphere into the private, *e.g.*, the family.

Her examples of decided cases in the chapter on reform in the public sphere graphically demonstrate the limited utility of a concept of liberal individualism (equal treatment) in achieving equality for women and men; her recognition of the need to take account of "indirect discrimination" (equality of outcome) in the pursuit of the equality objective is persuasively examined. In assessing reform in the private sphere, O'Donovan argues that legalization and regulation have been unsuccessful techniques: because these techniques are rooted in concepts of liberal individualism, they cannot redress the existing inequalities of the private sphere, and may reinforce them. Yet, withdrawal of the law from the private sphere is inappropriate in O'Donovan's view because of its ideological significance:

---

<sup>4</sup>*Ibid.*, at 57.

<sup>5</sup>*Id.*

<sup>6</sup>*Ibid.*, at ix.

<sup>7</sup>*Ibid.*, at 134.

... law in its presence or deliberate absence has an ideological function, ... it embodies principles and standards considered just in the community, and ... its absence from the sphere of personal relations is highly significant.<sup>8</sup>

Thus, while O'Donovan recognizes legalization/regulation as "intermediate moves" in the reform process, her conclusion is that there must be a "collapse of the distinction between public and private":

If equality is to be more than merely formal, if it is to be taken seriously, then we must look at individuals in their particular situations. Rights-based liberalism, whilst providing some of the conditions for respect for persons, fails to recognize the morality of communitarian values. Family responsibility, care and obligation — this is not only the language of domestic concern, it is also a morality of concern for others. It will not be enough however to affirm such values as private. It is in their extension to the public sphere that transcendence will be achieved.<sup>10</sup>

O'Donovan's conclusion is both a challenge and a puzzle. In concluding that the values of the private sphere (woman-centred values of responsibility, care and concern for others)<sup>11</sup> should be extended to the public sphere, she encourages developments beyond liberal individualism in the creation and application of laws, a challenge that is both attractive and logical in terms of her earlier analysis. What remains a puzzle, however, is how such a change is to occur, how law might actually work in such a context, and what other implications necessarily attend such a development. O'Donovan's analysis ends without addressing these questions, perhaps because to do so would require more than another chapter, probably another book. And despite the excellence of her analysis of the problem, the solution is not yet clear.

Indeed, it is only recently that the problem itself has been articulated from the broad theoretical perspective such as that evident in O'Donovan's book. The role of law and its differential impact on women was well-known in the nineteenth and early twentieth centuries.<sup>12</sup> However, between the time when women in western societies became entitled to vote in the early years of this century and the resurgence of feminism in the 1970s were several "lost generations", the members of which generally believed in law as neutral, impartial and fair to both sexes. Beginning in the 1970s, however, there was a "re-discovery" of the law's differential impact,<sup>13</sup> and a variety of reform measures designed to produce greater equality.

<sup>8</sup>*Ibid.*, at 201.

<sup>9</sup>*Ibid.*, at 207.

<sup>10</sup>*Ibid.*, at 208.

<sup>11</sup>For a fuller analysis of these ideas, see C. Gilligan, *In a Different Voice* (Cambridge: Harvard University Press, 1982).

<sup>12</sup>The suffrage movement, the reform of married women's property, and the admission of women to the professions are well influenced by those who advocated legal equality for men and women and who recognized that it did not then exist. See, for example, M. Beard, *Woman as Force in History* (New York: MacMillan, 1940); M. Schner (ed.), *Feminism: the Essential Historical Writings* (New York: Vintage, 1972); and S. Mann Trofimenkoll and A. Prentice, *The Neglected Majority* (Toronto: McClelland and Stewart, 1977).

<sup>13</sup>See, for example, K. DeCrow, *Sexist Justice* (New York: Random House, 1974); and L. Kanowitz, *Women and the Law: the Unfinished Revolution* (Albuquerque: University of New Mexico Press, 1969).

Over the past 15 years or so, the literature has changed; the earlier works which tended to be catalogues of legally-recognized differences between men and women<sup>14</sup> have gradually been replaced by more reflective literature which acknowledges the need to search for underlying rationales which, in turn, may support some legal differences while negating others<sup>15</sup>. In this continuum, O'Donovan's book represents a new point of departure. Offering a theoretical perspective which both takes account of the historical arrangements of feudalism as well as those of modern capitalism, and embraces a breadth of perspectives from tax policy to the validity of marriages, O'Donovan has attempted to demonstrate "a new way of seeing" sex divisions in law.

Her book also expressly addresses the "hidden power relations" revealed by this new way of seeing, and carefully explores the law's ideological impact. In her chapter on reform of the private sphere, she quotes approvingly from the work of E.P. Thompson and D. Hay concerning the ideological function of law.<sup>16</sup> However, while she seems accepting of these ideas, it is not clear that she has grasped the radicalism of feminist analysis in this context. As has been said with respect to another discipline:

We underestimate the radical intent of women's studies ... if we do not recognize that it aims at nothing less than ... [a] radical reconstruction of the normative tradition.<sup>17</sup>

In the context of law, which contributes to "the definition of the self-identity both of rulers and of ruled"<sup>18</sup>, the transformation of the normative tradition by feminist analysis is indeed a radical act; it is in fact nothing less than a transformation of our legal system, our society and ourselves.

It is such a transformation which is essential to attaining O'Donovan's goal of "transcendence". Yet not all feminist theorists agree that extending the values of the private sphere to the public domain will achieve the desired objective. As Olsen has suggested, many of the values of the private sphere are based on existing inequalities:

<sup>14</sup>For example, A. Coote and T. Gill, *Women's Rights: A Practical Guide* (London: Penguin, 1974); and M. Zuker and J. Callwood, *Canadian Women and the Law* (Toronto: Copp, 1971). Both these books have been subsequently updated and reissued.

<sup>15</sup>For example, see J. Brophy and C. Smart (eds.), *Women in Law* (London: Routledge, 1985); S. Atkins and H. Hoggett, *Women and the Law* (London: Blackwell, 1984); and S. Edwards (ed.), *Gender, Sex and the Law* (London: Croom Helm, 1985). In the latter, there is an essay by O'Donovan which repeats some of the themes of her book.

<sup>16</sup>*Supra*, footnote 1 at 199-200.

<sup>17</sup>R. Reuther, "The Feminist Critique in Religious Studies" in E. Langland and N. Gove (eds.), *A Feminist Perspective in the Academy: The Difference it Makes* (Chicago: University of Chicago Press, 1981) 50. The editors also assert at 3 that women's studies is a body of knowledge which is "perspective transforming", a phrase not unlike that of O'Donovan's "new way of seeing".

<sup>18</sup>E.P. Thompson and D. Hay as quoted by O'Donovan, *supra*, footnote 1 at 21.

Reforms that seek to improve the status of women by moderating the individualism of the market often improve conditions for women, but they also reinforce sexual stereotypes, augment hierarchy, and therefore undermine the quality of women's lives.<sup>19</sup>

Similarly, Tong has wondered whether the state and the law can ever be neutral or supportive of women, both because of the law's philosophical liberalism and its historical subjection of them:

When women encourage the law to be more active on their behalf, they tread a potentially perilous path. Support can mutate into control, and a gain on one front can represent a loss on another. A 'Catch 22' situation can develop only too rapidly. ... the law is not a panacea for women's woes.<sup>20</sup>

In part, the theoretical difficulty, and the resulting ambivalence of feminists, about the role of law in the context of sex/gender differentiation, derives from the fact that "feminism has no theory of the state".<sup>21</sup> The difficulties already experienced in making law responsive to the condition of women as well as that of men (equality of outcome), and in making it workable at all in the private sphere, suggest that the extension of private sphere values to the public domain may not achieve the goal of real equality and dignity for all persons regardless of sex. Thus, both the desirability of O'Donovan's "transcendence" and its feasibility await further analysis.

Even without the answer to the puzzle, O'Donovan's book is an excellent contribution to feminist legal thought. Although it does not offer a definitive solution, there is nonetheless much that will provoke "a new way of seeing". It also suggests the desirability of feminist bridge-building across the Atlantic about the shaping of "transcendence". The task is not an easy one, by its very nature. A radical reconstruction of the normative tradition requires no less than a new societal order created out of, but transformed beyond, what exists at present. In patterns of thought and speech, as well as actions, we must reconsider our "way of seeing", and recognize the "hidden power relations". Katherine O'Donovan's book is an excellent contribution to understanding "a new way of seeing" gender relations and the law.

MARY JANE MOSSMAN\*

<sup>19</sup>F. Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 *Harv. L. Rev.* 1497 at 1555. Olsen's analysis addresses the dichotomy between "the market" and "the family", and like O'Donovan, concludes with a recommendation for "transcendence"; for Olsen, the goal is to transcend the male/female dichotomy. The author states at 1578:

When I speak of transcending the male/female dichotomy, I have in mind creating a new referential system for relating men and women to the world, a systemic departure from the ordinary image of male and female as correlatives. This does not mean making women more like men, or men more like women. Rather, it means radically increasing the options available to each individual, and more importantly, allowing the human personality to break out of the present dichotomized system.... [R]ather than shades of grey as an alternative to all black and all white, I envision reds and greens and blues.

<sup>20</sup>R. Tong, *Women, Sex and the Law* (New Jersey: Rowman and Allanheld, 1984) 4.

<sup>21</sup>C. MacKinnon, "Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence" (1983), 8 *Signs* 635 at 635.

\*Associate Professor, Osgoode Hall Law School, York University.