

# Book Review: Gender Injustice: An International Comparative Analysis of Equality in Employment, by Anne-Marie Mooney Cotter

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*GENDER INJUSTICE: AN INTERNATIONAL COMPARATIVE ANALYSIS OF EQUALITY IN EMPLOYMENT* BY ANNE-MARIE MOONEY COTTER (ALDERSHOT: ASHGATE PUBLISHING, 2004) 298 pages.<sup>1</sup>

BY RACHAEL LORNA JOHNSTONE<sup>2</sup>

Despite decades of academic research into gender inequality and countless legal and political strategies to reduce it, the gap between the incomes of women and men around the world remains unconscionable. Anne-Marie Mooney Cotter, in her new book, *Gender Injustice: An International Comparative Analysis of Equality in Employment*, draws together law and sociological data from around the world into a single concise and well-organized text. *Gender Injustice* is an ambitious project that attempts to provide an international and

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comparative perspective on inequality between women and men in employment and promote the role of law in reducing that inequality.

Although much has been written on gender inequality, the majority of the literature is country-specific. Cotter recognizes the international and cross-cultural nature of the problem and successfully brings together source material from a number of states. She also examines some international instruments of which domestic advocates may be unaware. While it is perhaps true that better country-specific analyses do exist, *Gender Injustice* is a rare attempt to bring the material together. It can be forgiven for lacking the detail that might be expected of a text devoted to one single system, as Cotter reports on twelve legal systems. Hence, for those beginning their research from an international perspective, *Gender Injustice* is a good introduction. It might also be recommended to scholars with an interest, but not a specialization, in gender inequality in employment around the world.

While recognizing that depth is impossible in such a broad project, better referencing could have compensated for this lack of depth by allowing a curious reader to find out more.<sup>3</sup> This would also permit clarification of some of the sociological data that is sometimes carelessly expressed. Such information is extremely important if we are to put law in context, but it is only meaningful if it is unambiguously expressed.<sup>4</sup>

The text also suffers from some unevenness. Some chapters focus more on legal texts, others on cases, and still others on the sociological position of women and men. Even within chapters it is often difficult to draw comparisons when information provided is of a different kind.<sup>5</sup>

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<sup>3</sup> See e.g. on data for the European Union, *Gender Injustice*, *supra* note 1 at 240; on assertions about employment "choices," family patterns, and the impact of wage laws (*ibid.* at 6-11).

<sup>4</sup> We are told that Australian women in full-time employment earn 84.3 per cent of what men in full-time employment earn, but we do not learn whether this is hourly, weekly, or annually. Even amongst full-time workers the trend is for men to work longer hours. Part-time workers earn 66.3 per cent of male earnings; but again, we do not know whether this is hourly, weekly, or annually. See *ibid.* at 94. Unemployment is not defined in the text and it is unclear whether the rates cited describe unemployment as assessed by the International Labour Organization [ILO] criteria or whether the rates describe unemployment recognized by the state as such (*ibid.* at 139).

<sup>5</sup> See e.g. Chapter Six for Mexico, the relevant laws are explained, but there is no explanation of their application, nor is there any sociological material provided. For the United States, the author discusses cases where the legislation has been interpreted, but not for Canada or Mexico. See *ibid.* at 139-73.

Cotter introduces the main schools of feminist theory in Chapter Two.<sup>6</sup> This provides a background for considering the attempts of various states to reduce the gender pay-gap, which is the main focus of the text. Cotter does not place herself firmly within any of these schools. She draws from Catharine MacKinnon to assert that the *current* laws still consider equality as “being like a man.”<sup>7</sup> However, she is not willing to give up on-law as a tool to empower women quite yet.

In the same chapter Cotter criticizes trade unions for neglecting the needs of women: as in the legal system, they consider the male, unencumbered worker as the norm and the member for whom they should fight.<sup>8</sup> Indeed, the marginalization of female workers in trade unions, combined with increasing job insecurity for male workers, has in the past left the gender equality issue off the agenda—to the relief of employers.<sup>9</sup> However, in the past ten years, trade unions (in the United Kingdom, at least) have not only recognized the importance of female membership for their own survival, but have aggressively pursued improvements in the conditions of employment experienced by female workers. A perusal of the campaigns of British unions over the past few years may comfort Cotter as it reveals that her recommendations for gender mainstreaming in unions have, by and large, been met.<sup>10</sup> Yet despite these advances, the glass ceiling appears everywhere. Women remain grossly under-represented in trade-union-leadership.<sup>11</sup>

Chapter Three, “Gender Injustice and the United Nations,” brings together a very useful introductory summary of the key human rights instruments relevant to gender inequality. The United Nations

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<sup>6</sup> *Ibid.* at 15-18.

<sup>7</sup> *Ibid.* at 19. The original quote is as follows: “Gender equality law is still based on the notion that to be human is to be a man.”

<sup>8</sup> *Ibid.* at 32-34. On the “unencumbered worker” see Jill Rubery, “Women in the Labour Market: A Gender Equality Perspective” in Lucy Smith, ed., *Changing Labour Market and Gender Inequality: The Role of Policy. Proceedings of a Conference Held October 12-13, 1998* (Oslo: O.E.C.D., 1998) 10.

<sup>9</sup> See e.g. Sylvia Walby, *Patriarchy at Work* (Cambridge: Polity Press, 1986).

<sup>10</sup> *Gender Injustice*, *supra* note 1 at 33-34; but see Trade Union Congress, “Equality,” online: <<http://www.tuc.ork.uk/equality/index.cfm>>.

<sup>11</sup> See “Women Everywhere but the Top” (2000) 89:3 Lab. Res. 17; and Anne Morris, “Workers First, Women Second? Trade Unions and the Equality Agenda” in Anne Morris & Therese O’Donnell, eds., *Feminist Perspectives on Employment Law* (London: Cavendish, 1999).

(UN) is rightly criticized for a historically patriarchal approach.<sup>12</sup> The earliest work of the UN addressing gender inequality takes an approach of formal equality, which Cotter considers and finds wanting.<sup>13</sup> More recently, both the ILO and treaty bodies dealing with human rights have taken much bolder steps in their demands for de facto equality between women and men.<sup>14</sup> It remains true that the stronger the requirement on states to promote equality, the weaker the enforcement mechanism for the international norm.

It is impossible to summarize the entire continent of Africa in one chapter, so, in Chapter Five, Cotter focuses on South Africa.<sup>15</sup> Female and male rates of participation in the paid labour market are provided, but wages and income are not. Even so, statistics themselves may not explain the whole situation. The fact that fewer women than men work for wages does not demonstrate discrimination or even inequality. It may be that the explosion of HIV and AIDS in South Africa has multiplied the caring work that falls on women's shoulders—not only do they care for dependent children and elderly relatives, but also sick partners, siblings, and friends. Paid work, in addition to a full-time caring role, is not “liberation.” Cotter could have also addressed the division of unpaid work between women and men and differences in poverty rates between the two sexes.

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<sup>12</sup> See e.g. Hilary Charlesworth, Christine Chinkin & Shelley Wright, “Feminist Approaches to International Law” (1991) 85 A.J.I.L. 613.

<sup>13</sup> See e.g. *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171, cited in *Gender Injustice*, supra note 1 at 47; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, cited in *Gender Injustice*, supra note 1 at 50; *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, U.K.T.S. 1989 No. 2, cited in *Gender Injustice*, supra note 1 at 53; and *Convention Concerning Equal Remuneration for Women and Men Workers for Work of Equal Value*, 29 June 1951, 165 U.N.T.S. 303 (ILO Convention No. 100), cited in *Gender Injustice*, supra note 1 at 45.

<sup>14</sup> See e.g. *Convention concerning Part-Time Work*, 24 June 1994, 2010 U.N.T.S. 51 (ILO Convention No. 175); *Convention concerning Home Work*, 20 June 1996, 2108 U.N.T.S. 161 (ILO Convention No. 177); and *Convention concerning Maternity Protection*, 15 June 2000, 2181 U.N.T.S. 253 (ILO Convention No. 183). On the human rights treaty bodies, see e.g. Human Rights Committee, *Report of the Human Rights Committee, Sixty-Seventh Session, Sixty-Eighth Session and Sixty-Ninth Session*, UN GAOR, 55th Sess., Supp. No. 40, UN Doc. A/55/40, (2000) at 63-64; Committee on Economic, Social and Cultural Rights, *Report on the Twentieth and Twenty-First Sessions*, UN ESCOR, Supp. No. 2, UN Doc. E/2000/22 (2000) at 28, 31, 58; and Committee on Economic, Social and Cultural Rights, *Report on the Twenty-Fifth, Twenty-Sixth and Twenty-Seventh Sessions*, UN ESCOR, Supp. No. 2, UN Doc. E/2002/22 (2002) at 99-100, 108.

<sup>15</sup> *Gender Injustice*, supra note 1 at 123-35.

Cotter, in the final sentence of this chapter, states: "Entrenched attitudes and practices, as well as limited resources, limit the practical effect of these [laws]."<sup>16</sup> This seems to be the heart of the problem. Why are South African constitutional guarantees of equality not enough? What else do we need? Can law *be* enough? This incongruity between gender equality law and gender inequality practice is finally addressed in Chapter Ten, but this basic tension might have been addressed throughout the text.

Mexican gender equality law, as described in Chapter Six, looks wonderful. There are constitutional guarantees for gender equality. Maternity leave is twelve weeks at full pay and may be extended on half pay, breast-feeding women are entitled to extra breaks, and women are entitled to return to their pre-birth occupational positions with seniority and other rights accruing in their absence. There is a strong social insurance system providing, *inter alia*, nursery care for children under four.<sup>17</sup> What is missing is the sociological information that would enable a reader to consider whether or not it works. We do not learn if there is a pay-gap or if there is employment segregation. We do not learn if the maternity rights are strongly enforced, or, as stories from the *maquilladoras* would suggest, employers evade the law.

Cotter's consideration of the impact of the North American Free Trade Agreement (NAFTA) in Chapter Seven suggests that it has brought mainly hardship to the women and men most vulnerable to job insecurity. She focuses on the effects on Canadian women.<sup>18</sup> I would have liked to see similar reflections on the positions of Mexican and American women. Are Mexican women better off, better paid, following NAFTA? Are professional American women benefiting?

There is another question to ask about the NAFTA experience. Reflecting on the generous labour and maternity laws for Mexican women described in the preceding chapter, neo-classical economic analysis would imply that this renders Mexico at a substantial competitive disadvantage vis-à-vis the United States, where maternity pay is slim to non-existent. If Mexico's labour is still relatively cheap, one must ask why this is.

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<sup>16</sup> *Ibid.* at 135.

<sup>17</sup> *Ibid.* at 151-52.

<sup>18</sup> *Ibid.* at 196-99.

Chapter Eight, "Gender Injustice in the United Kingdom and Ireland," is a very well-structured chapter that would have made an excellent model for every chapter. In Cotter's description of Great Britain, we are given a sociological description of the relative status of women and men, some factors that correlate to differences (for example, marriage, parenthood, and so on), and clear statistics.<sup>19</sup> Cotter then explains the principal legislation.<sup>20</sup> She also explains why occupational segregation and tacit assumptions about the value of "female" and "male" work limit the effect of the legislation.<sup>21</sup> Had every chapter taken a similar form, it would have made it easy for readers to compare different countries, both in law and in results. More importantly, such a comparison would have allowed the reader to consider which laws "work," and why certain laws may work in some countries, but not in others.

Cotter provides a solid introduction to European law on gender equality in Chapter Nine, "Gender Injustice in the European Union." However, the title itself is a little misleading, as she does not distinguish clearly between the European Union (EU) and the Council of Europe. A better title for this chapter might have been "Gender Injustice in European Institutions." While all the member states of the EU are members of the Council of Europe, the reverse is not true. The details of the EU directives should follow the EU treaties,<sup>22</sup> *not* the Council of Europe instruments such as the *European Convention on Human Rights*<sup>23</sup> and the *European Social Charter*.<sup>24</sup> Not only is the *European Social Charter* completely unenforceable, it is a "pick and mix" convention. For

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<sup>19</sup> *Ibid.* at 212-15.

<sup>20</sup> *Ibid.* at 215-26.

<sup>21</sup> *Ibid.* at 223.

<sup>22</sup> *Ibid.* at 242-50. The treaties include the Treaty of Paris, the Treaty of Rome, the Maastricht Treaty, and the Treaty of Amsterdam.

<sup>23</sup> *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, cited in *Gender Injustice*, *ibid.* at 253-58.

<sup>24</sup> *European Social Charter*, 18 October 1961, Eur. T.S. 35 [*European Social Charter*]; also cited in *Gender Injustice*, *ibid.* at 256-58. Clarity is not helped by the fact that the EU also has a "social charter" that is quite distinct: see *Community Charter of the Fundamental Social Rights of Workers*, 1989, O.J. (C 323) 44.

example, the United Kingdom did not sign up to the provisions on equal pay or those on protections for pregnant and nursing women.<sup>25</sup>

In the concluding chapter, "Conclusion to Gender Injustice," Cotter recognizes that the position of women does not reflect the laws designed to ensure equality. She notes problems in the "way the laws are written, interpreted and enforced by hostility or indifference."<sup>26</sup> This is the key to the whole problem.

Cotter suggests that an "*a priori* assumption of freedom and impartiality"<sup>27</sup> passes the burden to each woman to prove oppression and discrimination. The structural barriers to equality are ingrained and invisible.

She also recognizes the importance of the unpaid labour of women; women are *productive*, even when (and perhaps especially when) they are invisible to the global economic mechanisms that their unpaid work essentially maintains.<sup>28</sup> With such responsibilities, one might ask why we should encourage them into paid employment unless we can reduce this unpaid workload.

A greater use of the comparative approach would help to show what the states described in this book have to teach each other. What can states learn from countries with smaller gender gaps? What do countries with greater equality (as none have full equality) still have to do? Why are "good intentions" and laws not enough? This kind of approach would have been easier had Cotter approached the law and circumstances of each state as she did in Chapter Eight.

Cotter defends law to the end. Inequality between women and men is shrinking (albeit slowly)<sup>29</sup> and "it is clear that the legislative and legal systems are of primary importance in the fight against gender injustice and for gender justice."<sup>30</sup>

But are they? This book leaves me skeptical. Law does not appear to be doing a particularly effective job. While the gender pay-gap

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<sup>25</sup> *European Social Charter*, *ibid.* at Part III art. 20. The United Kingdom did not sign up to arts. 4(3), 8(2) & 8(3).

<sup>26</sup> *Gender Injustice*, *supra* note 1 at 273.

<sup>27</sup> *Ibid.* at 274.

<sup>28</sup> *Ibid.* at 275.

<sup>29</sup> *Ibid.* at 278.

<sup>30</sup> *Ibid.* at 277.



has fallen, can we really say that *law* is the principal contributing factor?<sup>31</sup>

Cotter is a defender of the use of law to encourage sociological changes. She shows us a number of laws that are aimed at promoting equality—and then describes a lot of inequality. The laws appear, at least on the surface, to be good. Why then, is inequality continuing to be such a problem? While Cotter addresses this paradox in the final chapter, it would have been desirable to see an explicit engagement throughout the text of this tension between the existence of inequality despite the existence of law. While I do agree that law is at least one of the tools of change at our disposal and that it can be a powerful tool, a reader with no such preconceived opinion is likely to be unconvinced by this book.

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<sup>31</sup> Sociological research in the United Kingdom suggests that the main driver of the reduction in the gender pay-gap has been neither law nor policy, but improvements in the basic human capital of female employees relative to men. See Heather Joshi & Pierella Paci, *Unequal Pay for Women and Men: Evidence from the British Birth Cohort Studies* (London: MIT Press, 1998) at 64.