



# Defining Gender for International Criminal Law and Human Rights Law Translating Feminist Theorisations

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# DEFINING GENDER FOR INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS LAW

## Translating Feminist Theorisations

### INTRODUCTION: EXPANDING CONCEPTION OF GENDER

Gender has been recognised as a relevant category in international criminal and human rights law in order to ensure protection under the law in an inclusive manner. Despite the inclusion of gender in international formulations and practices, the definitional understanding of gender is often rigid and potentially exclusionary. In light of recent discussions concerning proposed changes to the definition of gender in the Crimes Against Humanity Treaty,<sup>1</sup> it becomes pertinent to bring to fore relevant ways of conceiving gender in socio-political realities. There has been a movement towards acknowledging the social construction of gender in international discussions. However, “social construction” is a complex notion which can have different meanings in distinct contexts. Feminist scholarship has a rich and long history of theorising the social nature of gender and can offer key insights to human rights practitioners in conceiving gender within particular cases and more generally.

Feminist scholars do not have a singular, shared understanding of gender. The understanding of gender has been a deeply contested matter within feminist literature. Nevertheless, reviewing conceptions of gender from classical feminist texts is useful for several different ends. First, it allows policymakers and researchers to *locate* what they are looking at (and perhaps trying to influence). Second, it allows for viewing the dimensions of socio-political reality within which gender exists – what are the parameters to look at? A review can provide directions in answering such a question. Third, gender is codified in law and in state policies; reviewing conceptions of gender is pivotal for recognising specific elements of gendered lives and sociality and consequently addressing social inequalities within the legal framework. This paper provides an overview of the distinct understandings of gender in feminist scholarship. These have emerged in historically and socially situated contexts and have mutually influenced each other. They have crossed over from the specific locations from which they emerged and have instilled and inspired responses in other locations over space and time. The interactions between different scholars and schools of feminist thought provide for rich material of study in themselves. However, this paper is focused on eliciting key elements from distinct feminist schools of thought concerning the question of what constitutes gender, and the related question of what makes a “woman” (and “man”). Conducting such a review would enable for expanding gender as a concept to make it more inclusive of distinct realities and experiences. This review focuses on the following three broad approaches to gender in feminist scholarship:

- > gender as a construction and structure,
- > gender as a doing, and
- > gender as power relations.

Each of these provide insight for a more effective and inclusive definition of gender in international criminal law and human rights law.

<sup>1</sup> The legal notion of crimes against humanity has mainly evolved within the jurisprudence of international courts and tribunals, such as the Nuremberg trials and the two ad hoc tribunals on Rwanda and Yugoslavia (International Criminal Tribunal for Rwanda, ICTR, and International Criminal Tribunal for the former Yugoslavia, ICTY). The attempt to codify crimes against humanity in an international treaty is part of a long-running effort that seeks to develop means to complement the Rome Statute in criminalising and taking effective action against crimes against humanity (Sadat 2018).

## SOCIAL CONSTRUCTION OF GENDER

In arguing that gender is a social construct, feminist scholars have rejected the idea that gender is a matter of immutable nature or biology and rendered gender relations open to change. Two relevant schools engage with this dimension, i.e. psychoanalytical feminism which focuses on the level of individuals and families, and structuralist approaches to gender which bring into focus the operations of the state, law and kinship orders. The two schools highlight where the social construction of gender takes place, the forms it takes, and the meanings attached to it.

### Psychoanalytical feminism

Psychoanalysis has been highly influential for feminism, with feminists both critiquing and using the works of Sigmund Freud (and others) to theorise gender with greater clarity. In his psychoanalytical work, developed from his experience with several patients, Freud strove to provide an understanding of the self, though he did not develop a theory of gender. But Freud broke away from liberal traditions, which assumed that the self is unified and coherent, and instead delineated how the self is internally split. Sexuality and the relationship of the child to the mother and the father are central to Freud's theory of self formation which, by destabilising the self, opened up the idea that it is fluid and made. Despite this, feminists have extensively criticised Freudian psychoanalysis, starting with Simone de Beauvoir who questioned Freud's assumption of women's inferiority and the absence of an original feminine libido. Women are not accorded full subjectivity in the Freudian worldview (de Beauvoir 2011, 39). But newer generations of feminists (in some cases inspired by the contributions of Jacques Lacan) began using psychoanalytical methods for a feminist political project.

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From the psychoanalytical viewpoint, gender difference is not absolute. Gender differences do not exist in essence but are generated in relation. Difference is socially and psychologically situated. Thus, Nancy Chodorow, a psychologist from the United States, offered *differentiation* as an explanation for the emergence of gender difference(s). According to her, a child is born having a narcissistic relation to reality and experiences itself as being continuous with the external world, including with the mother. Differentiation is the process which marks a demarcation between the self and the object world, where the child no longer perceives itself to be continuous with the world, but as distinct from it. This differentiation happens in relation with the mother, and significantly, both boys and girls are raised primarily by mothers. A young boy learns his identity as being "non-female" and hence, men become psychologically invested in maintaining difference from women as their own selfhood is premised on this distinction. Young girls do not define themselves as "non-male" and consequently, women are not as invested in difference and separateness from the male (Chodorow 1997).

The Belgian-French linguist-philosopher Luce Irigaray shifts the focus on to the (sexed) body, which she deems as socially and individually significant – difference is sexual in nature. This gender difference comes to be established because the masculine assumes to speak for everyone; the masculine assumes universality because it has disembodied itself. Masculinity assumes a transcendental, disembodied existence and fails to perceive its own situatedness. The transcendental nature is created amidst phallogentrism – a network of images, representations and methods within which women (and the feminine) are ascribed a solely relational characteristic to men (taken from Gross 1986). Irigaray's larger political aim is to allow for the creation of a positive understanding of the feminine and of the female sexuality – one that is not solely ingrained in its relation with the male.

Psychoanalytical feminism argues that gender is closely related with sexuality, and emerges in relation to others. Gendered selves are formed in relation to other selves; the relational aspect makes the family and kinship systems within which individuals exist central to this approach. Gender does not have an essential existence prior to the family; it comes into existence within the power disparities between men and women in a family.

## Structuralism

In a shift away from studying individuated self formations, structuralism seeks to understand sociality and actions by looking at the larger “structures” that enable and underlie human behaviours and relationships. Structures provide an explanation for broad social patterns and regularities observed. Cultural anthropologist Gayle Rubin extracted key tenets from Claude Levi-Strauss’ structuralist ideas but used them to understand the oppression of women. According to Rubin, gender exists within a sex-gender system, which is a set of arrangements through which a society transforms biological sexuality into “products of human activity” (1975). This system is at the heart of social relationships. According to Levi-Strauss, the system of gift-giving is central to establishing social links and marriage is a fundamental means through which such gift exchange takes place. Rubin builds this further to argue that it is women who are exchanged in marriages and men are beneficiaries of such an exchange. Women do not have full rights to their own bodies. Incest is taboo because it would make women no longer “available” for exchange with others, but rather for “self-consumption”. Hence, gender oppression is an intrinsic element of familial and kinship systems. Consequently, the feminist solution must also be structural and seek a revolutionary transformation in these systems.

Catherine MacKinnon, feminist legal theorist from the United States, delineates the structural nature of gender by focussing on the legal and statist structures. She argues that most liberal political strategies tend to entrust women to the state, assuming that the state will protect them. However, the state itself is male. She delineates this in the context of law on sexual assault where the criminality of an act of violation is measured from the point of view of the man’s use of force instead of the victim’s perspective and suffering (1982). Wendy Brown extends this critique of the state in generating gendered power disparities by arguing that the public-private distinction creates gendered identities. The liberal state assumes that an individual can participate in the political, public realm and have domestic needs fulfilled in order to do so within the private realm. However, the private sphere is never private for women – it is marked with labour and violence. Hence, this individual assumed within liberalism is a man who possesses the freedom to move between public and private realms and for whom the private sphere is one that supports his participation in the public sphere. The public-private division *creates* gender and male and female categories. It demarcates the private as the sphere where men can control “their” women, outside of the state’s view (Brown 1995). Hence, gender is formed and entrenched in state-based structures and the law.

Overall, the structural view outlined above shows how gender is structural in nature – with different theorisations focusing on distinct structures such as family and kinship systems, legal frameworks, and state policies and politics. These structures allow for the creation of gendered identities and lend larger meanings and reality to such constructions. Within this view, addressing gendered power inequalities and disparities would require targeting larger structures to bring about change.

## GENDER AS DOING(S)

In a departure from above conceptualisations, more recent approaches have moved away from *locating* gender in specific structures or units and instead unravelled gender as a set of doings in the everyday. Gender, in this approach, is not something achieved “out there”; instead it is produced in everyday performances. These approaches contend that gender, sex and sexual orientation are not separable “units” but are deeply interrelated; the material-biological reality of the body is closely connected to gender and its sociality.

### “Doing gender” in the everyday

While the structural view places structures as the centre of analysis, other theorisations within feminist literature show how gender comes into existence in the *everyday*. Gender not only comes into being through large structures at play, but in the everyday interactions that happen between individuals and in relation to each other and their social contexts. “Doing Gender” by sociologists Candace West and

Don Zimmerman is particularly relevant in this regard. Instead of seeking to locate gender in quasi-timeless features of the gender system, the authors look for gender in everyday activities and constructions. According to them, gender is not a specific set of variables, which can be pre-defined; gender is continuously constructed in relation with others. Gender exists because we are always being assessed for our gender performance by the “outside” world. Gender identities are generated in interaction with others; these interactions occur within hierarchies and further allow for the maintenance of these hierarchies and structures (West and Zimmerman 1987). Sociologist Mimi Schippers (2007) further argues for the everyday and changing nature of gender in different contexts. She contends that there is no singular masculinity; there is hegemonic masculinity which co-exists with several marginalised masculinities and the same applies to femininity. The idealised versions of hegemonic masculinity and femininity provide the basis for social relations at all levels socially, culturally and economically – including the self, institutions, international relations, labour distribution and routinised acts and activities.

The starting point here is sharply different from that in structuralist theorisations – the aim is not to find the “origins” of gender or answer the question “where does it come from”. Instead, the focus is on deciphering *how* gender operates and is constructed in everyday lived realities of individuals and societies. We are all constantly *doing* gender in relation to each other. Addressing gender imbalances and disparities in this view does not solely stem from transforming structures (as within structuralism), but in everyday settings and practices that each of us perform and participate in.

### Post-structuralism

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The notion of “doing gender” in the everyday expands even more in post-structuralism, particularly in the works of Judith Butler. Butler argues that the construction of “woman” as a gendered subject is an act of representation, which necessarily excludes and devalues certain elements of subjectivity. Representation in identity forms such as “woman” assume a “fictive universality” and itself allows for the perpetuation of certain forms of domination and exclusion (Butler 1990, 7). While earlier feminist literature sought to distinguish between sex and gender in order to argue for the opening up of the gender spectrum, Butler argues that gender cannot be theorised independently from sex. Gender does not exist as a metaphysical entity; rather, it is produced on the body, which itself is a construction inscribed with cultural and social meanings and power. In other words, Butler shows that sex itself is a construction – the sexed body and associated sexual desires do not have an essence independent of gender. They are given meanings socially – through language and its significations. While gender and sex are embodied, they are posited as representational forms that have an abstract existence divested of the body. “Man” and “woman” are representational, abstract notions which erase the large spectrum of both biological differences and social behaviours that lies between these two assumed forms. Butler’s analysis expands to include language into the everyday performance. Gender comes into existence by repetitive stylised acts over time and language is at the core of these everyday acts. Discursive attributions of certain actions and behaviours to specific genders generates gendered selves. In a significant difference from structuralist views, post-structuralism locates gender in the everyday – in our actions, language and interactions, instead of larger structures such as the law. In this view, structures and individual behaviours are not separate entities existing on different levels. Language and discourse which form gendered selves penetrate through each facet of sociality and do not sprout from a particular, unified, “structural” origin. In light of this understanding of gender, Butler (1990, 144) argues for destabilising abstracted representations of gender to problematise gender binaries and relationships. Gender and the body do not exist prior to their entry into society; gender is performed and this performativity *is* gender. It is through slippages in the performance and discourse of gender that its established forms are inflected and undisciplined modes of gender expression come to the fore.

### New materialism

Several recent studies have explored the relationship between the body, mind and social habitus and moved away from Cartesian assumptions of a mind-body

distinction.<sup>2</sup> Sex and gender influence “objective” parameters of the body and life outcomes and the mental dimension of human life is closely connected to the physical aspect. New materialism is the broad name attributed to the theorisations that began to emerge in the 1990s that make material reality the focal point of gender.

New materialism has been gaining prominence within cultural studies, strands of feminist theory and critical literary theory. The revival of materialist/neo-materialist approaches has happened during a time when the “linguistic turn” in cultural studies and in feminist literature is criticised as insufficient. The in-depth exploration of language and representation (discussed above in post-structuralism) has perhaps obscured the *material* dimensions of reality. Placing emphasis on discourse alone can make the study of gender highly anthropocentric and re-inscribe the very nature-culture distinction that many constructivist feminists have sought to deconstruct. New materialism places *matter* at the core of understanding power and gender. Placing matter at the centre does not imply that biology or biological functions are fixed, in fact, quite the opposite. Karen Barad, a theorist in physics and feminism, has made key contributions in this direction. She provides us with an overview of the theorisations and findings in quantum physics from the last century (Barad 2003). Niels Bohr rejected atomistic metaphysics which considers “things” to be the basic entities in atomic physics. The *Heisenberg Uncertainty Principle* shows the impossibility of simultaneous measurement of position and momentum of a particle. This impossibility is not because of flaws in measurement devices but is in the very nature of matter itself. Thus, in atomic physics the “object” of study is no longer objects but *phenomena*. According to Barad, agency is not a property to be held but an enactment of various possibilities. The two-slit experiment in physics showed that the particle’s behaviour (as particulate or as waves) changes when the measuring apparatus of the experiment was changed, showing how matter is responsive and comes into being, much like social identities. Barad draws upon this (and several other experiments) to argue that gender and ethics are matters of responsiveness and responsibility to what is outside; there is no essential notion of gender and a gendered body.

The concept of performativity encountered in Butler – wherein gender is in its doings – attains a material basis here. Matter itself is a set of doings and phenomena, so how can the human body be any different? Matter is not static but has historicity and is continuously “becoming” and becoming materialised through human engagement. The biological, material body is not an abstract, fixed unit but a “materialisation of phenomena” (Barad 2003, 822). Hence, it is physically impossible to have a fixed body as the object of analysis in understanding gender – this body is in an ongoing and relational process of becoming. The biosocial turn in biology considers biological processes as highly dynamic and responsive to social and physical environments.

The arguments presented by Barad and others propose taking the empirical world seriously and deriving understandings of gender and ethics from the study of matter and the physical world. New materialism breaks away from certain understandings that have treated matter as “fixed”, contrasted with ideas, norms and sociality that keep changing. It shows that matter itself exists in a processual form, changing over time and space. This approach provides the material “grounding” for similar arguments that have been made by feminists before and elicit how the body cannot be essentialised but is always in a state of becoming. Thus far, we have mainly focused on gender as ideational, structural, or discursive. However, this approach shows that gender is material and always in close relationship with sex; furthermore, the sex(ed)-gender(ed) body is material and amenable to change and responsiveness in relation to the “outside” world.

## GENDER AS POWER RELATIONS

The principal point for some strands of feminist literature has been the power differential and hierarchy included in and generated by gendered relations. Simone de Beauvoir’s feminist contributions were a pioneering force in delineating the power differences that gender is imbued with across socio-political spaces. Postcolonial and intersectional feminism has pushed this point concerning power differences

<sup>2</sup> For instance, Krieger, Jahn and Waterman’s research shows how women raised in the Jim Crow south have higher rates of estrogen-receptor-negative tumours than black women born outside of the region, indicating how the cancer subtype is susceptible to social-political factors (2017).

further by underscoring that gender operates in conjunction with other power relations such as race, class, ethnicity, and religion taking particular forms in specific contexts. Power, in this reading, is a highly contextual phenomenon that occurs within and in-between individuals and social groups.

### Woman as the Other

The relational nature of gender and self formation(s) has been a focal point within feminism beyond psychoanalytical literature. Simone de Beauvoir captures the relational nature of gender and the construction of woman as the Other using extensive historical and cultural evidence. In *The Second Sex*, she provides a comprehensive account of cultural, religious and political means by which woman is designated as the Other to man. Poets utilise women's bodies as metaphors; in the Bible, God created woman so that man could be saved from loneliness and woman is forever an idea through which man can attain his own transcendence (de Beauvoir 2011, 240). Sherry Ortner, a cultural anthropologist from the United States, extends a similar argument of the construction of woman as the Other but frames it within a nature-culture dichotomy. Woman is designated as nature while man as culture. Women's creative capacities are socially limited to the domestic sphere while men create lasting, transcendental objects that belong in the public sphere. Culture (and its apparent permanence) is deemed more worthy than nature and this defines women's universal devaluation (1974).

Within this view, gender is constructed as a means to allow for the male to be superior to the feminine. Woman is not accrued subjectivity and selfhood, but diminished to being the Other, which provides for a separateness from which man can extend subjecthood and transcendence to himself. These works exhibit how the gendered construction of woman as the "Other" to man is at the core of literature, philosophy, culture and history. The relational aspect of gender does not only exist within families or kinship arrangements, but is entrenched (and perpetuated) within different facets of cultural life as well.<sup>3</sup>

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### Post-colonial feminism and situated knowledges

As feminist literature expanded and distinct political projects and goals were being pushed forth, critique(s) of dominant feminist scholarship also began to emerge. These critiques rose from spaces that had thus far been excluded or peripheral to western feminism and can be very broadly bracketed under "third world feminism", which rose as a distinct field in the 1980s. Chandra Mohanty argues that feminist scholarship itself exists within matrices of power and carries the potential to contribute to supporting existing power hierarchies. According to Mohanty, there is no universal patriarchy or a universal "woman". Gendered identities of man and woman cannot be defined universally and in fact, such a universalising construction erases the specificities of the lives being discussed. There also is no universal category of "brown" women. Such a category serves white women in constructing their own identities in opposition – "we have rights but *they* don't, we have access to the political sphere but *they* don't". This is a similar kind of othering as is exercised by men in relation to women – where a supposed distinct identity is constructed as the Other in order to construct the Self in opposition (and generally in superiority). The question to consider when thinking about gender and gendered identities is the following: how much of a person's life experience is being captured in the identities constructed (Mohanty 1988)? The lived reality of a gender cannot be captured without having comprehensive knowledge and understanding of the broader context within which this life is lived. A lack of immersive knowledge generates understandings of gendered identities that are less able to capture the lived experience and are more an imposition of the onlooker's own view. Uma Narayan discusses this in the context of the understanding of dowry murders in India that exists in mainstream imaginary in the United States. The issue is framed on terms that are particular to the US context – are there homes for battered women in India? Such a question does not consider the particular social context of Indian women – do

<sup>3</sup> An example that can help thinking about the gendered nature of culture at large is the following: women have often been the "muse", the source of inspiration for male artists to produce art. Men here are subjects that perform action in the material and ideological worlds, while women are the source of inspiration that stirs such action, not agents performing and generating such actions themselves.

women seek to have their individual lives rehabilitated? What is held as a valuable and emancipatory end by these women and possible within their social contexts? (Narayan 1997). As gendered lives and their needs and demands are contextual, it is impossible to arrive at a universal understanding of “womanhood” and ideals of justice applicable for all women, across distinct social locations. In fact, extracting a particular understanding of gender (say, from the context in the United States) and positing this as a universal which can be extended to the rest of the world ends up doing violence. This fails to perceive the social realities and dimensions particular to the specific context and imposes a hegemonic view of what gender “should” look like.

The argument for deep contextual and subjectively located knowledge is also made by theorists that argue for the feminist standpoint as a means of *knowing*. Philosopher Nancy Hartsock (1998) contends that women’s viewpoint and their identity can only be expressed from a particular time and place. Donna Haraway (1988) argues that vision and the act of knowing the world is always partial. The view of the world does not come from nowhere. Gender cannot be defined and described from a distant, objective position; such a position assumes that what we are studying is also passive, inert and immutable and that we have a superior knowing position in relation to what we are looking at. Gender and gendered identities are not universal entities; these are highly particular and undergoing changes over time and space. To be able to truly lend subjecthood to those being studied, it is required that one listens carefully to their subjective conceptions of gender and gendering.

### Intersectionality

Starting in the 1980s, the critique of white western feminism took a powerful, political and mobilised form in the United States with legal scholar Kimberlé Crenshaw being the first person to use the term “intersectionality” to denote the forms of oppression that occur at the *intersection* of distinct identities – such as of race and gender. The oppression faced by black women is of a markedly different character than that of white women but also that of black men (Crenshaw 1989). Blackness and “womanness” cannot merely be “summed” together to explain the identity and selfhood of a black woman. In understanding the specific context(s) to arrive at the meaning of gender, a wide assemblage of networks and relationships has to be considered. The relationship is never just male-female or man-woman but includes several other identity markers such as race, class, ethnicity, and religion. Differentiated gendered constructions occur at the intersection of these complex power assemblages. Jasbir Puar (2012) argues that feminist literature has to put the relations within these networks at the core of its study. When discussing gender, we cannot look at “units” but need to look at the “in-between space” between these assumed “units”. Gender and race become inscribed relationally and their meanings change depending on context.

As previously discussed, gender is contextually-situated and this context exists at the intersection of several different identity markers in relation to each other. Gender cannot be extrapolated on to a distinct plane as *separate* from other identities; it exists and co-constitutes other social identities.

### CONCLUSION: TRANSLATING GENDER THEORISATIONS

The above review charts some of the key approaches and “schools” within feminist literature. Feminist scholarship has never been separate from feminist movements, derives ideas from such movements and itself contributes towards them. This paper seeks to formulate key insights relevant to the practice of international criminal law and human rights law, by taking the above principal feminist theorisations into consideration. While feminist scholarship is internally contested, one core thread that we see running through is that gender is constructed. How this construction occurs and what construction even means are questions that have found different answers. Recognising the changing, constructed nature of gender and gender identities opens the space to *change* these identities and the power differentials marking these. Each theorisation places importance on distinct dimensions. For instance, psychoanalytical feminism holds the family and sexuality as central to gendered self formations. Structuralism locates structures such as families, kinship systems, the law, etc. as pivotal to constituting gender. In contrast, post-structuralism locates

gender in the everyday and in dispelled, un-structured performances and utterances within language. New materialism shifts from post-structuralist emphasis upon language to look at matter and its changing nature. Gender is intrinsically tied with sex and the gender-sex body is constantly exposed to the “outside” and keeps changing in the process. The theorisations of postcolonial feminism argue for recognising the highly contextual and situated nature of gender and associated identities. Finally, the work on intersectionality contends that gender and gendered identities are deeply intertwined with identities along other markers such as race, class and ethnicity. Locating gender in particular contexts requires an understanding and recognition of other identity markers and wider sociality.

After considering the above theorisations of gender, this paper arrives at the following key insights:

1. Gender is a social construct.
2. Gender, sex, and sexual orientation are co-constituted; and the material world of bodies is as malleable as the social world.
3. Gender signifies a power relation that operates in congruence with other power relations, in particular, race, ethnicity, religion, and class.
4. The meaning of gender is always situated; projecting a seemingly universal understanding of gender onto societies in the South is a colonialist move.

Any definition of gender in a new Crimes Against Humanity Treaty and in international criminal law and human rights law more broadly needs to address these insights from feminist scholarship if it wants to avoid the dangers of excluding distinctive populations, ignoring multidimensional facets of social reality and silencing situated experiences. A definition that reduces gender to mean women and men ignores its malleability, its tight connection to matters of sex and sexuality, its role as a signifier of power, and the vast variety of realities it authors in conjunction with other status distinctions.

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