Introduction to the Special Issue: Law, Harm and Depletion through Social Reproduction

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This special issue addresses the question of how we can broaden legal definitions of harm to include recognition of and compensation for depletion through social reproduction. This is an urgent and important issue. As per the UN report on population trends in 2017, 'an increasing share of the world's population now lives in countries where total fertility has fallen below the replacement level of approximately 2.1 live births per woman over a lifetime' (UN 2017a:); this is particularly true in some countries of the global North, while the major increases in populations will be in Africa and India. The report also notes that by 2015, globally, 'life expectancy at birth rose by 3.6 years from 67.2 to 70.8 years' and that 'Europe has the greatest percentage of population aged 60 or over (25 per cent)…[Such] ageing is projected to have a profound effect on the support ratio, defined as the number of workers per retiree…', which is already 3.3 for Europe. (UN, 2017b, p.7; p11). In this context, increasing elasticity of care labour everywhere (including global care chains) will continue to be important mitigatory routes to providing care to an aging population. Who will bear the costs of this provision, especially in the absence of adequate recognition of and support for this work? We worry that if this question is not addressed then the legal frameworks for addressing gendered modes of caring will continue to harm those engaged in it, rather than ensuring that caring can be fulfilling for all those who are engaged in it and those who are being cared for. One way of recognising social reproductive work is through the law. We see possibilities in the law in preventing harm caused by social reproduction that depletes those doing this work. Legal recognition of this harm can lead to compensation for harm resulting in this depletion both to assist those harmed but also to bring institutional recognition to the issue of unsupported care work.

In this special issue, we examine the issue of law, harm and depletion through social reproduction to show how different strategies are already being used by individuals, households and communities to mitigate depletion and how this is being addressed (or not) at the policy and legal levels – local, national and international. We note that whilst the inclusion of unpaid social reproductive work in the UN Sustainable Development Goals (5.4) is an important step forward, we have a long way to go before this issue is adequately and holistically addressed. Given the remit of this special issue, it is an interdisciplinary collection, with feminist lawyers, political economists and sociologists working together to explore the central themes of harm and depletion through a range of issues, policy frameworks and geographical contexts at a multi-scalar level.

In this introduction we will explain the concept of depletion through social reproduction and outline how it can affect our understanding of relational harm in law. This will allow us to show why the questions that we ask above are: a) important to our understanding of feminist work on harm; b) useful in pointing to the leverage that interdisciplinary work on harm can provide; and c) valuable in indicating where scalar issues – from micro to macro-level - impinge on policy making and how these might be addressed. It is important to note that this issue is a global issue and we approach it as such. The papers in this volume traverse the North/South boundary as they explore the different manifestations of depletion through social reproduction, and strategies to reverse it, which are outlined at the national, regional and international levels.

Research questions and concepts

Much has been written about the importance of the anomaly of excluding most of the work within the home as unproductive labour and its harmful effects (Waring, 1988; Picchio, 1992; Fraser, 2017; Hoskyns and Rai, 2007). Feminist political economists have argued that there is a simultaneous crisis

of the economy and of reproduction that has its roots in the denial of the place of social reproduction in the economy and its commodification through the market (Fraser, 2016; Elson, 2000). They have also argued that the restructuring of states and markets is leading to a situation where the subsidy provided by social reproduction is being increasingly relied upon to fill the gaps in the state provision of welfare (Folbre, 2001; Elson, 2000; Pearson 1998). Rai et al (2014) argue that in order to identify the extent to which this is harmful we need to measure the costs of social reproduction, which they term depletion through social reproduction.

In this special issue we address the following questions:

• Does the concept of depletion give greater conceptual depth to the notion of harm occasioned by caring?

• What role can the state play in developing policies that address the harm attendant upon depletion?

• Can legal change, whether through legislation or the courts, open up the compensatory regime, taking into account depletion of carers, households and communities?

• Can we include ideas of harm due to depletion into international law in framing a range of compensatory/reparative responses?

So, what is harm in the context of social reproduction? Fraser (1995) has identified two types of harm, status-injury and the injuries of economic maldistribution in her recognition/redistribution framework. Rai et al (2014) argue that harm occurs when there is a measurable deterioration in the well-being of individuals – both physical and mental - and the fabric of households and communities, and when the inflows required to maintain them fall below a threshold of sustainability. This harm is what they call depletion through social reproduction (DSR). In this context, despite consensual social relations, the depletion accrued through doing of social reproductive work may still remain harmful. The harm through depletion is experienced at different levels: by *individuals* involved in this work – to their health, both physical and mental, and to their sense of self as well as to their entitlements; to the *household* and those who inhabit it in terms of the fabric of household, decrease in collective household resources, including lack of leisure time spent together, failure to manage the consequences of an increase in the number of household members engaged in wage labour and reduced support structures; and to the *communities* within which households and individuals live their lives, which would include the shrinking of spaces for community mobilization as a result of a lack of time commitments from those mobilized into paid work. Specifically, Rai et al outline four kinds of harm attached to DSR – '(1) discursive harm that occurs through negating work in the domestic sector, while affirming gendered social hierarchies and distinctions of class and race… (2) emotional harm, for example, in the guilt associated with being a 'working mother'…; (3) bodily and physical harm through neglect of the working body of those providing social reproductive labour, especially when access to health is not easily available to all and (4) harm to citizenship entitlements when groups (those providing social reproduction in this case) are constituted as 'non-contributors' to the economy; and therefore, although the recipients of its welfare, perhaps not entirely worthy of entitlements as citizens (Morris 2010). Together, these can be seen as communities of harm where harm affects not only the individual but also the communities that situate her. (Ni Aolain 2009, 219), with class, race and other vectors of exclusion affecting the strategies for addressing them. These harms also have ripple effects (Sankey), whereby members of communities and households suffer from lost opportunities to work, study, play and therefore to live a good/better life.

In law, Feinberg suggests, 'only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms…' (36). The concept of interests of course is, we would argue, a gendered concept; it is not one that can be taken for granted. In liberal jurisprudence, interests are seen as both, 'a person's more ultimate goals and aspirations' and 'as 'interests in the continuance …of one's life…' (ibid. 37). This continuance of life, we argue is what feminists have called social reproduction – it is the reproduction of life itself. So, any action that undermines, marginalises and neglects the work that goes into this continuance and reproduction of life is harmful. Further, as Nicholas Rescher has argued, these interests make a chain that is imbricated and cannot be unpicked without weakening the whole: 'there are few, if any trade-offs operative here…' (in Feinberg: 37).The feminist critiques of law assist in understanding why the complexities of caring work and the depletion that may result from it are often absent in the law (Smart 1989). The traditional legal subject, like capitalism's economic subject, is seen as an autonomous and enabled citizen. The social reproductive labour on whose supports this person depends is usually invisible, while at the same time, assumed (Fineman 2004). For example, while tort law is focused on duties of care that people owe to each other it avoids acknowledging some of the key relationships that underpin this care in determining the legal scope of such duties (Conaghan 2003; Steele 2012). Feminist legal scholarship has challenged the invisibility of care, arguing for it to be recognised and compensated (Conaghan 2003). Feminist work in international law and in the context of post-conflict transition has also challenged traditional legal conceptions of harm and compensation (Charlesworth et al 1991, MacKinnon 2006). This has alerted us to 'subsistence harms' - deprivations of subsistence needs as a discrete form of violence (Sankey, 2014). The feminist legal project is thus both a critical one, directed at exposing the gendered assumptions underlying law, but also attempts to rethink and remake law in pursuit of a better world (Lacey 2005).

The special issue explores the possibilities and limits of legal and political approaches at local, national and international levels and also pushes us not only to critique but to think through what a feminist approach to the law addressing harm and compensation for depletion of social reproduction might look like. Below we introduce the readers to the arguments of the various papers included in this special issue and demonstrate how these come together to advance the feminist work on social reproduction, law and harm both theoretically and empirically.

Arguments

Building on the work of feminist legal theorists, Fionnuala Ní Aoláin, in her paper, 'Harm: Towards Construction of a Feminist Theory', explores the macro and the micro experiences of harm at the individual and group level for women and why legal norms have fixed the notion of harm in ways that illustrate a propensity toward masculine rather than feminine experience. The premise of her article is that the idea of harm to women has been central to women's placement in legal discourse, which however is not synonymous with status and recognition. Rather, she argues that the dominant legal discourses of harm affirm women as an object of legal attention and regulation which affirms their secondary and disjunctive social status. Ni Aolain argues that the classification of what constitutes "harm" for legal purposes is innately linked to the practical experience of justice for many. She draws on the work of Robin West who has observed that much more effort has gone into the business of deploying law as an instrument for the redress of harm than with the more fundamental questions of what precisely harm entails and how we should know and recognise its manifestations (1997, 96). Whilst not directly discussing issues of depletion through social reproduction, the article provides us with a sketch of a feminist theory of harm, which could be developed that is grounded in women's everyday experiences, which several articles in this volume

focus on. Such a theory would also inform the improved measurement of harm, and disrupt the categorical nature of law itself.

In their article, 'Remedying depletion through social reproduction – a critical engagement with the UN's Business and Human Rights framework', Beth Goldblatt and Shirin M Rai treat depletion as a multi-level harm, which arises not only in the context of conflict and disaster but from a range of exigencies that confront individuals, households and communities in their everyday experience. They critically discuss the recent recognition of unpaid care at the UN level in the SDGs, at the ILO, and in international human rights law. They use the idea of harm related to DSR to critically evaluate the work of UN human rights bodies dealing with business and human rights. They suggest that bringing more relational ideas of harm that recognise social reproductive work and its depletion effects should inform improved international legal frameworks in relation to business and human rights. They note that this new focus is an opportunity to consider the multiple ways in which the costs of such care work, conceptualised as depletion through social reproduction, could be recognised and compensated better. However, improved compensatory responses, while valuable, are not enough and that transformative responses to depletion as a harm are needed. This, they argue, is difficult because whilst the Business and Human Rights framework addresses the issue of corporate responsibility to avoid destruction of livelihoods, it does not challenge the growth agenda at the centre of the development paradigm sufficiently. This produces strains in the narratives of change that the Business and Human Rights framework proposes.

The focus of feminist work on unpaid domestic work has largely been on adults. If women disproportionately bear the burden of care and domestic work, children and adolescents also provide care (and more widely unpaid domestic work) to support their households and sometimes to third party households as well. While girl children are mobilised into this care work more than boys, the latter too have significant presence in this landscape of care. Yet the provision of care and domestic work by children and adolescents has remained unrecognised and therefore under-researched and is largely limited to few contexts and issues, such as young carers in the Global North and in a few HIV/AIDS-affected countries in Sub-Saharan Africa, and child domestic workers. Few studies have tackled this issue by asking whether children and young people are 'harmed' in the process and, if so, what kind of harms do they experience. In part, as with women, the concern has been not to treat children as victims and to underscore the importance of children's participation in the adult world (see Lutterel, 2013). Jean Grugel, Susana Macias and Shirin M Rai, while recognising this contribution, in their paper 'Child Carers and the Meaning of Harm', draw on a pilot project carried out in Mexico by Susana Macias and Jean Grugel to explore the burden of care work experienced by children and young people and the attitudes that surround their experiences. The paper asks what 'harm' means in contexts where children and young people experience little in the way of choice in relation to the care work they carry out. They find that highly gendered and idealised notion of the family and childhood can prevent the state from responding to the needs of children who care.

Another group of people often overlooked in the discussions of social reproduction is that of older women. In her article, 'Caring for Older Women within Kenya's Plural Legal System', Ann Stewart provides an intergenerational analysis and notes that developmental states presently provide little replenishment for the subsidy provided by social reproduction in relation to the care of older people which is gendered and family based. She focuses on 'woman to woman' marriage practices in Kenya to gain insights into how, in the absence of state support, older people in Kenya are developing care relationships. The article asks how the law contributes to the way in which caring relationships are supported, and to what extent are the interests of both those in need of care and those who provide

it recognised and protected? It assesses the contribution of community-based approaches to provision of care, particularly for older women, when there is little social welfare available. The everyday practices of caring for older people particularly women, traditionally woven into communal relations, are changing in the socio-economic and political circumstances of contemporary Kenya. Are woman to woman marriages, historically understood as a means of tackling infertility, evolving into a way of recognising and mitigating the harms associated with caring labour provided within kin based relationships? She examines this question from both the point of view of the older woman and the younger carer. At a broader level, through an analysis of two cases, Stewart wonders if this mitigation of social reproductive work addressed through claims on 'private' property and the distribution of bequeathable assets is a form of asset based welfare involving a highly gendered duty/beneficiary relationship?

Given the aging demographic worldwide, the issue of global care chains is a critical one. In her article, 'Migrant women domestic worker, depletion and harm: what can be done?', Rianne Mahon makes a scalar shift from the national to the global regimes of migration and what Safri and Graham have called 'the global household' (2010). Her paper focuses on the (also often invisible) harms experienced by migrant care workers and those whom they have left behind. Migrant domestic workers, the vast majority of whom are women are not only exposed to highly gendered precarious work in the countries of destination but the very reasons for their decision to migrate are often linked to efforts to mitigate existing conditions at home. Although the remittances they send play a role in supporting those left behind, the latter – children, parents, spouses and communities - too are often subject to harms associated with depletion through social reproduction (DSR). The concept of depletion through social reproduction, she argues, helps to make visible what gendered norms often render invisible: social reproduction is typically seen as women's work. To reverse its effects, states in both countries of origin and destination can play a role in addressing the harms experienced by the migrant domestic workers and those left behind. However, Mahon argues, it will take action on multiple scales – bilateral, regional and global – to enable the replenishment of their reproductive resources, not to mention the launching of measures that challenge the structural underpinnings of their protracted precarity. She concludes that this needs to be done through national action and bilateral agreements that can be supplemented by various international conventions as well as the work of multilateral organisations at the global and regional scales.

Whilst Mahon focuses on the international routes of mitigation, Ania Plomien and Grzesiek Schwartz focus on the failure of replenishment strategies in Europe and its effect on individual and household responses. In their paper 'Production, social reproduction and mobility nexus in uneven and combined Europe', start from the premise that the sphere of social reproduction is subject to intensified pressures triggered by attempts to defer crisis tendencies in the sphere of production. As a consequence, social reproduction is reconstituted by capitalist market relations penetrating the structures of everyday life, the responsibility for social reproduction is privatised and individualised, while the resources and capabilities of individuals or households to meet this responsibility are inadequately supported. They focus on the European Union and the intrinsically linked crisis of capitalist production and social reproduction and argue that the specific character of depletion is determined by the particular dynamics of social reproduction. This, they argue, instigates a range of legal, policy, and practical responses by the EU, nation states, as well as by individuals, households and communities. By analysing the interconnected mobilities of labour between Ukraine, Poland and the UK in the sectors of care provision, food production, and housing construction, Plomien and Schwartz argue that mitigation (expressed through labour mobility) is currently the dominant mode within the EU and its periphery through which depletion is staved off at the household level. These

responses, however, are partial, uneven, and unsustainable, as their case of labour mobility as a strategy demonstrates.

If mitigation at the household level is the focus of Mahon and Plomien & Schwartz's papers, in her paper 'Human rights at the frontline? Mapping the harms to caregivers during global health emergencies', Sharifah Sekalala, focuses on how the lack of awareness of social reproduction generates gendered and racialised harms in the context of global health crises. In emergencies, the issue of who provides care is often ignored because the focus is on the scarcity of 'frontline workers' such as doctors and nurses. This is because global health crises often occur in parts of the world that have weak health and social infrastructure and a lack of health professionals and expertise. The paper analyses the Ebola crisis in West Africa and the DRC by examining the role of four categories of caregivers: health workers from international humanitarian organisations, medical professionals from the local area, volunteers and family members who cared for ill patients before they were diagnosed and quarantined and continued their care work after the crisis was declared to be over. Sekalala notes that although all these categories were subject to the gendered harm of contagion, the last-mentioned group were frequently the unsung heroes These caregivers, she argues, faced depletion of their physical, emotional and psychological health through the distress of caring for a disease with incredibly high fatalities and the separation from families due to strict quarantine laws within health crises. Sekalala argues that the hierarchies of care work exacerbate the depletion and social reproductive harms that carers face, leading to intersectional impacts on existing inequalities of geography, class, educational background and race. Using the lens of complex humanitarian emergencies, it builds on existing critiques of the gendered nature of humanitarian law and considers whether humanitarian law/international human rights regimes can redress this.

Emerging themes

Several connected and clear themes emerge from the papers in this special issue. There is growing strain under conditions of globalisation and neoliberalism on people providing social reproductive labour as well as paid care work that is usually invisible in law and is leading to ongoing and new forms of depletion (migrants, health workers and carers, communities affected by business mal-practices, etc). What many of the papers show is that even as the neoliberal project fails, its effect on how mitigation of depletion may be attempted is profound. As the feminist global care chain literature shows, the mitigation of depletion through buying in the labour of others intensifies depletion of the weakest down the care chain – the poor, migrant women who join the care chain at the lower ends (Mahon; Yeates, 2009). Politically, this can also result in the revival of the discourse of mothering that supports the withdrawal of women from the labour market, on the one hand, even as austerity policies push more and more women into employment (Rubery, 2013). Often, the racialised engagement of the state with the issue of social reproduction leads to government policies 'clearly intended to dissuade 'undesirable' migrants from having children' and blaming women for not bringing up obedient, neoliberal families; the discursive harm through labelling poor households as 'troubled families' is, for example, visible in the UK, (Sekelala this volume; Lonergan, 2015; Nunn and Tepe-Belfrage,). The depleting effects on children's education, friendships and aspirations are considerable. For women, issues of health, vulnerability to violence and individualised strategies of mitigation take the place of a state supported framework. What is made invisible through these discursive moves is social reproductive labour, including that of children in conditions poverty and neoliberal policy frameworks at the local and regional levels (Grugel et al; Plomien and Schwartz, this volume). Working through a lens of depletion allows this special issue to shine a light on the costs of social reproduction and think through the importance of valuing this work. As Federici suggests, this

non- or misrecognition itself reflects 'a new round of primitive accumulation' based upon 'a rationalization of social reproduction aimed at destroying the last vestiges of communal property and community relations' (2004).

Further, we notice that rendering visible relational harms arising from social reproduction in law remains stubbornly difficult to change despite growing international recognition of the burden of unpaid care on women and the need to treat paid caring work as equivalent to other forms of work. This is because international legal frames are yet to filter down to state level, and even where they do, social change often lags far behind law reform if implementation and enforcement is poor. As Ni Aiolin points out in her article, disrupting legal categorisation of harms by feminists is a valuable challenge to the dominance of law, but unless such reframing is fully grounded in women's experience it will not represent their lived reality. In addition, without grounded struggles to challenge these imposed notions of harm, the law is unlikely easily to cede its patriarchal role. However, social and economic pressures alongside political challenge may impact on the nature and shape of caring. As Ann Stewart's paper argues, the pressures of social reproduction can, in some contexts of legal pluralism generate alternative modes of thinking about the law. In a country where homosexuality is criminalised, the pragmatics of the care of older women has led to the acceptance of 'women-to-women' marriages, which seem to provide some level of protection to both protagonists in this relationship. At the international levels too, we see some signs of making visible the contribution of social reproduction to the economy (Goldblatt and Rai; Plomien and Schwartz this volume; Sepulvada; Razavi, 2016; Rai et al, 2018). However, this recognition still has to be integrated into macro-economic policies and measures of economic growth. The law continues to deal in binaries of the public and private, demarcating and policing these boundaries. The project to challenge law in its definition of harm and its compensatory responses is emerging more clearly in relation to social reproduction and its depletion impacts (Ni'Ailoan; Goldblatt and Rai this volume) but still requires further theorising and application to new contexts.

Further areas for study, thought and activity

One area that we feel needs more work is that of post facto and anticipatory harm. This special issue asks, can feminist critiques of tort law allow us to take into account (gendered) harm done and compensation for this post facto? We could, and perhaps should, also ask whether and how, knowing the harmful costs of unrecognised and unpaid social reproduction, the law might address anticipatory harm – harm being done even before it is manifested? The depletion that has occurred needs to be remedied, depletion that can occur needs to be prevented. The law is usually better at taking account of harm post facto, than it is in anticipating harm. This is particularly the case in terms of accounting for the depleting effects of anxiety about disappearing worlds through environmental devastation.

This brings us to a second area that needs further attention. Rai et al (2014) built on the work of environmental statisticians who have also suggested that the environment is depleted through extractive and other forms of exploitation and that this depletion is not counted in our understanding and accounting for economic growth but needs to be through debiting the cost of environmental depletion from growth measures. They did not however connect the two in their analysis. We need to fill this gap; how can we recognise the depletion of the environment together with depletion through social reproduction? Economies that threaten the environment also threaten habitats and lives of individuals, households and communities. Both depletion of humans and the environment thus subsidise economic growth through the unaccounted for harm that is inflicted and

absorbed by human subjects and by the environment. How can we understand depletion through social reproduction by recognising the pain of such futuristic dystopia? We hope this special issue will open up the field of law to the pressing issues of costs of social reproduction and enliven the scholarship on social reproduction with further examination of the role of law.

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