Feminism and Conventional Legal Theory

Introduction

In this paper, I shall explore the argument that there is something not about particular laws or sets of laws, but rather, and more generally, about the very structure or methodology of modern law, which is hierarchically gendered. To most lawyers this is a far more counter-intuitive claim than, say, feminist allegation of bias in particular laws. It is, however, absolutely central to any strong feminist theory of law. In what follows, therefore, my main concerns will be to clarify the ways in which feminist legal theory differs from and challenges the understandings of law which inform conventional legal theory; to explore the continuities between feminist and other critical approaches to the study of law; and to identify some of the difficult questions still confronting feminist analyses.

To speak of ‘feminist legal theory' is, of course, to gather together a set of heterogeneous approaches. In this paper, I shall not be concerned with these important differences. I shall simply set out from an inclusive conception of feminist legal theory as proceeding from two foundational claims. First, at an analytic and indeed sociological level, and on the basis of a wide range of research in a number of disciplines, feminist legal theorists take sex/gender to be one important social structure or discourse. We hence claim that sex/gender characterizes the shape of law as one important social institution. Secondly, at a normative or political level, feminist legal theorists claim that the ways in which sex/gender has shaped the legal realm are presumptively politically and ethically problematic, in that sex/gender is an axis not merely of differentiation but also of discrimination, domination or oppression. At a methodological level, feminist legal theorists are almost universally committed to a social constructionist stance: in other words to the idea that the power and meaning of sex/gender is a product not of nature but of culture. Feminist legal theorists are hence of the view that gender relations are open to revision through the modification of powerful social institutions such as law.

Within this broad conception, it is probably worth distinguishing two main schools of feminist legal thought. The first, which might be called liberal feminism, is committed, as is mainstream legal theory, to the ideals of gender neutrality and equality before the law. Its focus is primarily instrumental, seeing law as a tool of feminist strategy, and the impact of law as basis for feminist critique. By contrast the second approach, which I shall label difference feminism, is sceptical about the possibility of neutrality; it has an implicit commitment to a more complex idea of equality which accommodates and values, whilst not fixing, women's specificity ‘as women'; and it has a focus on the symbolic and dynamic aspects of law and not just on its instrumental aspects (for more detailed discussion, see Lacey 1995). In what follows, I shall concentrate on the implications of this more radical approach to feminist legal theory - difference feminism - for the tenets of conventional legal scholarship and theory.

I shall approach this question by singling out a number of assumptions common to positivistic legal scholarship which are the target of feminist critique of the gender bias of legal method.

These various points are closely interwoven, but I think that it is useful to separate them out to get a sense of the range of arguments which have been influential in the development of feminist legal thought.

1. The neutral framework of legal reasoning

A central tenet of both positivistic scholarship and of the liberal rule of law ideal is that laws set up standards which are applied in a neutral manner to formally equal parties: the questions of inequality and power which may affect the capacity of those parties to engage effectively in legal reasoning has featured little in mainstream legal theory. These questions have, on the other hand, always been central to critical legal theory, and they now find an important place within feminist legal thought. In particular, recent work by Carol Gilligan (Gilligan 1982) on the varying ways of constructing moral problems, and their relationship to gender, has opened up a very striking argument about the possible 'masculinity' of the very process of legal reasoning.

As is widely known, Gilligan's research was motivated by the finding of psychological research that men reach a 'higher' level of moral development than do women. Gilligan set out to investigate the neutrality of the tests being applied: she also engaged in empirical research designed to illuminate the ways in which different people construct moral problems. Her research elicited two main approaches to moral reasoning. The first, which Gilligan calls the ethic of rights, proceeds in an essentially legalistic way: it formulates rules structuring the values at issue in a hierarchical away, and then applies those rules to the facts. The second, which Gilligan calls the ethic of care or responsibility, takes a more holistic approach to moral problems, exploring the context and relationships, as well as the values, involved, and producing a more complex, but less conclusive, analysis. The tests on which assessments of moral development have conventionally been made by psychologists were based on the ethic of rights: analyses proceeding from the ethic of care were hence adjudged morally under-developed. It was therefore significant that Gilligan's fieldwork suggested that these two types were gender-related, in that women tended to adopt the care perspective, whilst men more often adopted the rights approach.

Gilligan's assertion of the relationship between the two models and gender is a controversial one. Nonetheless, her analytical distinction between the two ethics is of great significance for feminist legal theory. The idea that the distinctive structure of legal reasoning may systematically silence the voices of those who speak the language of relationships is a potentially important one for all critical legal theory. The rights model is, as I have already observed, reminiscent of law: it works from a clear hierarchy of sources which are reasoned through in a formally logical way. The more contextual, care or relationship-oriented model would, by contrast, be harder to capture by legal frameworks, within which holistic or relationally oriented reasoning tends to sound 'woolly' or legally incompetent, or to be rendered legally irrelevant by substantive and evidential rules. Most law students will be familiar with the way in which intuitive judgments are marginalised or disqualified in legal education, which proceeds precisely by imbuing the student with a sense of the exclusive relevance of formal legal sources and technical modes of reasoning.

There are, however, several important pitfalls for feminist legal theory in some of the arguments deriving from Gilligan's research (for a useful discussion, see Frug 1992 Chapter 3). One way of reading the implications for law of Gilligan's approach is that legal issues, indeed the conceptualisation of legal subjects themselves, should be recast in less formal and abstract terms. But such a strategy of recontextualisation may obscure the (sometimes damaging) ways in which legal subjects are already contextualised. In the sentencing of offenders, or in the assumptions on which victims and defendants are treated in rape cases, for example, we have some clear examples of effective contextualisation which cuts in several political directions - not all of them appealing to feminists. In certain areas, it may be that legal reasoning is already 'relational' in the sense espoused by many feminists, but that it privileges certain kinds of relationships: i.e. proprietary, object relations (for further discussion see Nedelsky 1993; Irigaray 1996). A general call for 'contextualisation' may also be making naive assumptions about the power of such a strategy to generate real change given surrounding power relations: as the case of rape trials shows all too clearly, the framework of legal doctrine is not the only formative context shaping the legal process. The important project, I would argue, is that of recontextualisation understood not as reformist strategy but rather as critique: in other words, the development of a critical analysis which unearths the logic, the substantive assumptions, underlying law's current contextualisation of its subjects, and which can hence illuminate the interests and relationships which these arrangements privilege (see further Lacey 1996).

2. Law's autonomy and discreteness

Another standard assumption of mainstream legal scholarship is that law is a relatively autonomous social practice, discrete from politics, ethics, religion. An extreme expression of this assumption is found in Hans Kelsen's ‘pure' theory of law (Kelsen 1967), but weaker versions inform the entire positivist tradition. Indeed, this is what sets up one of positivism's recurring problems - that is, the question of foundations, of the boundaries between the legal and the non-legal; of the source of legal authority, and the relation between law and justice.

This mainstream assumption, like the idea that legal method is discrete or distinctive, is challenged by feminist legal theory. Feminist theory seeks to reveal the ways in which law reflects, reproduces, expresses, constructs and reinforces power relations along sexually patterned lines: in doing so, it questions law's claims to autonomy and represents it as a practice which is continuous with deeper social, political and economic forces which constantly seep through its supposed boundaries. Hence the ideals of the Rule of Law call for modification and reinterpretation. There are obvious, and strong, continuities here between the feminist and the marxist traditions in legal thought.

3. Law's neutrality and objectivity

As I have already mentioned, difference feminism has developed a critique of the very idea of gender neutrality, of gender equality before the law, in a sexually patterned world. Feminist legal theory deconstructs law's claims to be enunciating Truths, its pretension to neutral or objective judgement, and its constitution of a field of discrete and hence unassailable knowledge.

This argument takes a number of forms in contemporary feminist legal theory. One derives from the Foucaultian critique of feminist writers such as Smart (Smart,1989: Foucault 1972, 1977). The argument is that law, by policing its own boundaries via its substantive rules and rules of evidence, constitutes itself as self-contained, as a self-reproducing system. There is, hence, a certain ‘truth' to this aspect of law. But by standing back so as to cast light on the point of view from which law's truth is being construted, we can undermine law's claims to objectivity. Another, rather different, example is Catharine MacKinnon's well known epistemological argument (MacKinnon 1989). In MacKinnon's view, law constructs knowledge which claims objectivity, but objectivity in fact expresses the male point of view. Hence ‘objective' standards in civil and criminal law - the ‘reasonable person' - in fact represents a position which is specific in not only gender but also class, ethnic and other terms. The epistemological assertion of ‘knowledge' or ‘objectivity' disguises this process of construction, and writes sexually specific bodies out of the text of law. The project of feminism is to replace them. The difficult trick is to do so without fixing their shape and identity within received categories of masculine and feminine. Hence not all feminists endorse the idea of abandoning ‘reasonableness' tests or the appeal to otherwise universal standards (see for example Cornell 1995 Chapter 1).

4. Law's centrality

In stark contrast to not only a great deal of positivist legal scholarship but also much ‘law and society' work, feminist writers have often questioned law's importance or centrality to the constitution of social relations and the struggle to change those relations. Clearly feminist views diverge here. Catharine MacKinnon, for example, is optimistic about using law for radical purposes; but many other feminists - notably British feminist Carol Smart - have questioned the wisdom of placing great reliance on law and of putting law too much at the centre of our critical analysis. Perhaps this is partly a cultural difference: the British women's movement has typically been relatively anti-institutional and oppositional. Yet even in the USA, where there is a stronger tradition of reformist legal activism, feminists associated with critical legal studies have been notably more cautious about claims advanced in some critical legal scholarship (see for example Unger 1983) about law's central role in constituting social relations. Feminists have thus tended further towards a classical marxist orientation on this question than have their non-feminist critical counterparts. In terms of analytic focus, however, this has led feminists to address a range of social institutions - the family, sexuality, the political realm, bureaucracies - well beyond the marxist terrain of political economy. Feminists writers continue to be ambivalent about

whether and how law ought to be deployed as a tool of feminist action, practice and strategy. To the extent that feminist critique identifies law as implicated in the construction of existing gender relations, how far can it really be used to change them, and do strategic attempts to use law risk the danger of reconfirming law's power?

5. Law as a system of enacted norms or rules

Typically, feminist legal theory reaches beyond a conception of law as a system of norms or rules - statutes, constitutions, cases - and beyond ‘standard' legal officials, such as judges - to encompass other practices which are legally relevant or ‘quasi-legal'. For example, the Oslo school of Women's Law had a main focus on administrative and regulatory bodies such as social welfare agences, the medical system and the family (Stang Dahl 1986).

This institutional refocussing is also connected with poststructuralist ideas, and notably with Michel Foucault's reconceptualisation of power, and the implications of this reconceptualisation for law (Foucault 1972, 1977; Smart 1989). Foucault distinguished between sovereignty power - power as a property or possession; and disciplinary power - the relational power which inheres in particular practices and which flows unseen throughout the ‘social body'. His basic argument was that the later modern world was gradually seeing the growth of subtle, intangible, disciplinary power, at the expense of the old sovereignty power. Since Foucault associated legal power with sovereignty power, he also tended to think that law was waning in importance. Smart, however, uses his argument about power in a different way in relation to law: she points out that law itself has not only sovereignty but disciplinary power. For one of the distinguishing features of disciplinary power is its subtly normalising effect, and as soon as we look beyond a narrow stereotype of law as a system of rules backed up by sanctions, we begin to see that one of law's functions is precisely to distribute its subjects with disciplinary precision around a mean or norm. For example, the way in which legal rules distribute social welfare benefits or allocate custody of children (on divorce or via adoption) reflects judgements about the right way to live; it expresses assumptions about ‘normality'. A yet more spectacular example is that of the construction of gay and straight sexualities in criminal laws and in family and social welfare legislation. These ‘normalising' assumptions have a pervasive power which also structures the administration of laws - e.g. of social welfare benefits and policing policies - at the bureaucratic level, generating phenomena such as reluctance to prosecute in ‘domestic violence' cases, the oppressive policing of gay sexuality, and the discriminatory administration of welfare benefits. Feminist (like other critical) analyses are interested here in not just legal doctrine but also legal discourse - i.e. how differently sexed legal subjects are constituted by and inserted within legal categories via the mediation of judicial, police or lawyers' discourse. The feminist approach therefore mounts a fundamental challenge to the standard ways of conceptualising law and the legal, and moves to a broader undersanding of legally relevant spheres of practice (for further discussion see Lacey 1996).

6. Law's unity and coherence

Readers of both student texts and legal cases will be familiar with the very high importance attached by lawyers and legal commentators to the idea (perhaps the ideal) of law as a unitary and a coherent system of rules or norms. It is an idea which informs legal theory in a number of ways. Once again, Kelsen provides a spectacular example (Kelsen 1967): his Grundnorm had to be hypothesised precisely because otherwise it would have been impossible to interpret law as a coherent, non-contradictory normative field of meaning. As a law student, one of the first things one is taught to do is to hone in on contradictory or inconsistent arguments. The idea of coherence as the idea(l) which lies at the heart of law finds its fullest expression in Ronald Dworkin's idea of 'law as integrity' (Dworkin 1986), but it also finds some support in procedurally oriented ethical and political theories, notably in critical theory of the Frankfurt School (Habermas 1992).

Feminist scholarship, like much other critical legal theory, is concerned to unsettle this belief in law's coherence and rather to reconstruct the pretension to coherence as part of the ideology of both law and jurisprudence: as part of what helps to represent law as authoritative, adjudication as democratically legitimate and so on. The search for contradictions, and the unearthing of what have been called 'dangerous supplements' and hidden agendas, takes place both at the level of doctrine and at that of discourse (Unger 1983).

To take some specific examples, the assertion within legal doctrine of particular questions or issues as within public or private spheres is contradictory, question-begging, under-determined: sexuality, for example, is public for some purposes and private for others (Olsen 1983; Lacey 1993): the idea of the legal subject as rational and as abstracted from its social context is undermined by exceptions such as defences in criminal law, shifts of time frame in the casting of legal questions, and an arbitrary division of issues pertaining to conviction and those pertaining to sentence (Kelman 1981; Lacey 1995). In contract law, once could cite shifts between a freedom of contract model and a model which views contract as a long term relationship within which, for example, loss occasioned by contracting parties' general reliance upon the contractual relationship can be recognised and compensated (Collins 1993). Nor are these incoherencies confined to the doctrinal framework: they mark also the discourse through which human subjects are inserted into that structure. For example, the rational and controlled male of legal subjectivity is, after all, also the rape defendant who is subject to feminine wiles and incapable of telling yes from no. The unearthing of such contradictions is not just a matter of 'trashing': it forms part of an intellectual and political strategy - of exposing law's indeterminacy, of emphasising its contingency, and of finding resources for its reconstruction in those doctrinal principles and discursive images which are less dominant yet which fracture and complicate the seamless web imagined and created by orthodox legal scholarship.

7. Law's rationality

Perhaps most fundamentally of all, it is argued that contradictions and indeterminacy in legal doctrine undermine law's supposed grounding in reason, just as the smuggling in of contextual and affective factors undermines law's apparent construction of the subject as rational, self-interested actor. Furthermore, in so far as law is successful in maintaining its self-image as a rational enterprise, this is because the emotional and affective aspects of legal practice are systematically repressed in orthodox representations. Once one reads cases and other legal texts not only for their formal meaning but also as rhetoric, one sees how values and techniques which are not acknowledged on the surface of legal doctrine are in fact crucial to the way in which cases are decided (Frug 1992; Goodrich 1986).

Conclusion

These, then, are the principal ways in which feminist legal theory has challenged the tenets of conventional jurisprudence. It will be apparent that feminist method shares certain conceptual tools with other critical approaches, including marxist theory and American critical legal theory. Clearly, these ambitious arguments of a general theoretical nature raised by feminist legal scholars raise a number of difficult questions with which those scholars are still coming to terms. Equally, it should be apparent that the feminist challenge to conventional legal theory is of considerable intellectual power and ethical importance. As the establishment of a guest professorship in Feministrechtswissenschaft at the Humboldt University recognises, it is a challenge which the legal academy can no longer afford to ignore.