

Sex Gender and the Law, Significance as Foundational Courses It Started with a Tale ...

By :

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In countries where promoting rule of law¹ is part of the duties of any law school, teaching Sex, Gender and the Law as a foundational course in first year is a must. It is even more so in states where statute laws enforce an ideology of male supremacy.

In this short paper, I aim to make my point by sharing how I bring students to understand that equality before the law for men and women is often an empty provision without a true understanding of the gender issue and its impact in the legal field.

Sex, Gender and the Law as a foundational course is also necessary in order to bring to Law students' attention the role gender stereotypes play in shaping the outlooks of legislators, lawyers, judges, law professors and law students alike. People tend to see themselves as neutral but, in truth, nobody is. Such a course highlights the fact that legal rules based on social norms of gender are neither neutral nor derived from natural law. We all have in common the fact that, as human beings, we carry prejudices and bias derived from our experiences of life determined by upbringing, friends, peers, culture, messages and stereotypes conveyed by the media.

Cheikh Anta Diop Law Faculty does not yet offer a course on "Gender and the Law" or "Women's rights" in its curriculum. While I actively advocate for such an adjunct to the curriculum, I have put "Gender and the Law" in a section of my course on *Introduction to Civil law*, a course in first year Law studies².

To bring to the awareness of first year law students how gender plays a role in the law field, the section on Gender and the Law is divided in 4 sub-sections:

- I. Starting with a Tale
- II. Defining Gender
- III. Challenging the universality of gender based laws
- IV. Analyzing Gender in Patriarchal and Matriarchal Societies

¹ The « rule of law » has been described as : « ... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency ... (Report of the Secretary General on the Rule of law and transitional justice in conflict and post conflict societies, August 2004) cited in Ethics Central, winter/spring 2011, vol 14, n°1, p. 4, available at: brandeis.edu/ethics/internationaljustice/bij/2010.html

² The course is available on the law school's website: http://fsjp.ucad.sn/index.php?option=com_content&view=article&id=64:cours-droit-civil-1ere-annee-disponible&catid=42:actualites

I. STARTING WITH A TALE

The overwhelming majority of students being Senegalese, they share a cultural background where fables play an important role as an educational tool. They are also familiar with tales where animals speak and have human characteristics. Hence my choice of using the Ancient African tale of the Fox and the Stork brought to the Greeks by Aesop.

At one time the Fox and the Stork were on visiting terms and seemed very good friends. So the Fox invited the Stork to dinner, and for a joke put nothing before her but some soup in a very shallow dish. This the Fox could easily lap up, but the Stork could only wet the end of her long bill in it, and left the meal as hungry as when she began. "I am sorry," said the Fox, "the soup is not to your liking."

"Pray do not apologize," said the Stork. "I hope you will return this visit, and come and dine with me soon." So a day was appointed when the Fox should visit the Stork; but when they were seated at table all that was for their dinner was contained in a very long-necked jar with a narrow mouth, in which the Fox could not insert his snout, so all he could manage to do was to lick the outside of the jar.

"I will not apologize for the dinner," said the Stork:

"One bad turn deserves another."

What is the lesson the Stork gave the Fox?

For each meal equality is respected. Each time the Fox and the Stork have been served the exact same food in the exact same dish. Yet when called to partake of the food, "strangely", one has unfettered access to the meal but not the other.

What is the reason for this situation? I ask the students. What about the identity of the one who chooses the dish? Does it have an impact on who in the end will benefit from it and who will not, although the same rule (same food, same dish, same setting) applies "equally" to all?

Dealing with animals their physiology would be the main answer. In the society of human beings a gender analysis would be required.

That is my introduction to defining gender.

II. DEFINING GENDER

Gender is a concept based on a distinction between sexual identification as it appears on birth certificates and gender identity. Gender is the social construction around what it means to be of the female sex and what it means to be of the male sex. Sexual identification points to what a person is physically. Gender identity indicates what one should be socially, and what one can do, according to their sex. Society, family, religious teachings and beliefs, mainstream media and popular culture concur to assign specific roles and responsibilities to each individual according to their sex.

The next step in this "crash course" on "sex, gender and the law" is to bring students to challenge their ingrained belief that gender stereotypes are not stereotypes but universal laws which are, as such, both timeless and eternal.

III. CHALLENGING THE UNIVERSALITY OF GENDER BASED LAWS

A natural law is universal. It is the same everywhere. It is not subject to cultural norms and geographical boundaries. A natural law is timeless, it does not change according to eras and issues of modernity vs. tradition.

Statute laws, customary laws and court decisions based on gender are none of the above. They are neither timeless nor universal.

Women bear children and give birth to them. That is a natural law. Nevertheless in different cultures and communities around the world, the rules of name giving are far from being the same. In some cultures the rule is that children bear the name of their mother, in others it is fathers who transmit their surnames to their legitimate or acknowledged children. There are communities where surnames or family names do not even exist.

Comparing name giving across time and culture puts in perspective the fact that the provision of the statute law on this matter does not derive from biological facts but from a social construction as to the status of fathers and mothers.

The same exercise can be repeated over and over with a variety of statute laws or court decisions.

When the law states that “les charges du ménage pèsent à titre principal sur la mari” (household expenses weigh mainly on the husband)³. It is clear that the legislator does not mean that men should take the biggest share of the household chores. It is also clear that although women do all if not most of the domestic chores and care the law does not give them any credit for that.

IV. ANALYSING GENDER IN PATRIARCHAL AND MATRIARCHAL SOCIETIES

So far in feminist literature gender analysis relies on a patriarchal background. Not many attempts have been made to consider the way gender has been used in matriarchal societies. The fact is, matriarchy in itself is often ill-defined and, subsequently, presented as being a myth. Hence, in this last sub-section, I give the students the right definition of matriarchy as well as a brief comparative study of matriarchal systems and patriarchal ones based on Cheikh Anta Diop's book (*L'unité culturelle de l'Afrique Noire – Domaine du patriarcat et du matriarcat dans l'antiquité classique*, Présence africaine, Paris, 1ère édition, 1959, 2^{ème} édition 1982, and other material. It shows the students that while in a patriarchal system gender is used to subjugate the “weaker” sex and consider anything related to “female characteristics” as weak, in matriarchal societies maternal values (values associated with the ability to give, nurture, respect and protect life) are the core values all human beings are encouraged to live by.

The following citation, justifies, from my point of view, the importance of such a comparative analysis: “The German experience should be regarded as a lesson. Initially, after the codification of German law in 1900, academic lectures were still based on a study of private law with reference to Roman law, the Pandectists and Germanic law as the basis for comparison. Since 1918, education in law focused only on national law while the legal-historical and comparative possibilities that were available to adapt the law were largely ignored. Students were unable to critically analyse

³ Article 375 Code de la Famille, Sénégal.

the law or to resist the German socialist-nationalism system. They had no value system against which their own legal system could be tested." Du Plessis W. ⁴

CONCLUSION

At the end of the course, students should be ready to concede that gender neutrality in the law is a myth and that each legal rule should be construed with a gender perspective, especially when the aim of the law is – as should be the case in a democracy - to enforce the dignity and equality of all human beings.

⁴ Du Plessis W. "Afrika en Rome: regsgeeskiedenis by die kruispad" 1992 *De Jure* 289–305.