ROUTLEDGE REVIVALS

The Social Construction of Sexual Harassment Law

The Role of the National, Organizational and Individual Context

Mia L. Cahill

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MIA L. CAHILL
Visiting Scholar, Institute for Law and Society
New York University

Routledge
Taylor & Francis Group
LONDON AND NEW YORK

First published 2001 by Dartmouth Publishing Company and Ashgate Publishing

Reissued 2018 by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN
711 Third Avenue, New York, NY 10017, USA

Routledge is an imprint of the Taylor & Francis Group, an informa business

A Library of Congress record exists under LC control number: 00135338

ISBN 13: 978-1-138-63648-4 (hbk)
ISBN 13: 978-1-315-20381-2 (ebk)

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Acknowledgments

I owe many thanks to those who have guided me through the intellectual beginnings and final stages of this project. I would like to thank Lauren Edelman, Howard Erlanger, Marc Galanter, Charles Halaby and Mark Suchman of the University of Wisconsin for their generosity with their time and words as I was implementing this study and beyond. I also wish to thank many at the Institute for Law and Society at New York University. I am grateful to Wolf Heydebrand, Christine Harrington, Jo Dixon, Eric Feldman and others at the Institute for Law and Society for their comments as I developed this study into the present book.

I also wish to thank my many mentors and friends who helped me shape these ideas before, during and after completion of this study. Valerie Hans, Joyce Sterling and Nancy Reichman provided invaluable comments on my work. Further, Katarina Zippel and Abigail Saguy, who shared my interest in international sexual harassment law, helped shape this book.

I received funding from several sources that enabled me to complete this project. The Hewlett Foundation supported the earliest stages of this research by funding me as a Hewlett Fellow at the Institute for Legal Studies at the University of Wisconsin. After the initial stages were complete, I received a National Science Foundation Dissertation Grant that made the cross-national research possible. I received a University of Wisconsin fellowship when I returned to the United States to support my dissertation writing. The Department of Sociology of the University of Wisconsin also provided a travel grant and a small grant to facilitate my work on this project. Finally, the support of the Institute for Law and Society at New York University enabled the completion of this project.

I also wish to thank the participants in Austria and in the United States who gave their time and thoughtfulness to make this study possible.

Finally, I am indebted to my family for their support in this process. My husband Matthew Sanidas, my children Madison Cahill-Sanidas and Alexander Cahill-Sanidas, as well as my parents and in-laws Teena Cahill, Brooks Dyer, James Cahill, Ellen Cahill, Frieda Sanidas and John Sanidas, all provided support and encouragement for the completion of this project.

1 Introduction

Law and its Social Context

Scholars have long considered the relationship between law and its social context. However, too often, operationalizations of social context are limited to a single level, such as national context (for example, Trubek and Galanter, 1974), organizational context (for example, Blumberg, 1967) or individual context (for example, Ewick and Silbey, 1998). While perceptions of law do vary across cultures, within organizations or among individuals, until now, no one has considered the significance of variation at all three levels. This study expands our notion of social context and shows how it fundamentally influences the understandings and implementation of legal rules. It explores empirically perceptions of law at three levels of social context: the national context, the organizational or corporate context and the individual, or sociodemographic, context. Each level of social context comes with the potential to introduce variability into the social understanding of what law is, and to interact with the other two levels.

In no area of law is social context more important than in sexual harassment law. While relatively new to the legal arena, today, sexual harassment law is a firmly established legal wrong in the United States and Austria, as well as in many other countries around the globe. The mere mention of the term 'sexual harassment' engenders reactions that range from righteous condemnation of sexualizing women in the workplace to cries of 'political correctness' gone awry. The range of reactions to sexual harassment is the result of differing perceptions of both the social problem of sexual harassment and its solutions in law. Like other legal issues that have transcended the domain of professional discourse, the social significance of sexual harassment goes far beyond its use as fodder for late-night television hosts.

Feminists fought to protect the rights of women at work by advocating that sexual harassment be seen as a social problem with a legal solution in sex discrimination law. They were supported by the United States Equal Employment Opportunity Commission (EEOC) in 1980, when they issued guidelines on sex discrimination that included sexual harassment. Sexual

harassment, as a type of sex discrimination, was recognized by the US Supreme Court six years later (*Meritor Savings Bank* v. *Vinson*, 477 U.S. 54 (1986)).[1]

The topic of sexual harassment was slowly gaining status as a social problem and a legal issue in the USA when interest in the issue exploded during the 1991 Senate confirmation hearings of Clarence Thomas. Law professor Anita Hill was called to testify before the Senate Judiciary Committee about her statements alleging Justice Thomas's sexual harassment. The Senate ultimately confirmed the appointment of Thomas to serve on the US Supreme Court with a Senate vote of 52 to 48. At the time, public opinion polls reflected popular support for Justice Thomas's denial of sexual harassment (Sanger, 1992).

The issue of sexual harassment remained an issue of national and international debate after the hearings, raising consciousness of the issue, if not necessarily sympathy for it. In 1997, the Supreme Court allowed a sexual harassment civil suit brought by former Arkansas state employee Paula Jones against President Clinton to proceed while he is in office. Although the case was later dismissed, the president's testimony in that case was the legal justification for his ensuing impeachment trial in the US Senate, which received extensive press coverage abroad. More than any other aspect of sex discrimination law, sexual harassment has been the object of considerable public debate and interest.

Sexual harassment law is an especially interesting law to examine because of the worldwide dominance of early US legal conceptualizations of sexual harassment, making it amenable to comparisons of similar law within different social context. The roots of an 'international convergence of sexual harassment law' (Earle and Madek, 1993:43) are often attributed to the USA, with comparative studies proclaiming sexual harassment 'made in America, by women' (Bernstein, 1994: 1227; Webb, 1994).[2] While certainly an over-simplification, the dominance of the US legal model of sexual harassment, as codified in the 1980 EEOC Guidelines, is undeniable. Although European countries vary in the degree to which they relied on the US legal conception of sexual harassment, with some countries, such as France, adopting law as a *foil* to the US model, it is this legal model, and the US cultural association with sexual harassment, with which all other national regulations must contend. It was the year after the Justice Thomas confirmation that Austria adopted a sexual harassment law.

In Austria, the push for sexual harassment legislation came later than in the USA, but when a sexual harassment law was finally adopted, it was striking in its similarity to the EEOC Guidelines. The laws of sexual harassment in the USA and Austria were chosen as the sites of this study because of the striking similarity in the substance of the sexual harassment laws in these two countries. Both Austrian and US law place sexual harassment within the context of sex

discrimination law, and define the legal *harm* of sexual harassment very similarly.[3] While the legal definition of the harm of sexual harassment in the USA and Austria is substantially similar, the laws exist in very different legal systems and very different national contexts (Cahill, The Illusion of Precedent, 1996; 1999).[4] This selection made it possible to isolate the role of national context on understandings of law.

In this study, I focus on three components of the *national context*. First, there is the formal law and legal system including statutes, court decisions, legal rules and regulatory guidelines. While the legal definition of sexual harassment is similar in the USA and Austria, there are substantial differences in the structure of the legal systems. Second, the national context includes legal culture or the norms associated with law, such as the emergence of sexual harassment law, the acceptance of legal claims for immaterial damages, access to lawyers and judicial receptivity to claims. Finally, the third component of national context is social norms.

To examine the role of the organizational context, I conducted five case studies of organizations similar in size, industry and gender composition of employees, but existing in different national sites: either the USA or Austria. I empirically focus on two aspects of the organizational context in the study: organizational characteristics, such as industry, size and employee composition, and organizational culture, including the beliefs, patterns and practices internal to the firm. I rely on these five organizational case studies to explore the influence of organizational context – as part of the social context – on the understandings and implementation of sexual harassment law.

Finally, I consider the role of individual differences, adding the third layer to my conceptualization of social context. To explore the variation among individuals in their perceptions of sexual harassment law, I focus on sociodemographic categories, such as sex and age, as well as differences in attitudes about law in general, or sex discrimination law in particular. *These three layers together, the national context, the organizational context and the individual context, provide the social context through which law is understood.*

It seems almost simplistic to claim that social context influences perceptions and understandings of law, but, indeed, this is a claim that challenges the dominant discourse of law by policy makers and many scholars. In this, the prevailing legal centrist view, law is knowable, hierarchically handed down from the state and codified in formal laws. Even many social science scholars describe law as a one-dimensional construct, relying heavily on the legal centrist vision of law (for example, Powell and DiMaggio, 1991; Fligstein, 1985; Sutton *et al.*, 1994; Guthrie and Roth, 1999). Comparative legal theorists too, tend to rely on too literal definitions of the formal law to explain differences in both law and practice, overlooking variation in perceptions of law (for

example, Lester, 1995; Lipper, 1992; Bernstein, 1994; 1996; Weiss, 1993; Fredrickson, 1995).

Law and society scholars have long countered this singular vision of law. They contend that the legal centrist view overlooks the ambiguity (Edelman, 1992; Suchman and Edelman, 1996) and the contested nature of law and legal authority (Ewick and Silbey, 1998). In the law and society perspective, law itself is a cultural construct, reflecting the power relations, priorities, symbols and ideologies of society at a particular point in time. In other words, 'law' is understood through its social context.

While legal understandings are a product of social context, they also constitute categories that limit and define social action, framing the very nature of social action, legal mobilization and enforcement (Tushnet, 1984; McCann, 1992; Ewick and Silbey, 1998). The formal law provides the boundaries and constitutive categories of legal understandings. Rather than merely responding to law, 'corporations', as legal categories, are defined by it. But there is a leap from the formal law, what the law is, to what actually happens in practice that is generally overlooked by many scholars and policy makers. Law is defined, not just by what it states or purports to do, but by *how it is understood* by those who might use it, or defend against it.

This two-sided understanding of law makes its analyses even more complex. While certainly there exists 'law', just what the law is, and what it means, is much more difficult to observe, much less know. This vision of law, as a continuing cultural process, implies that the demands of law are rarely clear-cut and unambiguous, a characteristic of sexual harassment law (Erlanger *et al.*, 1987; Abzug and Mezias, 1993; Suchman and Cahill, 1996). As McCann describes it, law is 'a complex repertoire of discursive strategies and symbolic frameworks that structure ongoing social intercourse and meaning-making activity among citizens... legal conventions... [that] are inherently indeterminate, pluralistic and contingent in actual social practice' (McCann, 1992: 282). To engage in a cultural study of law so conceptualized, Kahn (1999: 91) suggests that we stand apart from 'normative inquiries' about law and 'move scholarship... toward this description of the world of meaning that is the rule of law'. To do this, I focus on the three levels of social context that provide the means of legal understanding: national context, organizational context and individual context. Given this multifaceted view of law, it is almost unimaginable to examine law *without* a role for culture, or social context.

The Study Design

To explore the role social context plays on legal understandings and implementation, I selected five organizational case studies. By using the similarity

of law as my basis, I ask how the national context, the organizational context and individual context, contribute to variation in perceptions of law.

Table 1.1 identifies the five case studies. They relate to two firms in the USA, one firm in Austria and two firms that cross boundaries: US multinationals operating in Austria. Controlling for as many differences as possible, the chosen firms were matched according to industry (pharmaceutical[5]), organizational size (the mean and median number of employees is 56) and employee composition (42–60 per cent female employees).

These organizational characteristics were chosen as controls because of their potential relationship to understandings of law. The firms share another similarity: none of them had ever had a sexual harassment lawsuit at the organizational site, although they were not intentionally selected on this characteristic. The firms are known in this study under their pseudonyms to protect confidentiality. They are Gulf Stream, Jet Stream (the US multinationals), Hudson and Prairie (the US domestic firms), and Alpen, the Austrian firm.

Table 1.1 Selection of organizations

Organization	USA	Austria
Domestic	Hudson Prairie	Alpen
US multinational		Jet Stream Gulf Stream

I used a two-pronged approach to explore understandings of sexual harassment law at these firms. First, I gathered documents and information from the managers at each of the firms relating to the understanding and implementation of sexual harassment law within the organization. Second, I distributed questionnaires to employees at each of the organizations relating to understandings of sexual harassment law and support for its implementation within the organization.

Interviews began in Austria in November 1995, just after Austria had agreed to join the European Union in full, and ended in May 1997. Because the firms are relatively small, the CEO was personally involved in any existing sexual harassment policymaking at the firm. I interviewed the CEO,[6] and any other manager who would be involved in issues concerning sexual harassment policy or disputes at each of the firms.[7] All of the managers participating in the study