

PART II

CENTRAL CONCEPTS IN FEMINIST JURISPRUDENCE

CHAPTER 5

PATRIARCHY: PUBLIC AND PRIVATE

Before considering the many and varied means by which sexual discrimination and inequality is rooted in the law, it is necessary to consider a central concept of feminist jurisprudence: that of patriarchy. For feminist scholars, the concept of patriarchy – of male power, control and dominance – represents a powerful reminder of female exclusion and powerlessness. Patriarchy has been defined as:

- (1) a form of social organisation in which a male is head of the family and descent, kinship, and title are traced through the male line; and
- (2) any society governed by such a system.¹

As anthropologist Bradislow Malinowski has detailed, patriarchal societies are the norm throughout the world. A few matriarchal societies nevertheless remain, and there is evidence to suggest that matriarchal societies were widespread in times long past.² Friedrich Engels analysed the reasons for the transition from matriarchal society to patriarchal society, arguing that the transition is effected at the point in time in which individuals acquire private property. On this view, patriarchy is explained as a matter of economic management and succession through the male line.³ However, even where matriarchal societies continue to exist, it is clear from Malinowski's research, that the question of property management – and thus power – remains in male hands, for property management is vested not in the female head of the family, but rather in her male kin.

Patriarchy manifests itself in every forum – within the family, in religion, in employment, and in political life. Patriarchal attitudes in part explain the phenomenon of violence against women, both within the family unit and between strangers. In the transition from culture to law,⁴ the concept of patriarchy illuminates much that is otherwise unclear about the 'maleness' of the law and the legal process.⁵

The male assumption of the natural right of control and power in all fora is the subject of feminist analysis and in this chapter that analysis is considered.

In *Theorizing Patriarchy*,⁶ Sylvia Walby analyses the structure of contemporary patriarchy: in modes of production; in relations in paid work; in relations within the State; in male violence; in sexual relations and in relations in cultural institutions.

1 Collins English Dictionary (1991, 3rd edn).

2 B Malinowski, *Sex and Repression in Savage Society* (1927) (Routledge and Kegan Paul, 1927).

3 F Engels, *The Origins of the Family, Private Property and the State* (1884) (Lawrence and Wishart, 1940).

4 See Chapter 2.

5 See, in particular, Chapter 10 on the legal system's response to victims of rape and domestic violence.

6 Blackwell, 1990.

In *Pornography: Men Possessing Women*,⁷ radical feminist author Andrea Dworkin analyses patriarchy as consisting of 'a metaphysical assertion of self' and concept which 'expresses intrinsic authority'.⁸ Subsumed within this assertion of authority is the denial of women's power; the right to physical strength; the power – through that physical strength – to subordinate by forms of fear – 'symbols of terror'⁹ – individual women and women as a class. Men also assume, Dworkin writes, the power of 'naming', that is to say, the power to define thought, experience and language, to the exclusion of women. Fifth, Dworkin identifies the power of ownership. Men, traditionally and contemporarily, hold the power to own women, to deny them the right to own property in their own name, deny them the right to refuse intercourse in marriage (a position which held true in the United Kingdom until 1991). Finally, Dworkin identifies the power to control women through financial control, through dominating positions of power and influence in society, and through relegating women to less remunerative positions. Finally, the seventh tenet of male power is, for Dworkin, the power of sex. Women from this point of view are defined as sexual objects in the stereotypical definition given to female sexuality by male power. In Dworkin's words, 'sexual power illuminates his very nature'.¹⁰ Andrea Dworkin's powerfully angry words – however intuitively appealing to the reader – offer little succour to those for whom some reconciliation between the sexes – on the basis of true equality – is both desirable and necessary. By way of contrast, Shelley Wright, in the passage which follows, whilst tracing the origins of patriarchy, and the transition from religious to secular patriarchy, offers an insight into the means by which progress towards full and equal citizenship might be achieved.

Patriarchy is neither a vacuous concept, nor does it exist in a vacuum. As the extracts which follow reveal, patriarchy is sited in both the 'public' and 'private' spheres of life. In the second part of this chapter, the dichotomy between the 'public' and 'private' realms of life are considered.

THEORISING PATRIARCHY¹¹

Sylvia Walby¹²

Patriarchy needs to be conceptualised at different levels of abstraction. At the most abstract level it exists as a system of social relations. In contemporary Britain this is present in articulation with capitalism and with racism. However, I do not wish to imply that it is homologous in internal structure with capitalism. At a less abstract level patriarchy is composed of six structures: the patriarchal mode of production, patriarchal relations in paid work, patriarchal relations in the state, male violence, patriarchal relations in sexuality, and patriarchal

7 Andrea Dworkin, *Pornography: Men Possessing Women* (The Women's Press, 1981).

8 *Ibid*, p 13.

9 *Ibid*, p 15.

10 *Ibid*, p 24.

11 Sylvia Walby, *Theorising Patriarchy* (Blackwell, 1990).

12 At the time of writing, Lecturer in Sociology, the London School of Economics and Political Science.

relations in cultural institutions. More concretely, in relation to each of the structures, it is possible to identify sets of patriarchal practices which are less deeply sedimented. Structures are emergent properties of practices. Any specific empirical instance will embody the effects, not only of patriarchal structures, but also of capitalism and racism.

The six structures have causal effects upon each other, both reinforcing and blocking, but are relatively autonomous. The specification of several rather than simply one base is necessary in order to avoid reductionism and essentialism. The presence of only one base, for instance, reproduction for Firestone¹³ and rape for Brownmiller,¹⁴ is the reason for their difficulty with historical change and cultural variation. It is not necessary to go to the other extreme of denying significant social structures to overcome the charge of essentialism, as some of the postmodernist poststructuralists have done. The six identified are real, deep structures and necessary to capture the variation of gender relations in Westernised societies.

Patriarchal production relations in the household are my first structure. It is through these that women's household labour is expropriated by their husbands or cohabitantes. The woman may receive her maintenance in exchange for her labour, especially when she is not also engaged in waged labour. Housewives are the producing class, while husbands are the expropriating class.

The second patriarchal structure within the economic level is that of patriarchal relations within paid work. A complex of forms of patriarchal closure within waged labour exclude women from the better forms of work and segregate them into the worse jobs which are deemed to be less skilled.

The State is patriarchal as well as being capitalist and racist. While being a site of struggle and not a monolithic entity, the State has a systematic bias towards patriarchal interests in its policies and action.

Male violence constitutes a further structure, despite its apparently individualistic and diverse form. It is behaviour routinely experienced by women from men, with standard effects upon the actions of most women. Male violence against women is systematically condoned and legitimated by the State's refusal to intervene against it except in exceptional instances, though the practices of rape, wife beating, sexual harassment etc, are too decentralised in their practice to be part of the State itself.

Patriarchal relations in sexuality constitute a fifth structure. Compulsory heterosexuality and the sexual double standard are two of the key forms of this structure.

Patriarchal cultural institutions completes the array of structures. These are significant for the generation of a variety of gender-differentiated forms of subjectivity. This structure is composed of a set of institutions which create the representation of women within a patriarchal gaze in a variety of arenas, such as religions, education and the media.¹⁵

Walby identifies two principal arenas in which patriarchy is expressed – the public and the private:

13 Shulamith Firestone, *The Dialectic of Sex: The Case for Feminist Revolution* (New York: Morrow, 1970).

14 Susan Brownmiller, *Against Our Will: Men, Women and Rape* (Harmondsworth: Penguin, 1976).

15 Sylvia Walby, *op cit*, pp 20–21.

I am distinguishing two main forms of patriarchy, private and public. Private patriarchy is based upon household production as the main site of women’s oppression. Public patriarchy is based principally in public sites such as employment and the State. The household does not cease to be a patriarchal structure in the public form, but it is not longer the chief site. In private patriarchy the expropriation of women’s labour takes place primarily by individual patriarchs within the household, while in the public form it is a more collective appropriation. In private patriarchy the principle patriarchal strategy is exclusionary; in the public it is segregationist and subordinating.

The change from private to public patriarchy involves a change both in the relations between the structures and within the structures. In the private form household production is the dominant structure; in the public form it is replaced by employment and the State. In each form all the remaining patriarchal structures are present – there is simply a change in which are dominant. There is also a change in the institutional forms of patriarchy, with the replacement of a primarily individual form of appropriation of women by a collective one. This takes place within each of the six patriarchal structures.¹⁶

Table I.1¹⁷

PRIVATE AND PUBLIC PATRIARCHY

Form of patriarchy	Private	Public
Dominant structure	Household production	Employment/State
Wider patriarchal structures	Employment State Sexuality Violence Culture	Household production Sexuality Violence Culture
Period	C19th	C20th
Mode of expropriation	Individual	Collective
Patriarchal strategy	Exclusionary	Segregationist

16 *Ibid*, pp 23–24.

17 *Ibid*, p 24.

PATRIARCHAL FEMINISM AND THE LAW OF THE FATHER¹⁸

Shelley Wright¹⁹

The Genealogy of Patriarchy

If words themselves are important then the word 'patriarchy' must be of central significance to Western feminists. We might continue our work towards a redefinition of femininity and feminism with an etymology or genealogy of this particular word, in order to discover its role in the subjugation of women and the discipline of the body, as well as the possibilities for resistance, and the creation of new alliances. If 'patriarchy' is a Master-narrative devised by men masquerading as human beings, then it must have a history, a context, a cartography of knowledge which can be traced. It is not monolithic and can be changed, escaped from or destroyed.

The derivations of this word, and its structures through centuries of Western European culture, carry within them its roots in Judeo-Christian thought. The 'Word', either spoken or written, was the vehicle by which both Judaism and Christianity were propagated throughout the Mediterranean and Europe. Judaism, Christianity, and later Islam, are religions of 'The Book' and the social structures with which they are associated are cultures that have always placed a high value on language, especially literary language. The 'text' has always been of enormous significance in European and middle Eastern cultures.

In the beginning was the Word, and the Word was with God, and the Word was God ... And the Word was made flesh, and dwelt among us, (and we beheld his glory, the glory as of the only begotten of the Father), full of grace and truth.²⁰

Within the terms of the Biblical text, particularly after the translation of the Jewish canon into Greek 250 years before Christ, we can see the development of some interesting themes. 'Patriarchy' refers to a rulership which is emphatically tied to procreation – the male reproductive role. It is rule by a man in a very specific, misconstrued and exaggerated gender role – the role of the Father. It is a rulership which openly relegates the female reproductive role to the inconsequential and which allows women little other than a reproductive role to play, as freedom to do anything else might diminish male control over security of descent. The only significant role that women play is to safeguard the purity and potency of this line where male guardianship breaks down or is ineffective. Blood, semen, genealogy and power, are inextricably tied together in a narrative of ideological distortion of enormous influence.²¹

Taking the story further into the New Testament, while continuing to look back for a larger picture of Judeo-Christian sources, patriarchy can be seen as not only a description of tribal structures or religious ideology, nor only as a means of describing an institutionalised governmental system. It is also the primal myth of creation, death, redemption and resurrection which has remained with us in everything we have done, said or thought for thousands of years. We live in a

18 Shelley Wright, 'Patriarchal Feminism and the Law of the Father' (1993) 1 *Feminist Legal Studies* 115.

19 At the time of writing, Lecturer in Law, University of Sydney.

20 *The Gospel According to St John* I, 1–14, King James Version, first published in England in 1611.

21 See Northrop Frye, *The Great Code: The Bible and Literature* (Penguin, 1990).

secular society, but this Judeo-Christian founding myth of perception, of knowledge and power, is the pattern on which much of our own 'truth' is based.

The genealogy of patriarchy continues within the structures of Western history, first by the Roman and Orthodox Churches, and then in the burgeoning of the nation state in which 'patriarchy' becomes associated with the Father/King, the paternal head of '*le patrie*', the nation state. Patriarchal religious structures were challenged during the Reformation, and patriarchal political structures during the European revolutions of the 17th and 18th centuries. A detailed history of the increasing subordination of women during and after these revolutionary challenges to patriarchy is described in detail elsewhere.²² What is important is, that at a time when men were demanding political and economic freedom from the patriarchal rule of the Father/King, or the monarchy itself was being 'domesticated', as in England under Queen Victoria,²³ women were being ever more sharply subjected to the patriarch's rule within the private sphere of the home. This 'privatisation' of patriarchy had been evident since at least the Protestant Reformation of the 16th century and ran parallel with the growth of bourgeois capitalism and the idea of liberalism in political structures. Jean-Jacques Rousseau and Adam Smith, Martin Luther and Samuel Johnson, Edmund Burke and Robespierre could all agree on one thing – the inferiority and subservience of women.²⁴ The old patriarchy was killed, only to be replaced by a new patriarchy masquerading as the liberal democratic 'fraternity' of men so aptly described by Carole Pateman as the 'fraternal contract'.²⁵

Crucial to the perpetuation of this structure since the 19th century has been the discipline of the body, particularly the female body. The discipline of the female body in order to control and finally eradicate women as subjects-for-themselves (or as sisters) is a fundamental component of patriarchy. In the Judeo-Christian model, in which we find the genealogy of women's oppression in Western cultures, control and discipline of the body and the consequent continuing visibility of 'Woman' as a mirror for the male ego has been endemic. As Irigaray, among others, has written, women are physical containers which have their value as exchange within patriarchal economic and symbolic structures.²⁶ Within unmitigated patriarchy, ie that which existed prior to the fraternal contract of the late 18th century, women were literally exchanged as property or symbols of property. Since that time, women have continued to be characterised not as subjects or authors of our own lives, but as objects, containers of the male desire to retain patriarchal power within the fraternal contract. As the physical exchange of women declined in the West (at least for white middle-class women) the incorporation of femininity within women's minds and bodies as the objects of male desire increased. One means of constructing this has been, and still is, romantic love as the basis of heterosexual relations, rather than simple exchange. Because men are never simply the inhabitants of particular masculine bodies, but are always Man moving towards Mastery, Woman has remained the measure of exchange by which this universalising Mankind, this patriarchal linkage of power and masculinity, is given value. This is the Law of the Father which we

22 See Anderson and Zinsser, *A History of Their Own*, Pt II.

23 1837–1902.

24 See E Kennedy and S Mendus (eds) *Women in Western Political Philosophy: Kant to Nietzsche* (Wheatsheaf, 1987).

25 See C Pateman, *The Disorder of Women* (Polity Press, 1989).

26 Luce Irigaray, 'The Power of Discourse and the Subordination of the Feminine', in M Whitford (ed), *The Irigaray Reader* (Blackwell, 1991).

have internalised as his daughters, which our brothers have internalised as his sons – and heirs.

Patriarchal Feminism

It is almost impossible to envision a non-patriarchal social structure – the one we have has been with us for so long and is so pervasive. Feminism, as it developed out of the revolutionary changes in Europe of the 18th and 19th centuries, is based on an assumption that is rarely questioned. The assumption is that freedom or personal autonomy is an intrinsic need for human beings, including women, which has been forcibly denied us. The autonomous development of the individual is described, at least rhetorically, as an inherent right of everyone. Early feminists demanded that this rhetoric could not logically be denied to women, at least not to white middle class women of Western Europe. The Law of the Father became expressed as the 'rule of law', inscribed within legal structures as available to ensure freedom and equality for everyone. Women, and others, captured for themselves the power of this rhetoric to demand that the freedom which was denied to so many, not just women, be made a reality.

The fraternal contract and the rule of law,²⁷ the modern masks behind which patriarchy and the Law of the Father maintain their power, are the tools by which liberatory claims have been made and to some extent have been won. It is not illogical that women and others have made gains even within patriarchy, including both political suffrage and partial control over reproduction. One of the earliest examples of an undutiful daughter, that is one who demanded the fulfilment of the promise of the fraternal contract on behalf of herself and other women, is Mary Wollstonecraft.²⁸ She was speaking out of the experience of that first major revolution against the Father/King, the French Revolution, which succeeded only in replacing him with modern democratic patriarchy, the fraternal contract.

What is this 'autonomy', this 'freedom', this 'equality' for which we make our rebellious demands? What is the 'slavery' to which so many have been subjugated and from which the fraternal contract and the rule of law are meant to deliver us? Both slavery and freedom, as we understand them, are defined within patriarchy itself. Slavery cannot exist unless the alternative of freedom exists to define its limits. The lack of personal autonomy presupposes the existence of that which is lacking. The core of patriarchal feminism is that women cannot be slaves within patriarchal structures unless it is possible for us to be free as defined by patriarchy itself. It cannot be said that women have been denied something unless there is something there to be denied. If the need or desire or capacity for personal freedom is not an intrinsic human quality, then it can only exist as a social construct. In our case, this means that our demands for liberation and equality have been determined by the constraints of patriarchy as it now exists, ie the liberal, democratic, fraternal contract. The particular type of slavery which women suffer under this particular form of 'patriarchy' is not necessarily the same as that which women, or others, suffer under different social constructions, patriarchal or otherwise. Freedom is equally culturally defined.

Western patriarchal institutions rest on an either/or dichotomy of gender. This dichotomy, would appear to form the basis for a generalised concept of difference which places one side of the divide in a position of dominance over the other. The reliance on difference and hierarchy informs attempts at change or

27 On women in political theory, see Chapter 8.

28 Mary Wollstonecraft, *Vindication of the Rights of Woman* (1792) (Penguin, 1985).

restructuring. Freedom and slavery are also perceived in terms of difference and hierarchy. Feminists have demanded that freedom, within patriarchal terms, be extended to themselves and to others. Most feminisms that we are familiar with in the West are therefore what I would term 'patriarchal feminisms'. This is not to deny the importance of empowerment which such feminist efforts have gained for some women. But recognising feminism's deep connection to the ideology it is attempting to subvert, might help us to recognise some of the inconsistencies and blindnesses for which we are often accused.

A basic reading of what is meant by 'patriarchy' in the Western Judeo-Christian tradition that we live in, has been traced back no further than the written evidence of the Old Testament. The word itself is a Graeco/Christian translation of a Hebrew word. 'Patriarchy' as icon is based on sacred scripture. An examination of this scripture seems to indicate that there is a basic either/or distinction being made, and that the core distinction is male/female. More importantly this core concept seems to be intimately connected with procreation, reproduction, birth, life, genealogy, inheritance, racial purity and religious or political hegemony. The ethic which emerges is one based on aggressive masculinity, concentrating on the male gender role in conception and birth. The power structure is not just male oriented, but Father oriented. This power structure legitimates a whole host of what have been identified as 'problems' – the subjugation of women being a major, but not the only, one. The structure does not appear to adequately coincide with material economic bases of either an agricultural or an urban society, hence the failure of Marxist feminist analyses to adequately explain the persistence of patriarchy and its collaboration with capitalism.²⁹ Patriarchy as a means of social ordering has survived and adapted itself up to the present time. It is a paradigm so immune to overthrow that it has resisted even the most obvious evidence that its basic assumptions about sex and procreation are biological nonsense and that its effects are manifestly unjust.

Undutiful Daughters

The latest revival of feminism is at last having a noticeable effect on previously impervious patriarchal structures. Women are gaining access to education, jobs, financial independence and life options that we have never had before. But even the optimism engendered by real gains has to be tempered by one major drawback. The feminism which has gained the most attention, and which is what most people mean by 'feminism', is Eurocentric patriarchal feminism. It is feminism which draws its own ideology out of libertarian, or Marxist, or other visions of liberation, which are themselves permeated with Judeo-Christian ideology or its secular descendants' structures. Why else do we talk about 'liberal' feminism, or 'Marxist' feminism or even 'poststructuralist' or 'deconstructionist' feminism? Our discourse is taken from the predominant patriarchal ideology, the Master-narrative, or its masculinist alternatives. This is not surprising. Our subjugation is determined by patriarchy and its alternatives are also found within this ideology. Where else can we hope to find it? We ourselves are shaped by the structures within which we have been brought up, within which we live. Our very selves are culturally bound. If, within patriarchy, we perceive ourselves as enslaved, then it is to patriarchal definitions of freedom, such as they are, that we turn for sources of resistance. It is not surprising that modern secular feminism should have followed the paths that modern secular masculine revolutions have taken. We have no other models. We are our fathers' daughters, undutiful or otherwise.

29 On Marxist theory, see Chapter 8.

Parricide

The political and economic revolutions of the last 200 years put on the agenda, for the first time in European and Judeo-Christian history, the massive project of destroying the patriarchal King/Father. The revolutions only partially succeeded, driving the patriarch underground into the home where he has exercised far greater tyranny over women and children; or upstairs into the civil service and the State where he has been idealised and ideologised into a kind of 'folk king' or an abstracted patriarch called 'the people': or exported to the Third World in the guise of 'development'. The imagery of the warrior, the irresponsible male maturing into the despotic father, with women as nurturing chattels, remains virtually unchanged.

What may be of some hope is that the destruction of the patriarchal King/God, although incomplete, may still be in progress. Once men put this on the agenda they could, and can, no longer prevent women from demanding that the project be completed. It is all women, not younger or subservient men, who have borne the greatest burden within this structure and it is we who have the most to gain from its destruction (not just 'deconstruction'). Once men had provided the revolutionary models for destroying the father, feminism, as part of patriarchal ideology in its new secularised still masculine form, could no longer be contained. Every masculine form of revolution or resistance, none of which have succeeded in finally escaping patriarchy, has given birth to a feminist vision which has been more radical, and therefore more threatening. Masculinist revolutions have always drawn back from incorporating the feminist vision of real destruction of the patriarch, partly out of fear, but also partly out of a deep nostalgia for the initiation – the rebirth into Fatherhood and power. But it is important to remember that patriarchy, although still alive and strong, has been under siege by all revolutions and resistances, both masculine and feminine, for the last 200 years.

Liberalism merely domesticated the tyrant, took it upon itself to civilise and privatise the patriarch and bring him under control. The fraternal contract was an attempt to liberate sons so that all men might have the opportunity of becoming the Father. There was never any real commitment to destroying patriarchy. Socialism never achieved more than to create another patriarch in working class clothes, or to dress the working man in business suits and domesticate him as the liberal masters had done. The old man dies hard. Feminists who insisted, and continue to insist, that only parricide will do, simply frighten and infuriate men who can see themselves in far greater solidarity with their fathers and grandfathers than with their mothers and sisters, who have always terrified or mystified them. Sex, the old fractured knowledge of good and evil, keeps coming back to haunt us. Subjectivities of male/female, dominance and submission are not good places to find visions of egalitarianism or liberation. However, patriarchal feminism incorporates the radical challenges to patriarchy partially commenced in the 18th century. The great hope is that men, as well as women, have begun to see that the patriarch has to die.

This cannot be seen as an unmitigated source of optimism. If feminism itself is shaped by the masculinist agenda for change, then the alternative to patriarchy (whatever that might be) which is likely to succeed is unlikely to meet feminist demands for women. 'Equality' is not in fact what we want, even on a deep level, when the substance of 'equality' is masculinist, not feminist. Nor would we want a 'liberty' that is defined in terms solely of the antithesis to patriarchal slavery. In this sense radical feminists are perfectly correct in viewing liberal or even Marxist feminisms with extreme suspicion. It may be that one day we will have a