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Feminist and Queer Legal Theories: Gender and Sexuality as Useful Categories for the Critique of Law

Teorias Feministas e Teorias Queer do Direito: gênero e sexualidade como categorias úteis para a crítica jurídica

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Abstract

The article proposes a mapping of feminisms and queer positionalities, demonstrating how gender and sexuality are useful categories of legal analysis and critique. It articulates the main discussions and dilemmas of feminist and queer struggles and theories, seeking to identify how their categories, methods and strategies offer a privileged and powerful position for legal criticism.

Keywords: Legal Critique; Feminist Theory; Queer Theory.

Resumo

O artigo propõe um mapeamento dos feminismos e das posicionalidades queer, demonstrando como o gênero e a sexualidade se apresentam como categorias úteis de análise e crítica do direito. Ele reconstitui algumas das principais discussões e dilemas das lutas e das teorias feministas e queer a fim de identificar como as suas categorias, métodos e estratégias oferecem uma posição privilegiada e potente para a crítica jurídica.

Palavras-chave: Crítica Jurídica; Teorias Feministas; Teorias Queer.

Introduction

What are the contributions of feminist and queer critiques to the understanding of the legal phenomenon? Can we speak of a feminist legal theory or a queer legal theory? What are their categories of analysis, methods and criticisms? What do they denounce or defend in relation to legal structures and norms?

What I propose in the following pages is a brief prospect of feminist and queer positionalities, both in the context of their activism aimed at the emancipation of women and LGBT[1], and in their theoretical disputes and developments. The argument I intend to demonstrate is that gender and sexuality are useful and potent categories of legal analysis and criticism. They present a privileged perspective or position for the examination of how legal regulations, court decisions, and legal theories are persistently and systematically crossed by sexist and heteronormative structures and devices.

It is important to say, from the start, that there is not one feminist perspective or queer positionality that can be synthesized in a coherent and definitive manner. They offer multiple perspectives and positions, different strategies and objectives. Many feminist and queer activists and scholars promote a pragmatic approach to law, proposing to use it as an inclusive tool of social recognition and protection. Many others formulate a radical mistrust in relation to the contradictions and limits of law, proposing its destabilization or even its complete refusal.

Although I am especially interested in the more radical perspectives of feminist and queer studies as starting positions for a critical legal theory, I have also sought to explore the ambiguities and the productive characteristics of their reformist uses. Even if the strategies of fighting violence and discrimination through law are limited, contradictory or precarious, as we shall see later on, they always express to some extent a transgressive use of the hegemonic legal devices and apparatus.

With Michel Foucault we understand that critique is an attitude of insubordination, a theoretical practice of "voluntary *inservitude*" or " reflected

[1] I use the most widespread form of the acronym LGBT, following the use of the Brazilian Association of Lesbians, Gays, Bisexuals, Transvestites and Transsexuals (ABGLT). However, it is important to register the growing use of the forms LGBT+, LGBTI+, LGBTTI, among others. These variations seek to give visibility to other sexual and gender minorities, such as intersex, or indicate with a + sign the permanent opening of the movement to other identities or experiences.

indocility". It is the movement through which the subject interrogates the effect of power of the discourses and norms through which they rebel against the power that produces themselves (1990, p. 36-39; 2015, p. 10-11). Feminist and queer studies embody precisely attitudes of practical and theoretical insubordination. They refuse the government of heterosexist powers, producing, in its multiple perspectives and strategies, a counter-discourse that tensions, displaces and subverts hegemonic powers and knowledge. When they take law as their object of analysis, feminist and queer studies offer a privilege position for the critique of legal theories and practices. They engender a place of theoretical and practical transgressions, of *voluntary inservitude,* and of *reflected indocility*.

Furthermore, feminist and queer legal theories, especially in their more radical versions, tend to articulate the examination of gender and sexuality with class and race, producing multidimensional analyzes of structures and devices of domination that defy and make advance the diagnoses and strategies of other legal criticisms.

In order to present a cartography of the potentialities of feminist and queer legal critiques, I tried to reconstruct in the following pages the main discussions and dilemmas of gender and sexuality studies in their disputes and uses of the law. This is not a systematic or exhaustive presentation of feminist and queer theories, but rather a re-articulation of the main discussions and dilemmas, from which a starting point is offered for those who wish to make use of gender and sexuality as tools for understanding and criticizing the legal phenomenon. The analysis is made mainly from the use of the vast bibliography produced in the United States since the 1980s, where the introduction of feminist and queer studies in the spaces of production of legal knowledge had a huge and fruitful impact. As the intention is not to present a diagnosis of feminist and queer positionalities in Brazil, but to encourage or broaden its development, I did not try to explain the absences or difficulties of the legal debate here.

The article is divided into two parts, one dedicated to feminist theories and the other to queer theories. In both I tried to navigate and situate the debates, strategies, discoveries, disputes, and possibilities for analyzing gender and sexuality as useful categories for the construction of a feminist and queer critique of law.

1) The power of feminist critique (feminist legal theories)

Preliminarily, it is important to say that feminisms, in their different tendencies, have women as their subject and object, or at least they did in their first developments. From the point of view of feminist action, it is always constituted around the struggle of women against violence, domination, and inequality, either through revolutionary emancipation, or through political and legal instruments of recognition and equalization, or through systematic transgression of the devices and structures of oppression, or through some kind of combination of these different strategies. From a theoretical point of view, feminisms appear in the second half of the 20th century as women's studies, later as gender studies and feminist theories. In this process, a variety of epistemological and methodological tools were developed and criticized, the very category of woman became disputed and rethought by black, lesbian, transgender and *latinas* feminists.

Through these disputes, feminist studies produced approaches and tensions with liberal perspectives (claiming for institutional recognition and expansion of women's rights), with Marxism (promoting gender analysis with or beyond class), with black thought (claiming an intersectional examination of gender and race-based oppression), with post-structuralist tendencies (thinking the processes of subjectivation in the framework of micro power-relations), with queer criticism (denouncing compulsory heteronormativity and the invisibility of bodies and experiences considered abject and misfit), with colonial or post-colonial critiques (rethinking the persistent relations of colonization of knowledge and the subordination of women in the global south).

The initial question of feminism, of what it means to be a woman in a world dominated by men, unfolded and expanded in these multiple dimensions, leading to broader and more complex inquiries over what gender oppression means and how it is structured along with circumstances of economic, racial, sexual, cultural, and epistemological subalternity. Although attentive to the problems of a single or definitive definition, *bell hooks* proposed, as a starting point, that "feminism is the struggle to end sexist oppression" (1984, p. 24). It is still true that feminisms continue to examine, denounce and fight against sexism and patriarchy, against the lack of structural equality and freedom for women. But they advanced enormously in examining the power relations that constitute gender, the processes of formation of subjectivity, the internalization and reiteration of the discourses and norms that establish the inferiorization and subjugation of women. This is what makes Clare Hemmings see in feminist theories an ongoing and

radical potential. They teach a new way of telling stories, attentive to the differences, intersections, lies, and silences (2011, p. 2).

The analysis of gender as a theoretical starting point has become a powerful instrument for understanding oppression and inequality, for radically rethinking history, institutions, and power relations. Especially in a context in which not only history has been told by men, but also institutions and the production of knowledge and norms have been dominated by them. As Joan Scott explains, gender is used by feminist theories to designate social relations between the sexes. It is a social category, a cultural construction that legitimates and constitutes power relations based on perceived differences between the sexes. If politics (the powers) constructs gender, gender (here perceived as the difference between the sexes) also constructs politics. Hence, gender is an extremely powerful category of analysis. It "offers a way of decoding meaning and understanding the complex connections between the various forms of human interaction" (1986, p. 1056, 1067, and 1070). As it permeates all social relations, as institutions incorporate it into their presuppositions and organizations, any understanding of oppression and inequality will be incomplete without a gender analysis. The same conclusion is valid for any radical critique of the law committed to the overcoming of the structures and mechanisms of domination, exploitation and marginalization of individuals and groups.

In the case of law, we are facing not only institutional structures for the production and application of legal rules (parliaments, courts, police apparatus, public offices), and legal instruments for the regulation of life and conflict resolution (legal rules, court rulings, contracts, legal doctrines), but also complex power relations that produce legal institutions and devices. In this sense, we could say, paraphrasing Scott, that law constructs gender, just as the established perceptions about gender also construct the law. Gender, therefore, is an extremely useful category for the analysis of legal institutions, norms and discourses.

Although the law has always been a theoretical instrument for feminists, feminism took a while to establish itself in the legal field. Clare Dalton stated in 1987 that being committed to feminist legal thinking means being "a feminist who locates both her inquiry, and her activity, in relation to the legal system". For her, law must be understood in its broadest sense, which includes its body of rules, the discourses in which these rules are situated and through which they are articulated and elaborated, the institutions that implement them, the training spaces in which legal culture is formed and transmitted, the

various actors that operate these rules and discourses, lawyers, judges, jurors, legislators, professors, students, court officials, social workers, clients, etc. (1987, p. 2) .

In US law schools, feminist legal thought began to appear in the 1970s in specialized courses and disciplines such as “Women and the Law” and “Sexual Discrimination”. According to Clare Dalton, the first feminist legal disciplines sought to discuss the unequal treatment of women by law and society, focusing on constitutional doctrine and legal production that addressed the discrimination of women in employment, education and receiving public benefits. These disciplines assumed the universalist content of legal principles, such as equality, questioning their arbitrary and discriminatory application to women (1987, p. 4). Christina Whitman explains that feminist legal theories or feminist legal practices were at the outset aimed at promoting women's rights through legal reforms or litigation. They were designed to be persuasive to those who wielded power in state structures. In the 1980s, feminist legal thinking began to pay greater attention to the critique of law as a construction of patriarchy, confronting the assumption of neutrality of the law, court decisions and legal doctrines (1991, p. 494).

Catharine Mackinnon, one of the most prominent feminist jurists, states that "Sexuality is to feminism what the work is to marxism". Just as class is defined by the expropriation of the labor of proletarians for the benefit of the bourgeois, sex is defined by the expropriation of women's sexuality for the benefit of men. But this kind of approach between marxism and the feminism was never free from tension and criticism from both sides. Mackinnon herself alerts us to the fact that Marxists often accuse feminism to be bourgeois in their theories and practices, or that feminist issues divide the workers' struggle and undermine their efforts to overcome the class struggle. On the other hand, "feminists charge that marxism is male defined in theory and in practice, meaning that it moves within the world view and in the interest of men", arguing that "analyzing society exclusively in class terms ignores the distinctive social experiences of the sexes”, obscuring and undervaluing women's work and concerns (1982, p. 515-518). For MacKinnon, although feminism has always been marked by liberal, marxist and radical tendencies, only the latter would be properly feminist. True feminism must be radical, anti-liberal and post-marxist (1983, p. 639, 642-643).

As methods of a feminist theory and practice, Mackinnon proposes: (1) the production of knowledge from the point of view of women; (2) the formation of

awareness about the collective reality of women's condition considering their personal experiences and not supposedly objective and external perspectives; (3) the affirmation of the personal as political in the experience of women, in order to confront the artificial separations between the public and the private and to expose the fact that for women the political has been lived within the sphere associated with the "personal-private, emotional, interiorized, particular, individuated, intimate" (1982, p. 535-536) .

Katharine Bartlett, in a more pragmatic perspective thought in the context of legal practice, identifies the following strategies as specifically feminist's methods:

(1) one must ask "the woman question", examining the implications of gender in the context of legal regulations and exposing how law fails in adequately considering experiences that are more typical of women than men, and how existing legal norms and concepts represent a disadvantage for women.

(2) a feminist practical reasoning must be developed, expanding the traditional notions of what is legally relevant in order to lead to court decisions that take into account the gender implications and the interests reflected in a given rule or argument. For Bartlett, a feminist argument is a state of alert. A warning to gender-based forms of injustice that are not normally questioned and to the fact that neutrality in decision-making processes masks the bias contained in the norm and in the typical instruments of argumentation.

(3) Finally, awareness-raising on women's issues should be promoted by offering ways to test the validity of legal rules through the lens of the personal experience of those directly affected by them. At the institutional level, it is a matter of highlighting patriarchal practices whenever they occur and of influencing legislation and court decisions in favor of women (1990, p. 836-837, 856, 862-863).

Regarding the construction of a feminist theory of law and the state, Mackinnon argued, in the early 1980s, that it was necessary to move from a simple description of the state's treatment of the gender difference to an analysis of the state as gender hierarchy. She proposed the following questions:

> Is the state to some degree autonomous of the interests of men or an integral expression of them? Does the state embody and serve male interests in its form, dynamics, relation to society, and specific policies? Is the state constructed upon the subordination of women? If so, how does male power become state power? (1983, p. 643).

Although in recent decades several feminist theories on law and the state have taken shape, these questions remain current. They serve to inquire how the sources of law (statutes, court decisions, contracts) and legal doctrines (the discourses that articulate these sources) are crossed by structures and devices by which male power imposes itself on women. For political scientist Carole Pateman, the law and the state are constituted on the subordination of women through the theoretical fiction of the social contract, which is nothing more than a pact of subordination to a new type of patriarchal power. Although this theoretical fiction is presented as a story of freedom, it overlooks the fact that the original pact, while promising civil liberties for men, establishes subjection for women (1993, p. 2, 18, 21). In this sense, one of the important aspects that legal feminism has been demonstrating is the fact that law not only incorporates and serves male interests, but that it constitutes the subordination of women.

One of the most important critical contributions to feminist legal theories appears in the 1980s and 1990s in the context of the debates promoted by black feminists. Interestingly, the most cited paper[2] in the legal field with a feminist approach is Angela Harris's *Race and Essentialism in Feminist Legal* Theory (1990). Harris draws attention to the persistence of a gender essentialism or a unitary notion of women's experience in works of prominent (and avowedly anti-racist) feminists such as Catherine Mackinnon and Robin West, who end up disregarding other circumstances of subordination such as race, class, and sexual orientation (HARRIS, 1990, p. 585-589).

Robin West draws from the typical essentialist category of legal theories, the human, to claim the humanity of women. She defines feminist jurisprudence as "a jurisprudence built on feminist insights into women's true nature". West argues that while feminists take the humanity of women seriously, jurisprudence and the law do not. She argues that in the context of patriarchy, feminist jurisprudence is a conceptual anomaly and a political impossibility. For her, the contribution of feminist jurisprudence should ultimately be the construction of a humanistic legal theory and that only the

[2] Angela Harris's article appears in position number 18 of the 100 most cited legal articles of all times in the English language, according to research by Shapiro and Pearse (2012, p. 1489-1497).

abolition of patriarchy would produce the conditions for "a truly ungendered jurisprudence" (1988, p. 3-4).

For Angela Harris, this kind of essentialism silences certain voices to privilege others, paving the way for racist feminisms. Many feminist jurists, when speaking on behalf of all women (of a supposed true nature of women), end up incurring the same error of law that purports to speak for all people. Harris explains that, in legal theories, the voice of abstract categories tends to be stronger than in other fields and, therefore, the monolithic notion of "women's experience" seems to be even more persistent. For her, the reason intelligent, politically committed feminists like Mackinnon and West rely on gender essentialism is because it is easy and convenient. Being essentialist "means not having to do as much work, not having to try and learn about the lives of black women, with all the risks and discomfort that that effort entails". Harris argues that, in order to renew legal theory, "we need to subvert it with narratives and stories, accounts of the particular, the different and the hitherto silenced". With Mari Matsuda, she proposes as a legal method the promotion of a "multiple consciousness" of women, which abandons essentialized categories and embraces the differences in experiences (HARRIS, 1990, p. 585-589, 605, 613, 615; MATSUDA, 1989).

Still in the context of black feminism[3], one of the most widespread concepts in social sciences in recent decades is that of intersectionality, which gained great visibility from the work of feminist jurist Kimberlé Crenshaw. The notion had already appeared in 1977 in black feminist collective *The Combahee River's statement of* its commitment to the struggle "against racial, sexual, heterosexual, and class oppression" and its particular task to develop "integrated analysis and practices based upon the fact that the major systems of oppression are interlocking" (1977). It is a perspective that arises in the context of the invisibility of the experience of black women by white hegemonic feminism.

Crenshaw uses the word intersectionality to refer to the various ways in which race and gender interact to shape the multiple dimensions of the experience of black women, arguing that the intersection of racism and sexism cannot be fully understood within the traditional boundaries of gender discrimination or of race

[3] One of the paradigmatic works of black feminism is "Black Feminist Thought: Knowledge, Consciousness, and Politics of Empowerment" by Patricia Hill Collins (1990). For a more contemporary reading, see also "Black Feminism Reimagined: After Intersectionality" by Jennifer Nash (2019)

discrimination (1991, p. 1244). For her, it is not about examining the sum of racism and sexism, but the particular way in which black women are subordinated. Crenshaw demonstrates, through the analysis of court decisions in the USA, how the application of anti-discrimination laws based on gender or race ended up protecting black women only when their experiences coincided with those of white women or black men. She argues that this produced the erasure of situations in which the intersectionality of racism and sexism prevails in situations of discrimination at work and domestic and sexual violence (1989, p. 140, 143 *et seq*.). For Crenshaw, the notion of intersectionality serves as an instrument for locating black women within overlapping structures of domination. Or, still, as a way of framing the various interactions of race and gender in the context of violence against black women. It is a useful way to mediate the tensions between multiple identities claims, and to oppose essentialist perspectives (1991, p. 1245-1248, 1250, 1265, 1296). What black legal feminism does, then, is to reveal the nuances, ambiguities, and contradictions of the relationship of gender and race in anti-discrimination legal practices.

Beyond the legal field, there is a certain distrust regarding the complicity of many feminist jurists with legal instruments. Or even a perception that jurists would be too concerned with practical legal strategies and would have little to contribute to the wider theoretical reflection. Feminist political scientist Wendy Brown draws attention to the fact that "whether one is dealing with the state, the Mafia, parents, pimps, police, or husbands, the heavy price of institutionalized protection is always a measure of dependence and agreement to abide by the protector's rules" (1995, p. 169). And even feminist jurists such as Janet Halley accuse legal feminism of having been driven to complacency by prioritizing the question of how to obtain power rather than criticizing it (2006, p. 125).

On a more pragmatic note, the most discussed problems of legal feminism are: full recognition of women as legal subjects, legal protection against femicide, domestic violence, rape, pornography, sexual harassment, and trafficking of women, expansion of sexual and reproductive rights (access to reproductive and contraceptive technology and safe abortion methods) as well as rights related to divorce, parental authority, motherhood, wages, and equal work opportunities, political participation, access to education etc. Among the most common criticisms, we find discussions on unequal legal treatment, bias, false neutrality and the patriarchal or

sexist character of the law, the limits and ambiguities of anti-discrimination and protective laws, the typical legal dichotomy of public and private etc.

Unlike marxism, which, despite its internal disputes and developments, provides a scathing and widespread critique of law, feminisms, in their multiple theoretical orientations, sometimes ally themselves with the law as an instrument of emancipation and equalization of women, sometimes they offer a radical critique to the law directed at its foundations, structures and devices of patriarchal domination. In any case, even in its strategic uses of the law, in its efforts to transform it through legal reforms, feminism exposes the role of law (its omission, complicity or direct action) for the domination of women. Radical feminists (marxist, poststructuralist, queer) go further: they call into question the very fundamental categories on which law and feminism itself rest. They refute the essentialist or universalist positions of the subject (the human, the person, the legal subject) and the woman, denouncing the false neutrality and objectivity of knowledge and rights and exposing the limits and contradictions of anti-discrimination laws and identity policies.

In Brazilian Law Schools, feminist theories were practically non-existent or ignored until the end of the 2000s, as noted by Eduardo Rabenhorst (2009, p. 22)[4]. Salete Maria da Silva (2018, p. 84)[5] draws attention to the fact that the speed of infiltration of feminism in the legal field occurred more slowly than in other areas of social sciences in Brazil[6]. Nonetheless, we observe in recent years the proliferation of initiatives related to the rights of women and feminist scholarship in the legal field. In post-graduate law

[4] See also: "Feminismo e direito" (RABENHORST, 2010) e "Encontrando a teoria feminista do direito" (RABENHORST, 2011).

[5] In an effort to map the importance of feminist legal theories and their critical potential, see also "Teorias Feministas do Direito: Contribuições a uma Visão Crítica do Direito" (SANTOS, 2015, pp. 294-310).

[6] Some feminist contributions to the analysis and critique of law in Brazil: "Evolução dos Direitos da Mulher: Fato, Valor, Norma" (PIMENTEL, 1978), "A Mulher e a Constituinte: Uma contribuição ao debate" (PIMENTEL, 1987), "A Mulher e o Direito" (VERUCCI, 1987); "Cidadania, Relações de Gênero e Relações de Trabalho" (BARROS, 2008), "Um pouco da história da luta feminista pela descriminalização do aborto" (PIMENTEL; VILLELA, 2012), "Introdução às Teorias Feministas do Direito" (SOUSA, 2014), "Anotações sobre a teoria feminista do direito de Catharine MacKinnon" (CABALLERO; TAVARES, 2016), "Gênero, Sexualidade e Direito: uma Introdução" (RAMOS; NICOLI; BRENER, 2016), "Gênero, Sexualidade e Direito: Perspectivas Multidisciplinares" (RAMOS; NICOLI; ALKMIN, 2017), "Uma Reflexão Feminista sobre o Conceito de Justiça de Gênero" (SILVA; WRIGHT, 2016), "Criminologia Feminista" (CAMPOS, 2017), "Feminismo Estatal, Injustiças Metapolíticas e a Formação do Rol de Legitimados do Controle Concentrado de Constitucionalidade" (CABALLERO; CASTELLANO, 2018), "Gênero, Sexualidade e Direito: Dissidências e Resistências" (RAMOS; BAHIA; PEREIRA; NICOLI, 2019). It is also worth mentioning some important Latin American contributions in the Spanish language: "Gender and Derecho" (FACIO; FRIES, 1999), "El Derecho in the Gender and the Gender in the Derecho" (BIRGIN, 2000), "La Crítica Feminista al Derecho" (JARAMILLO, 2000).

programs, research and disciplines that have gender issues as their object or method have increased significantly and consistently[7].

2) The radicality of queer critique (queer legal theories)

The queer phenomenon resists its own definition. It refuses to assert its claim, its project or its political plans. According to Annamarie Jagose, the more normative, the less queer something is. Any attempt to synthesize it would be violently partial (1996, p. 1-2). Identifying it as a school of thought would imply an act of domestication or fixation of a type of thinking that resists domestication or fixation. Although the term *queer theory* is recognized by many as an academic discipline, queer represents a theoretical effort that struggles against the effects of institutionalization, that refuses definitive conclusions about itself, and that tries to remain in the ambiguous process of becoming and deconstructing itself. According to Nikki Sullivan, there is a fear on the part of queer critique of being assimilated by the hegemonic perspectives it criticizes. Rather than defining oneself, saying what queer theory is, it would be easier to talk about what it does or offers as a critique (2003, p. vi).

The expression "queer theory" appears and gains repercussion with Teresa Lauretis's paper *Queer Theory: Lesbian and Gay Sexualities* published in 1990 in the feminist journal *Differences: a Journal of Feminist Cultural Studies*. Lauretis seeks to articulate the terms by which lesbians and gay sexuality could be understood and imagined as form of resistance against cultural homogenization and dominant discourses (1991, p. v)[8].

The word queer, which was already being used by gay and lesbian movements and studies as a more comprehensive term to talk about minority sexualities, is then invoked to constitute a set of critical theoretical practices. The word queer, which literally means stranger, was used pejoratively to refer to effeminate men, gays, lesbians,

[7] A detailed mapping of these productions and initiatives is currently being carried out by Diverso UFMG – Legal Division of Sexual and Gender Diversity – and will be published shortly.

[8] According to Annamarie Jagose, Lauretis herself would have later abandoned the expression queer theory, claiming that it had been captured by dominant institutions and forces, against which it was originally coined to resist (1996, p. 127).

trans people or anyone who did not conform to the hegemonic norms of gender and sexuality. In the context of gay and lesbian movements and studies (later LGBT studies), queer is reappropriated and re-signified, either as an identity (I am queer, we are queer) or as practices that challenge the dominant schemas of identities, sexualities and gender (queer as a kind of anti-identity position).

For David Halperin, queer must be thought of as a positionality and not an identity. An eccentric positionality to explore, a privileged place for the critique and analysis of cultural discourses. It is a positionality that is not restricted to lesbians and gays, but to anyone who feels marginalized because of their sexual practices. Queer describes both a horizon of heterogeneous possibilities and objectives that cannot be defined in advance, and a marginal place that multiplies the opportunities for "disidentification, denial and disavowal" (1995, p. 61-64).

José Esteban Munõz states that "queerness is utopian, and there is something queer about the utopian". After all, living in a straight world and desiring, claiming and imagining another time and place is utopian. He recognizes that utopia is an idealistic mode of criticism that reminds us that something is missing, but he asserts queer utopia as the insistence on something different, something better, an exercise of political imagination or a plan for a collective political becoming. Queer is the unreadable, what is lost (or wants to be lost) in the space constituted by heteronormativity. "To accept loss is to accept the way in which one's queerness will always render one lost to a world of heterosexual imperatives, codes, and laws. To accept loss is to accept the queerness – or more accurately, to accept the loss of heteronormativity, authorization, and entitlement". To be lost "is to veer away from heterosexuality's path" (2009, p. 26, 72-73, 100, 189).

Brazilian scholar Fernando Pocahy thinks of queer as insubordinations that mess up and undo ordinary certainties, as practical knowledge capable of establishing other epistemologies of questioning race/ethnicity, gender and sexuality. For him, the destiny of queer is to disappear. The queer project, if there is any, is to abdicate any theoretical-conceptual stability. It is an "ephemeral, insurgent, fleeting, elusive, *slut* political practice. For Pocahy, queer can be understood as an epistemological "(des)aquendar"[9],

[9] *Aquendar* in the Brazilian lingo of transgender women means "to perceive, see and know. But also, to take action, experimente, bid, hide – make something disappear" (POCAHY, 2016, p. 13). *Desaquendar* means let go of something.

as perceiving, taking an attitude, or as making disappear, letting go. It has a vagrant character, loose in life. It has “a kind of curiosity that moves research in the sense that we manage to get lost”. “It's about following, noticing, flirting, grabbing, and then detaching, escaping its own 'charms'”. Queer agencies those epistemological escapes, the refusal of traditional theories and methods, the desecration of concepts and theories, the reinvention of the problems of our time, "forcing the passage for other epistemologies", changing the landscapes of knowledge and practices, of research as a territory for experimentation (2016, p. 10-14 and 18).

For Judith Butler, queer is a movement that cannot be fully anticipated:

> If the term 'queer' is to be a site of collective contestation, the point of departure for a set of historical reflections and futural imaginings, it will have to remain that which is, in the present, never fully owned, but always and only redeployed, twisted, queered from a prior usage and in the direction of urgent and expanding political purposes, and perhaps also yielded in favor of terms that do that political work more effectively (1993, p. 19).

Like any term or theory, queer is not only an expression of refusal and dispute, but it is also disputed and claimed for different purposes. In the English language, the word ends up working as an umbrella term, covering gays, lesbians, bisexuals, trans people etc. As a result, much of what was previously called gay and lesbian studies comes to be identified as queer studies for the simple fact that they have deviant sexualities and gender identities as their object. The problem is that, as Gloria Anzaldúa points out, queer, when used as a false unifying umbrella, even when we seek shelter under it, ends up homogenizing and erasing our differences ([1981] 2002, p. 230-233).

It is interesting to note that queer as a theoretical phenomenon was developed in the context of the consolidation of lesbian and gay studies in North American universities in the 1990s (JAGOSE, 1996, p. 1-3). But even before the development of institutional spaces for research and knowledge production on dissident sexualities, queer has been associated with movements for recognition and pride of LGBT identities since the 1970s. The demand for a queer identity by these movements is historically marked by disputes and ambiguities. Queer has been used both as a broad and flexible identity category, encompassing everyone who does not fit the hegemonic norms of heterosexuality, and as a kind of anti-identity, a position of refusal of what is considered normal, stable and fixed. As a claimed identity that encompasses all LGBT people, queer ends up forging a shared common, threatening the erasure of specificities

and differences and making the most vulnerable individuals within the group invisible (transgender, black, women, national minorities etc.). As a critical positionality, queer denounces the complicity of the LGBT movement itself, which in the search for recognition and expansion of rights, negotiates and is assimilated by heterosexual power structures, in addition to instrumentalizing identity policies, reinforcing structures and devices that are harmful to diversity and to radical freedoms.

The very history of the LGBT movement is marked by identity disputes. Accusations of assimilating certain groups at the cost of marginalizing others, tension between more radical desires for sexual revolution (against hegemonic institutions and customs) and more "conservative" yearnings for institutional recognition of legal equality. In the process, the movements would have lost their initial radical character, adopting assimilationist political strategies. The general criticism of dominant cultural institutions gave way to pressures for social conformity in exchange for gradually recognized rights. This can be seen in the efforts to centralize the agenda (marriage, adoption, criminalization of homophobia) and in the fabrication of a positive image, quickly associated with middle-class white gays and lesbians. On the other hand, the marginalization of blacks, national minorities, transgender people, prostitutes, fetishists, effeminate gays, masculine lesbians, those who do not conform to acceptable standards of gender and sexuality has produced productive tensions in the movement and in LGBT studies. For Jagose, "queer marks both a continuity and the break with previous gay liberationist and lesbian feminist models of organization." It is the product of pressures and clashes about the contradictions and limits of a queer identity (1996, p. 75-78).

Within an effort to locate the practices and objects associated with the expression queer theory, we could say that they are crossed by markedly interdisciplinary approaches, by post-structuralist perspectives, by a critique of universalist or essentialist notions of truth, freedom, subjectivity and power, by an interest in understanding the discourses and norms that produce subjectivities, identities, notions of normal or abnormal. For Nikki Sullivan, queer theory is constructed as a vague and undefined set of practices and positions that challenge normative identities and knowledge, as a deconstructive practice, a bet on the inherent instability of terms, their cultural and historical specificities. It seeks to denaturalize and destabilize essentialist understandings about sex, gender, sexuality, and sociability (2003, p. 39, 43-44, 51).

Among the various notions that contributed to the formation of a queer theoretical position, some of them are key: such as the idea developed by Michel Foucault, in the *History of Sexuality* , that sexuality is a historical device, a discursive production and not something natural or essential ([1976] 2015, p. 157-163) ; the accusation of Monique Wittig in *La Pensée Straight*, that heterosexuality is a political regime that produces gender and sexuality (1980, p. 49-50); Adrienne Rich's notion of *Compulsory Heterosexuality and Lesbian Existence* (1980); Gayle Rubin's proposal, in *Thinking Sex* , of constituting a radical theory of sexuality capable of denouncing and describing the erotic injustice and the sexual oppression based on an essentialist hierarchy of sexual acts that punishes and stigmatizes sexual minorities (1984, p. 278 -279); Judith Butler's theorization, in *Gender Trouble*, that gender is not a natural, essential, fixed or stable identity, but rather a performance instituted by stylized repetition of various acts that are perceived, regulated, and coercively reinforced as feminine or masculine ([1990] 2016, p. 23, 127, 241-242); Eve Sedgwick's argument, in *Epistemology of the Closet*, that heterosexist culture produces the "closet" as a mechanism for the subordination of LGBT people (1990: 1, 68-77); and Michael Warner's (1991, p. xvi) notion of heteronormativity.

This is, of course, not an exhaustive list of all the ideas that produced what we now identify as queer theory. It is a complex universe produced from the encounters and disagreements of the studies of sexuality and gender, but also of race and class. It is a critical position that points out the limits and ambiguities of dominant knowledge, that seeks to understand and expose the contradictions and instabilities of powers, whether in their institutional aspects or from the point of view of the micro-relations that constitute the subject. Queer is interested in critically examining discourses and norms, how they are articulated in the production of subjectivities.

In the legal field, queer is a very discomforting presence. As an umbrella term that unites LGBT people, queer still occupies an apparently marginal space in doctrines, laws and court decisions. As a critical positionality, queer contests and rejects the normative and normalizing character of the law. It is a disruptive element of traditional legal practices and theories. On the other side of the equation, we could say that law is an antiqueer force insofar as it criminalizes or disadvantages non-heterosexual conduct, or insofar as it refuses to recognize, treat equally and protect LGBT people. Moreover, law is antiqueer as it is an instrument or a structure that operates

through fixation, stabilization and normalization of everything it regulates, including gender and sexuality. Given this, does it make sense to speak of a *queer law* or a *queer legal theory*? Can we speak of a queer method of analysis or a queer critique of law?

As in the English language the use of the word queer has the same general sense in Brazil we give to the acronym LGBT, we will find the use of the expression "*Queer Law"* referring to LGBT rights, or the expressions "*Queer Legal Studies"* , "*Queer Perspective on Law"* or "*Queer Approach to Law"* normally associated with the analysis of the treatment that the state and the law have currently or historically gave to sexuality and gender or, in a most general sense, to the LGBT rights. In most English-language legal books and articles that use the word queer[10], we come across reformist perspectives and proposals for legal change for inclusion of LGBT people, even if inserted in the general criticism regarding legal omissions or ambiguities and limits of the law. But the use of the expression "Queer Legal Theory" usually proposes an instrumentalization of queer positionality to critically think about the law. It is not simply about having LGBT (or queer) people as an object of reflection, but to promote a queer examination of categories, discourses, and legal norms.

Combining queer theory and law is no easy task. On the one hand, we have an anti-normative positionality, an attitude of contestation and deviation. On the other hand, a set of knowledge and practices that are fundamentally normative, justified on promises of rectitude and expectations of security and certainty. According to Adam Romero, if law articulates and normalizes the dominant social values, queer presents itself as an oppositional tool in relation to the hegemonic norms and values. For him, the term queer refers more to a methodological description than to a prescriptive concept. It describes more a positionality in relation to the normative than a positivity (2009, p. 190, 193).

What does it mean, then, to make queer legal theory? Is it a position that seeks to make the law queer, promoting sexual democracy and radical inclusion of LGBT

[10] In "*Law Like Love*" (in free translation, Law as Love), the editors understand that a queer perspective of law is something that can not only inform legal reform processes but transform the way the history of law is perceived, a different reading of the laws that deal with desire and sexuality, recovering lost voices and promoting a reading of the right from the perspective of individuals (NARRAIN, 2011, p. xiii). Libby Adler, in "*Gay Priori*", proposes an analysis of the priorities and discourses that cut across LGBT movements in their efforts to legal reform and promote equality (ADLER, 2018, p. 3-4). Margot Canaday, in "*The Straight State*", analyzes a series of immigration, military and social security legal instruments of the US State that implicitly or explicitly regulate and subordinate LGBT people (CANADAY, 2009).

people, as well as an in-depth review of legal categories and discourses? Or is it a matter of advocating for the destruction of law, demonstrating its impertinence and inability to adequately regulate the complex and elusive plurality of desires?

Daniel García López explains that queer theory attacks the core of the legal system: the norm. It seeks to demonstrate how legal rules act and set up contingent and historical elements as if they were natural. Its goal coincides in a way with Marxism. Queer theory wants the end of law, even though its intentions and strategies may be different. For García López, legal queer theory does not stand for the legal recognition of peripheral, eccentric or degenerate subjectivities. It inquires and confront the limits of citizenship, the subject and identities, insofar as these categories presuppose a universality or a common unit that erase differences. The queer is anti-essentialist and intersectional. At the same time that it denaturalizes gender and sexuality as fixed and stable identities, it seeks to demonstrate the discursive and normative linkages between gender, sexuality, race and class. Moreover, it refuses identity politics as a strategy and has as its primary mission the elimination of sex-gender as a legal category (2016, p. 327, 338, 345-347).

Francisco Valdes argues that legal queer theory, as an intersectional and multidisciplinary analysis of law focused on transforming the *status quo* and establishing a post- subordination society, represents a second stage of LGBT studies. The first stage was focused on a one-dimensional examination of discrimination and unequal legal treatment of sexual minorities (2009, p. 92-94). For Valdes, legal queer theory is part of a broader movement of anti-subordination legal discourses committed with an intersectional approach. It pays attention to the ways in which white straight supremacy articulates racist and homophobic elements to create legal e social conditions that encourages partiality and discrimination against sexual minorities (1997, p. 1295-1296).

Valdes identifies eight methods and tactics for queer legal theory, many of which had already been developed by feminists and critical racial theories. For him, a queer legal theory must: (1) fight against the heteropatriarchal stereotypes concerning sexuality and gender; (2) produce an interdisciplinary legal knowledge, connecting the studies of social sciences and the law; (3) employ narratives and counter-narratives capable of capturing the complexity and diversity of queer lives; (4) constitute constructive and anti-essentialist sensibilities attentive to the ideological and

cultural aspects of legal norms and discourses; (5) demonstrate that sexuality is a legal and social construction; (6) defend the erotic desires and bodily pleasures as a constitutive part of our emotional relationships; (7) challenge the artificial division between the public and private dominions and the assertion of sexuality as pertaining to the private domain, which imposes silence, invisibility and subordination of LGBT people to the politics of the "closet"; (8) promote the positionality, the relational aspect and the intersectional analysis of the multiple dimensions of discrimination and subordination (1995, p. 366-370).

Although in this methodological scheme there is a reformist expectation of making law queer, many of the tactics serve as disruptive proposals for a more radical critique of law that exposes how its discursive and normative mechanisms operate in the production of gender and sexuality, as well as of class and race.

Finally, it is worth saying that the power of queer lies in its elusive, vagrant, twisted and insubordinate character. It is from an illegible position, made invisible and marginalized by hegemonic discourses and norms that the queer presents itself as a possibility of epistemological experimentation, of collective contestation, of deconstruction of matters considered fair, essential or natural. It is from this position that a queer legal theory has the advantage of experimenting with legal discourses and norms, appropriating and confronting them in order to explain them from the perspective of the subaltern. But at the same time that the queer seizes the law for itself, it immediately detaches from it so as not to lose itself in its institutionalization and assimilation charms. It *aquenda* (seizes) and *desaquenda* (let go of) the law, to use, with Pocahy, the vocabulary of transgender women of Brazil.

When I say that the queer occupies an apparently marginal space in law, I repeat the complaints of omission or neglect of the law in relation to LGBT people, I accuse the lack of full legal recognition and unequal legal treatment of sexual minorities. I venture to say that queer legal theory always starts from some kind of demonstration of this supposed legal vacuum. But, in doing so, in looking at the non-rights from this non-place, queer critique accesses in a privileged way the invisible or hidden operations of the legal phenomenon. It acknowledges that sex and sexuality are ubiquitous elements of the law. Between the lines of silence, from the unsaid on legal doctrines, sentences, and norms, queer positionality is able to demonstrate that everything in law is founded on the regulation of sex and on the

production of illegibility of queer individuals. This positionality allows us to reveal that sex pervades legal discourses and norms. The very bourgeois regulation of property, inheritance, family, labor, and crimes regulate sex and sexuality not only in a direct and explicit way, but mostly indirectly and silently. Queer critique, by profaning traditional categories and regulations of law, opens the way for both rethinking and destabilizing legal structures and discourses.

After all, as stated Gloria Anzaldúa in 1981:

> We are the queer groups, the people that don't belong anywhere, not in the dominant world nor completely in our own respective cultures. Combined we cover so many oppressions. But the overwhelming oppression is the collective fact that we do not fit, and because we do not fit, *we are a threat* ([1981] 2002, p. 233).

Queer is the threat that turns shame into pride and pride into shame. That confuses and embarrass moralizing explanations and norms about bodies and pleasures. It is the inverted, the crooked, the faggot, the dyke, the prostitute who, in order to survive the hegemonic discourses and norms that produce their abjection, inverts and twists the meanings of these norms and discourses. Queer is the ambiguous power of freedom that law cannot define and contain and that, existing and resisting, threatens the law and all its explanations and regulations on gender, sexuality, race, work, property etc. As it does not fit the laws, court decisions and legal doctrines, the queer haunts the norm that excludes it. It destabilizes the entire normative apparatus that produces false stable truths and ontological normality.

A few years ago, at the Law School where I teach, one of the most traditional and highly ranked in Brazil, a professor (and judge of law), horrified by the repercussion of a lesbian kiss in a Brazilian soap opera, said in the classroom something like "thank Good there is still a little heterosexuality in the law". The professor was evidently wrong and afraid. Wrong because it is not a matter of still having a bit of heterosexuality in the law. Everything in the law is built on heterosexual perspectives. Even the concessions that legal discourses and norms make for the inclusion of LGBT people are concessions of a legally produced and enforced heterosexual normality. Gay sex, lesbian marriage, the free use of the bathroom by transgender people, the change of name and gender in identification documents, the limits of our sexual and romantic engagements and our gender expression are produced by the authoritarian fear of the hegemonic heterosexuality, of which law is not only accomplice, but the main articulator. My colleague professor was also afraid because a short kiss between two

lesbians haunts the schemes of compulsory heterosexuality that constitutes the laws he applies as a judge or the doctrines that he teaches in his classes. After all, the queer is this threat that is made unintelligible by the system of explanations and regulations that law creates. It destabilizes and terrifies the very foundations of the law.

In Brazil, as elsewhere, a queer legal theory is still something to be built. In the field of education, for example, we find a more advanced and mature debate[11]. In the legal field, the word queer is still mostly associated with the claim for LGBT rights, recognition, identity politics, denunciation and combat of the structural homophobia of the law[12]. It is worth noting, however, that we are witnessing an important increase in debates and productions that propose a queer critique of law. In post-graduate law programs in Brazil, there is a multiplication of thesis and dissertations that propose to rethink legal categories based on a queer positionality. A good example of this type of production is the book "Qual é o Futuro da Sexualidade no Direito?" (What is the Future of Sexuality in Law?), organized by Eder Fernandes Mônica and Ana Paula Antunes (2017), which brings together a series of critical analyzes of the law based on the concept of sexuality.

Final considerations: for a feminist and queer critique of law

[11] Dilton Couto Junior and Fernando Pocahy produced an excellent cartography of queer theorizations in education research, collecting and explaining discussions and proposals, such as that of fag education, queer curriculum studies, queer rhizomatic education, queer pedagogy, via(da) queer gens, warming-research, misguided child, sending down, great theory, ass theory, misguided studies, among others (COUTO JUNIOR, POCAHY, 2017, p. 618-623). See also: "Teoria Queer. Uma política pós-identitária para a educação" (LOURO, 2001), "Enviadescer para produzir interseccionalidade" (COLLING; SOUSA; SENA, 2017), "O cu (de) Preciado: Estratégias cucarachas para não higienizar o queer no Brasil" (PELÚCIO, 2016), "O que pode uma teoria? Estudos transviados e a despatologização das identidades trans" (BENTO, 2014).

[12] Among the productions of Brazilian jurists on LGBT rights, homophobia, discrimination, sexual rights, see: "O Princípio da Igualdade e a Discriminação por Orientação Sexual" (RIOS, 2002), "Direito da Antidiscriminação: Discriminação e Ação Afirmativa" (RIOS, 2008), "A Construção Jurídica da Heterossexualidade" (MOREIRA, 2010), "União Homoafetiva: A Construção da Igualdade na Jurisprudência Brasileira" (MOREIRA, 2010), "Diversidade Sexual e Direito Homoafetivo" (DIAS, 2011), "Manual da Homoafetividade" (VECCHIATTI, 2012), "Ditadura e Homossexualidade" (QUINALHA; GREEN, 2014), "Cidadania Sexual: Postulado Interpretativo da Igualdade" (MOREIRA, 2016), "Gênero, Sexualidade e Direito: uma Introdução" (RAMOS; NICOLI; BRENER, 2016), "Gênero, Sexualidade e Direito: Perspectivas Multidisciplinares" (RAMOS; NICOLI; ALKMIN, 2017), "Homotransfobia e Direitos Sexuais: Debates e Embates Contemporâneos" (DESLANDES; BAHIA, 2018), "História do Movimento LGBT no Brasil" (QUINALHA; GREEN; CAETANO; FERNANDES, 2018); "Direitos Sexuais e Direito de Família em Perspectiva Queer" (BORILLO; SEFFNER; RIOS, 2018), "Gênero, Sexualidade e Direito: Dissidências e Resistências" (RAMOS; BAHIA; PEREIRA; NICOLI, 2019).

A critique of law is simultaneously an epistemological theory and a political practice. It is not a question of reconstructing a true idea of law or establishing a better or more complete theory. Criticism is not the affirmation of a new dogma. It is about situating what historically determines a certain position, demonstrating its contingent character, its effective starting point, often hidden by traditional or hegemonic knowledge (MIAILLE, 1992, p. 73-74, 76-78).

When I affirm gender and sexuality as useful and powerful categories of legal analysis and criticism, I am not invoking an external and stable method that can be applied to the law as a fixed object. It is a bet on understanding the dynamic processes of discursive and normative production in the legal field in its historical, economic, social, and cultural contingency. It is about exploring and exposing, from new positions, feminist and queer, what was hidden or what was normalized by the dominant discourses and norms. Invoking gender and sexuality as a critical instrument produces tensions and displacements in the very understanding of gender and sexuality. It is an operation that moves the meanings and uses not only of the law, but of the subjectivities that these meanings and uses have historically constituted.

A feminist and queer legal critique establishes itself as a critical epistemology insofar as it demonstrates, from the experiences or positionalities of women and LGBT, not only the limits and contradictions of legal knowledge about gender and sexuality, but also of its own foundations, categories, theories and norms. It is also a political practice both in its reformist strategies for the legal inclusion of sexual and gender minorities, and in its revolutionary claims for the abolition of gender, sexuality and of law itself or, yet, in its performative insubordinations that displace and subvert the meanings and uses of legal discourses and norms.

It is not about affirming new dogmas on the masculine and feminine, or on sexual and affective practices and alliances, but about breaking free from the essentialist normalization produced by the abstract perspectives of legal categories. It is about producing new knowledge from the point of view or experiences of women and LGBT in order to expose the gender and sexuality implications of legal norms, to unmask the partiality of laws, doctrines and court decisions, to denounce the false autonomy of the law in relation to heterosexists interests, to demonstrate that gender and sexuality are nothing but discursive and normative structures that are located in the contingency of a certain culture, which evidently includes the hegemonic legal culture.

Traditional legal theories refuse to analyze gender and sexuality beyond an essentialist binarism because, as we have seen, essentialism is easy and convenient. It means not having to do as much work, not having to learn about differences, about the marginalized, about the multiple material dimensions of exploitation and domination of women and the LGBT. In their moral conservatism, hegemonic legal doctrines tremble before the defense of erotic desires and pleasures, before the denunciation of the violence of patriarchal domination and compulsory heterosexuality. Among the multiple methods and strategies, the most powerful contribution of feminist and queer critique resides precisely in its efforts to produce a multidimensional analysis of oppressions and in its attentiveness to the lives of those that are made invisible and unintelligible by the hegemonic system of knowledge and norms.

If I hesitate to end with a more precise synthesis of what a feminist and queer critique of law is or should be, it is because I am convinced that its potentiality lies precisely in the disputes that constitute its perspectives and positions, in the insubordinate character of its practices and theories, in the openness of its point of departure. A feminist and queer critique of law embodies a deconstructionist stance that, by dislocating and destabilizing the meanings of the discourses and norms it inquires, dislocates and destabilases itself permanently.

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