4 Social Theory and Legal Argument

Introduction

Amidst the string of defeats and declines of the Reagan years, progress in respect to the justiciation of sexual harassment in the workplace stands out as one of the few beacons of hope in Catharine MacKinnon’s otherwise bleak assessment of ‘fifteen years of trying to change the status of women by legal and every other available means’ (MacKinnon, 1987a, p. 1). Starting with the decision in *Williams v Saxbe* (413 F.Supp 654 DDC, 1976) ‘ten years of steady progress in the lower courts’ (MacKinnon, op. cit., p. 231, n. 7) were capped by a unanimous confirmation in the US Supreme Court that a broad range of workplace sexual harassment constituted unlawful sex discrimination (*Meritor Savings Bank, FSB v Vinson* (91 L Ed 2d 49, 106 S.Ct. 2399, 1986)).

Crucial to this success, asserts MacKinnon, was the contribution made by feminist jurists and lawyers alert to the lures of legal ‘protection’ for women. MacKinnon’s personal role is exemplary. Drafts of her (1979) *Sexual Harassment of Working Women* were in circulation back in 1975, a critical year where case law was concerned (MacKinnon, 1979, p. xi). Her arguments and categorisations have helped to shape legal judgements both in the US and abroad. She herself helped represent Ms Vinson in the 1986 Supreme Court hearing (MacKinnon, 1987, p. 104).

MacKinnon (ibid., pp. 112–16) insists that this ‘success-story’ has to be heavily qualified. Still, the existence of a modicum of step-by-step progress in bringing the law to bear on the problem of sexual harassment seems incontestable. What part do bodies of feminist sociological knowledge and moral/political ideologies play in making this socio-legal progress regarding sexual harassment possible? Or, alternatively, in retarding it? How are these forms of thought used strategically (or tactically) in framing demands for legal remedies and, especially, in shaping actual legal arguments and decisions? Finally, returning to the question of ‘success’, how might the perceived limits of these legal remedies be interpreted?

Behind these questions lurks the claim that legal strategies cannot be ‘read off’ from the theories or ideologies by which they are supported. Taking Catharine MacKinnon’s arguments on law and sexual harassment as
its object, the purpose of this chapter is to provide a working illustration of arguments against the practice of regarding legal categories and arguments as founded upon the social theories (or ethico-political doctrines) with which they are explicitly or implicitly associated (as though identifying the theoretical or ideological 'presuppositions' of legal materials sufficed to determine their value and use). To anticipate, in case this anti-foundationalist point be thought too obvious to be worth reiterating, its heretical implications in this instance are that both the currently depleted reputation of feminist sociologies of 'gender' or 'sex-roles' and received opinions about the patriarchal significance of common law torts pertaining to 'sexual invasions' may need to be reconsidered.

A systematic empirical study of the strategic limits, uses and reception of feminist social theories in legal argumentation lies beyond the scope of this essay, which merely suggests a few lines of attack and terms of description. In so doing, the essay also finds itself engaging with intersecting debates about whether, or if so how, feminists should pursue the pathways of legal reform and about the usefulness of general theories of women's subordination. Whilst such general theories do not uniformly rule out working for piecemeal reform it will be agreed that the two are apt to collide.

Few writings enact this tension more dramatically than those of Catharine MacKinnon. In a study restricted to her legal and political approach to sexual harassment, however, it is not so much the oscillations in MacKinnon's views on these matters as her rigorous and seemingly successful attempt to synthesise social theory and a strategy of legal reform which provides a more appropriate focus of attention. As such, MacKinnon's argument may be read as a riposte to the criticism that general feminist theories of women's subordination ignore the diversity of ways in which women are constructed and positioned in a social order which is neither uniform, nor uniformly oppressive; and, consequently, are prone to an indiscriminate suspicion of institutions such as the law which militate against serious engagement in working for their reform.

Can this claim about the practical consequences of general theories be sustained in the face of MacKinnon's intervention? Prima facie, it is framed by a general theory which links a systematic explanation and social critique of sexual harassment to a technical-legal strategy for enhancing the possibilities of litigation, via a feminist vision of social change. However, examination of the linkages between theory, ethico-political vision, and legal strategy will indicate that her most telling socio-juristic arguments establishing the discriminatory character of sexual harassment may not depend upon that theory quite as much as