women, in the form of violence, is widespread. Gender-based violence, the evidence reveals, whether in the form of sexual harassment, assault, sexual offences or murder, is deeply embedded in society. Moreover, gender-based violence in all its manifestations, presents difficulties for analysis, in so far as explanations vary from psychological, economic, socio-structural to political. This embeddedness, and the lack of consensus among researchers of gender-based violence, presents its own difficulties for law. As has been well documented in the literature on 'legal transplants',[38] while law has a degree of autonomy from society, the prognosis for law's effectiveness in regulating conduct – particularly conduct in private – is particularly low when law seeks to change deeply engrained social attitudes.[39] As will be seen in Chapter 11, feminist analysis and campaigning has done much to raise the profile of gender-based violence against women, which, however, remains both universal and widespread within all societies.

LAW'S DEPENDENCE ON CULTURE: THEORETICAL EXPLANATIONS

Karl von Savigny, Eugen Ehrlich, William Graham Sumner

Towards the end of the nineteenth century and early in the twentieth century, three theorists sought to explain the evolution from culture to law. Whilst differing in their individual approaches and terminology, each writer sought to explain the need for law to rest on its societal foundations. For law to depart too greatly from the 'spirit of the people', or *volksgeist*,[40] or the '*mores*',[41] or '*living law*'[42] would spell disaster for the relevance of and respect for legal rules.

It has been well established by empirical research that there are limits to the utility of legal, as opposed to societal/cultural, reform, and these limits are no better demonstrated than in precisely the areas of reform which are the most culturally sensitive. In the nineteenth century, Karl von Savigny, seeking to impede hasty codification of the laws of Germany on unification, argued that before effective laws could be drafted and implemented, research needed to be undertaken in order to establish the common 'spirit' (the *volksgeist*) of the

38 The 'transplanting' of laws from one society to another.

39 See, *inter alia,* Allott, A, *The Limits of Law,* 1980, London: Butterworths; Cotterrell, RBM, *The Sociology of Law: An Introduction,* 1985, London: Butterworths.

40 von Savigny, K, *On the Vocation of Our Age for Legislation and Jurisprudence*, 1831, Hayward A (trans), 1975, New York: Arno.

41 Sumner, W, *Folkways* (1906), 1940, Boston, Mass: Ginn.

42 Ehrlich, E, *Fundamental Principles of the Sociology of Law* (1936), 1975, New York: Arno.

peoples.[43] At the turn of the century, William Graham Sumner, in a wide ranging historical survey, argued that for the maximum effectiveness of law to be guaranteed, the laws must be rooted firmly in the '*mores*' of the people. Too great a divergence between law and culture would result in the failure of law.[44] In 1936, Eugen Ehrlich's *The Fundamental Principles of the Sociology of Law* was published. Here too Ehrlich argues for an understanding of the rules which regulate everyday life before State law could intervene and seek to impose effective legal regulation. Evidence of the dependence of law upon culture comes also from comparative lawyers who have sought to explicate the conditions under which laws from one society could be effectively grafted on to the legal system of another culture.[45] In each case, the point which shines through most clearly is that laws which affect the most intimate parts of life, aspects of life which are central to a culture, will be of limited success unless there exists either a correspondence between the substance of the law being introduced and the cultural mores of society, or there exists a demonstrated willingness on the part of the recipient society to accept the proposed changes.[46]

On the other hand, and to offset the otherwise pessimistic prognosis for law as an instrument of social change, it must be recognised that law has a significant role to play in both changing the attitudes and conduct of those it regulates. Law has a relative autonomy. Without legal reform, slavery would still persist.[47] Without legal reform, apartheid and other forms of racial discrimination would remain. Without legal reform, women would not have achieved the vote, achieved legal equality within marriage and in the workplace. In the United Kingdom, the Race Relations Act 1968, although generally agreed to be of limited practical utility, represented a starting point for the effective elimination of racial discrimination, as did the Sex Discrimination Act 1970 and the Equal Pay Act 1975 in relation to sexual discrimination. In the United States, the Supreme Court in *Brown v Board of Education of Topeka*[48] reversed its decision of 1896[49] and ruled that the segregation of schools violated the Constitution and could no longer be justified on the basis that educational and other segregation amounted to justifiable 'separate but equal' treatment. On this basis, law plays and must

43 See *op cit*, von Savigny, K, fn 40.

44 See *op cit*, Sumner, fn 41.

45 See *op cit*, Allott, fn 39.

46 Such 'universal' theorising about societal development is, from a postmodern perspective (discussed in Chapter 9), too generalised to reveal the particularities of the forces which coalesce to produce laws. Notwithstanding postmodern reservations about 'grand theory', such theories illustrate the interaction between cultural mores and law.

47 See Lester, A and Bindman, G, *Race and Law*, 1972, London: Penguin.

48 347 US 483 (1954).

49 See *Plessey v Ferguson* 163 US 537 (1896).

continue to play a pivotal role in the elimination of sexism in society. It must also be recognised, however, that it is easier to change overt conduct through law than to change attitudes which underlie that conduct. To make racial or sexual discrimination an offence, as such, may result in a change in conduct, a change brought about by the fear of sanctions under the law, but may leave the racial or sexist attitude in place, but more carefully concealed. However, law also acts as a symbol in society: a symbol of what society regards as appropriate conduct or treatment towards another person. On this reasoning, while initially conduct but not attitudes may change, it can be argued that there is a long term effect on society, and that in the long term attitudes will change to come more into line with the requirements for conduct under the law.[50]

Deeply entrenched cultural mores – such as sexism and patriarchy – prove strongly resistant to change. Without such change at a cultural level, the success of law as an instrument of reform will inevitably be limited to the regulation of conduct which can be evaluated under the law, whilst attitudes – so central to the real effectiveness of social change – remain either the same, or exceedingly slow to change. It for reasons such as these that radical feminists, whilst accepting and acknowledging the valuable work undertaken by liberal feminist legal scholars, question the tenets of liberalism with its insistence on formal equality under the law. Others, on the other hand, call for a recognition that law has limited utility and effectiveness as a mechanism for social change, and that an overemphasis on law – as opposed to social change – distorts the significance of law which is but one form of social regulation.[51]

EARLY STRUGGLES FOR EQUALITY IN WESTERN SOCIETY

Rights for women

One of the earliest English advocates for women's rights in relation to the franchise, education and laws relating to the family was Mary Wollstonecraft.[52] In *Vindication of the Rights of Women*,[53] written at the time of the French Revolution, Wollstonecraft argued for equality. Despite her radicalism, Wollstonecraft was imbued with the prevailing ideology of her time: that of the 'natural' inferiority of women to men. While reasoning that women's intellectual capacities were naturally equal to those of men, Wollstonecraft accepted the traditional role of women in the family. There is

50 On the English Race Relations Act and Sex Discrimination Act, see Cotterrell, RBM [1981] PL 469.

51 See, eg, Smart, C, *Feminism and the Power of Law,* 1989, London: Routledge and Kegan Paul.

52 1759–97.

53 Wollestonecraft, M, *Vindication of the Rights of Women* (1792), 1967, New York, WW Norton.

accordingly a dualism in her work: women campaigning for full participation in civic 'public' life, and women in more conventional mode in the 'private' sphere: the home.

In the nineteenth century, one of the most influential women was the feminist writer Hariett Martineau.[54] Widely travelled, and an insightful social and political commentator, Martineau was as well known and regarded in the United States as in England.[55] Education for women was a constant campaign for Martineau for only through education could women participate fully in public life, on equal terms with men. Martineau observed, however, that while girls and boys having equal educational opportunities succeeded on equal terms, too often girls were not encouraged to complete their education, and then criticised for failing to achieve their true potential:

> She is taught to believe that solid information is unbecoming her sex, almost her whole time is expended on light accomplishments and thus before she is sensible of her powers, they are checked in her growth, chained down to mean objects, to risk no more; and when the natural consequences of this mode of treatment arise, all mankind agree that the abilities of women are far inferior to those of men.[56]

The right to vote was also central to Martineau's concerns and she was critical of the idea that democracy could exist without the participation of women.

Education for women,[57] full civil rights for women and the law relating to prostitution[58] represented two sites of political activity for the Victorian campaigner Josephine Butler.[59] The Contagious Diseases Acts represented one of the most discriminatory legal provisions of the nineteenth century. In an attempt to eradicate venereal disease among soldiers and sailors, the government enacted legislation which provided for designated army towns and ports, in which special police forces would identify women prostitutes. The prostitutes were then required to submit to regular medical treatment, or if they refused, to appear in court. The court had the power to order the examinations. The burden of proof relating to a charge of being a prostitute lay on the woman accused.[60]

54 1802–76.

55 In the course of her life, Hariett Martineau wrote over 50 books and pamphlets and over 1,600 articles for the *Daily News* and a further 50 articles in periodicals such as the *Edinburgh Review* and *Westminster Review.*

56 Martineau, H, 1823, cited by Weiner, G, 'Harriet Martineau: a reassessment', in Spender, D (ed), *Feminist Theorists,* 1983, London: The Women's Press, p 65.

57 Butler was to become president of the North of England Council for the Higher Education of Women from 1868–73.

58 In 1869, Butler headed the Ladies National Association campaign for the Repeal of the Contagious Diseases Acts of 1864, 1866, 1869.

59 1828–1906.

60 The Acts were finally repealed in 1886.

Butler was keenly aware that the issue of prostitution was linked to women's inferiority in the labour market. In 1861 the census recorded three and a half million women working for subsistence pay. Butler attacked employers' practices which included qualifications for apprenticeships which women could not obtain, thus further pushing women down the economic scale to the position where women represented the lowest class in society.[61]

THE FRANCHISE

The franchise in the United Kingdom

Women were to remain disentitled from the right to vote until 1918, but the movement for women's right to vote predates the Representation of the People Act 1867, which greatly expanded the male franchise. In 1851, Harriet Taylor Mill had published 'Enfranchisement of women' in the *Westminster Review*, and at an election meeting in 1865 John Stuart Mill raised women's enfranchisement as a public political issue. In 1886, John Stuart Mill[62] presented a petition to parliament calling for the enfranchisement of women. The following year the Manchester Women's Suffrage Committee was formed, soon to be united in a national Committee based in London. When the Reform Bill was before parliament John Stuart Mill introduced an amendment – changing the word 'man' to 'person' and thereby entitling women to vote. The amendment was defeated.

A legal challenge to disenfranchisement came in *Chorlton v Lings.*[63] It was argued before the Court of Common Pleas that the Representation of the People Act 1867 had conferred on women a right to vote. The argument centred on the use of the word 'man' in the act. It was contended that Lord Brougham's Act[64] which stipulated that the word 'man' includes 'women' applied to an interpretation of the Representation Act. Chief Justice Bovill rejected such a view:

61 Campaigning for homeless emigrants in Australia, Caroline Chisholm rescued thousands of homeless, penniless young girls from a life of subsistence in the bush or life in the brothels. The girls came from workhouses and orphanages in England, the ships' captains received bonuses for every women transported. In 1846, Chisholm founded the Family Colonisation Loan Society in England. By 1862, she and her husband had brought to Australia over 11,000 emigrants. Chisholm successfully persuaded the government of Victoria to provide grants to establish shelters for the emigrants.

62 A member of parliament and radical reformer. See, *inter alia*, *Representative Government* (1865), 1958, Indianapolis: Bobbs-Merrill; See, also, *On Liberty* (1859), 1989, Cambridge: CUP, and *The Subjection of Women* (1869), 1989, Cambridge: CUP.

63 [1868] LR IV 374.

64 The Interpretation Act, 13 and 14 Vict c 21.

> The conclusion at which I have arrived is, that the legislature used the word 'man' in the Act of 1867 in the same sense as 'male person' in the former Act; that this word was intentionally used, in order to designate expressly the male sex; and that it amounts to an express enactment and provision that every man, as distinguished from women, possessing the qualification, is to have the franchise. In that view, Lord Brougham's Act does not apply to the present case, and does not extend the meaning of the word 'man' so as to include women.[65]

Mr Justice Willis, Byles J and Keating J agreed. In accepting Bovill CJ's interpretation, Willis J turned to comment on the wider issue. In declaring himself opposed to any view that women were excluded from the franchise on the basis of 'fickleness of judgment and liability to influence' which would be quite inconsistent 'with one of the glories of our civilisation – the respect and honour in which women are held', Willis J declared that the prohibition against voting – and the prohibition against peeresses in the House of Lords – could be explained:

> ... out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.[66]

In 1869, Mill published *The Subjection of Women.* The right to vote was but one campaign. Women were also seeking equal rights in education, in politics and in the medical profession. Millicent Garrett Fawcett[67] played a leading role in the struggle for women's equality:[68] her memorial in Westminster Abbey describes her as having 'won citizenship for women'. Her involvement in the suffrage movement became intense after the death of her husband in 1884. But while her life was primarily[69] devoted to the campaign for the vote, Millicent Garrett Fawcett neither joined in the more militant campaign led by the Pankhursts,[70] nor did she believe that the women's movement alone would achieve its objective: social change was needed before success would be achieved.

In 1897, the differing suffrage movements were to be united under the National Union of Women's Suffrage Societies (the NUWSS), led until 1919 by Millicent Garrett Fawcett. By 1913 the number of affiliated societies had

---

65 [1868] LR IV 387.

66 [1868] LR IV 392. For the feminist analysis of the North American *Persons* cases, see Chapter 1.

67 1847–1929. See Strachey, R, *Millicent Garrett Fawcett*, 1951, London: John Murray.

68 With her husband Henry Fawcett, Millicent founded Newnham College, Cambridge, at which her daughter, Phillippa, was placed first in the mathematics tripos.

69 Education, morals, employment and married women's right to own and manage property (finally achieved in 1882 with the Married Women's Property Act) were also within her campaigning objectives.

70 On which see, further, below, pp 42–43.

reached 400. Under the banner of the Women's Union for Parliamentary Suffrage, the leadership of Emmeline,[71] Christabel[72] and Sylvia[73] (Emmeline's daughters) Pankhurst[74] injected new energy into the campaign and the age of militancy in support of the right to vote began. Millicent Garrett Fawcett was to remain staunchly opposed to violence in support of the campaign, and her attitude to the Pankhursts was ambivalent. Nor were the Pankhursts themselves united in their objectives: for Christabel and Emmeline militancy was a legitimate means in the pursuit of the right of middle-class women to vote; whereas for Sylvia the objective was the right of all women – working- and middle-class – to the vote. Sylvia Pankhurst also came to oppose the militancy of the campaign and in 1914 she founded the East London Federation of Suffragettes which included a programme for both socialism and pacifism.

The tide of public opinion started to turn in women's favour in 1909 when the authorities started to force feed hunger-striking suffragettes imprisoned as a result of their campaign. A Bill to give women the right to vote passed Second Reading in 1910 but was defeated by the Prime Minister, Asquith, acting in concert with Lloyd George, the Opposition Leader. The failure of a second Bill in 1911 sparked violent protest all over London: 217 women were arrested. A Reform Bill of 1913 met a similar fate, being defeated on a technicality. Its defeat met with swift reaction. Militant suffragists committed arson; threw bombs at churches and damaged golf courses. When an attempt was made to burn down Lloyd George's country house, Emmeline Pankhurst was arrested and charged with inciting to commit a felony, arrested, tried and found guilty. She was sentenced to three years' penal servitude.

Fearful of the consequences of imprisonment and hunger-strikes the government hurriedly passed the 'Cat and Mouse' Act,[75] which enabled the authorities to release hunger-striking prisoners who were in medical danger and re-arrest them on their physical recovery. In Mrs Pankhurst's case, she was released after only nine days in Holloway Prison, having immediately begun a hunger-strike. She was released for treatment. When she announced her intention to attend and address a rally, the police returned her to Holloway. After only five days she was again released.

The day after her second release was Derby Day. On that day, Emily Wilding Davidson threw herself under the hooves of the racing horses and was killed. Worldwide attention focused on the tragedy. Mrs Pankhurst was

71 1858–1928.

72 Dame Christabel Pankhurst, 1880–1958. Christabel studied law at Manchester University and was a founder member of the Women's Social and Political Union in 1903.

73 1882–1960.

74 1880–1958.

75 Prisoner's (Temporary Discharge for Ill-health) Act 1913.

prevented from attending her funeral procession as the police once again took her back to prison, where after only three days of a hunger-strike she was once again released only to return to prison for a fourth time for a short period before her life became endangered and she was again released. Shortly afterwards she left the country and travelled to America to raise money for the cause. On her arrival, however, she was detained at the request of the British Government. The storm of protest over her detention in America, and the political pressure put on the President by American women soon led to her release. On her return to England Mrs Pankhurst was once more detained: she was to endure a further eight attempts at forcing her to serve her sentence. In 1912, there had been 290 women suffrage prisoners under the Cat and Mouse Act; in the following year, 182. The public attention, and changing public mood resulted in 39,540 Friends of Women's Suffrage enrolling in support of the cause.

The persistence of the suffragettes combined with the involvement of women in industry during the First World War acted as catalysts for winning the right to vote. In 1916 an all-party conference on electoral reform was established under the chairmanship of the Speaker of the House of Commons. The Parliament (Qualification of Women) Act 1918 provided that women were eligible to stand for election to the House of Commons – although the right to vote was still denied to women under the age of 30.

The Representation of the People Act 1918 which implemented the conference's proposals, introduced a full franchise of all men in parliamentary elections and conferred the right to vote in Parliament on all women over the age of 30 who were either local government electors or the wives of local government electors. Full equality with men was delayed until 1928.

The franchise in the United States of America

In the United States, the campaign for women's votes may be traced to 1848 with a meeting in Seneca Falls, New York, which protested against women's political, economic and social inferiority. The outcome of the convention was the *Declaration of Sentiments*.[76] The early campaign for the vote was allied to, and confused by, the activists' abolitionist stance in relation to slavery. For abolitionists also the women's movement represented a problem: the fight for the abolition of slavery was radical and difficult on its own: to be complicated by the demand for women's rights might damage their own primary objective. Following the Civil War the Fourteenth Amendment to the Constitution was passed, declaring the equal protection of law to all male

76 See Steele Commage, H (ed), *Documents of American History*, 1956, New York: Appleton-Century-Crofts, pp 315–36; Smith, TV, *The American Philosophy of Equality*, 1927, Chicago: Chicago UP, pp 327–31.

citizens. Disagreements over the feminist response to the Fourteenth Amendment led to the formation of two separate organisations: the National Woman Suffrage Association and the American Woman Suffrage Association,[77] which worked separately until their merger in 1890 into the National American Woman Suffrage Association.[78]

Susan B Anthony[79] and Elizabeth Cady Stanton were two of the leading feminists of their era. In 1868, following the Civil War, Susan B Anthony and Elizabeth Cady Stanton launched their own newspaper, *Revolution.* The paper's motto reflected Anthony's ambitious aims: 'Men, their rights and nothing more. Women, their rights, and nothing less.' In 1872, Anthony cast her vote and was put on trial. Together, Anthony and Cady Stanton wrote *The History of Woman Suffrage*.[80]

By 1890, women's rights had advanced considerably. Initially women were granted the right to vote in school elections.[81] Municipal suffrage was granted to women in Kansas in 1887 and in 1890 Wyoming entered the Union as the first State with full suffrage for women, to be followed by Colorado in 1893 and Utah and Idaho in 1896. Not until 1910 did any other State enfranchise women,[82] to be followed in 1911 by California, and in 1912 by Arizona, Kansas and Oregon. A limited right to vote in presidential elections was granted to women by Illinois in 1913. It was to be in 1919 that Congress passed a national amendment securing full voting equality for women.[83] The suffragist movement was further complicated by the issue of votes for black women in the South. While the abolition of slavery was inextricably linked with the movement for women's equality and the vote, following the Civil War, the position of blacks in society was increasingly marginalised in the woman's movement and formed the focus for disputes between suffragists, as did the question of the enfranchisement of immigrant women.

Resistance and opposition to women's suffrage proved strong, with the 'anti-suffragists' employing emotive language centring on the 'women and the home', or more accurately the 'women in the home'. Theologians employed the Scriptures in their attack; others adopted the argument that women were physically incapable of undertaking the duty of voting. Octavius B Frothingham argued that men were characterised by rationality, by judgment; whereas women were emotional, idealistic, sentimental,

77 Led by Lucy Stone (1818–93).

78 The first president of the NAWSA was Elizabeth Cady Stanton.

79 1820–1906.

80 Stanton, A and Stanton, C, *The History of Woman Suffrage*, 1881, New York: Fowler & Wells; repr 1969, New York: Arno and New York Times.

81 By 1890, 16 States had introduced school suffrage.

82 Washington DC.

83 Ratified in 1920 as the Nineteenth Amendment.

irrational.[84, 85] The 'difference' argument was also employed to oppose the franchise: women were needed in the home; bearing and rearing children. Having the vote implied civic responsibilities which would conflict with women's natural and proper duties in the home. The argument that women did not want the vote was also employed both by male and female anti-suffragists, an argument which when interpreted meant that white, middle-class women (who were deemed better off in the home) should not have the vote, and accordingly neither should any other woman. The argument that it was *unwomanly* was employed: why should a woman need the vote when their husband's could vote for them?

The 'equality/sameness/difference' debate was also employed on both sides of the argument. On the anti-suffragists' side, the argument about 'women's place' in the 'private sphere' of life – in the home. To counter the argument of the anti-suffragists that centuries of women's suppression rendered women *unfit* to vote proved difficult. The suffragists insisted that women were equal: that women represented 50 per cent of the population and had a legitimate right to participation in the democratic process.

EDUCATION FOR WOMEN

While Mary Wollstonecraft, Hariett Martineau and Josephine Butler campaigned for equality in education in England as part of their overall strategy for eliminating discrimination against women, Emily Davies[86] focused almost all her energies on women's education. In 1862 Emily Davies became editor of a new feminist newspaper, *The Englishwomen's Journal.* In 1865, she and other feminists formed an education committee which lobbied for the right of girls to sit preliminary entrance examinations for colleges which had previously only been open to boys. In 1873, Davies opened Girton College, Cambridge, the first undergraduate college for women, and became its first Mistress until 1875. She also campaigned successfully for women to be given degrees by London University in 1874.[87]

84 The same arguments employed in the late 20th century to oppose further equality between men and women.

85 Frothingham, OB, 'The real case of the "remonstrants" against woman suffrage' (1890) 11 The Arena 176, p 179.

86 1830–1921.

87 Oxford first conferred degrees on women in 1920; Cambridge delayed conferring degrees on women until 1948.

Science and medicine

Historically, women have always practised the art of medicine. In ancient Egypt, in classical Greece and Rome and in the Middle Ages women were doctors. The medical school at Salerno near Naples, founded in the tenth century, had women students. In the sixteenth century women in England were allowed to enter the qualifying examinations for medicine. From around that time, however, until the mid nineteenth century women became excluded from medicine. In England, those practising medicine in the sixteenth and seventeenth centuries were liable to prosecution for witchcraft. In the other sciences a similar pattern can be found. In classical times women were free to study mathematics and philosophy, but again around the seventeenth century they were denied this right.

In England and the United States, the names of Elizabeth Blackwell[88] and Elizabeth Garrett Anderson[89] dominated the struggle for the right to practise medicine. Elizabeth Blackwell started her career as a headmistress in Kentucky in 1842. In 1844, she applied to medical schools in New York and Philadelphia, but was rejected on the basis of her sex. She was finally awarded her degree by a small medical school in Geneva, New York.[90] In 1853, Elizabeth Blackwell and two other women doctors, her sister Emily and Marie Zackrzewska, opened a dispensary and medical college for women in New York. In 1858, Blackwell returned to England, from where her family had emigrated when she was seven. For the rest of her career, Elizabeth Blackwell was Professor of Gynaecology at what is now the Royal Free Hospital.

Inspired by a lecture given by Dr Elizabeth Blackwell, Elizabeth Garrett Anderson was ultimately to become the first woman doctor in England, although she was forced to take her qualifying examinations in Paris. Having been rejected for university courses, Elizabeth Garrett Anderson studied medicine privately, although she pursued a midwifery course at the London Hospital. In 1865, the Society of Apothecaries granted her a qualification certificate and she then ran a dispensary for women. In 1870, she took her final medical examination. In 1872, Elizabeth Garrett Anderson opened the New Hospital, a hospital staffed entirely by women, for women.[91] In 1869, Sophia Jex-Blake and six others persuaded the University of Edinburgh to admit women to lectures in medicine. The University, however, reneged on its own regulations. When Sophia Jax-Blake and others took the matter to law, the University claimed that its own regulations were *ultra vires*. The judges agreed: the purpose of a university was the education of men.[92]

88 1821–1910.

89 1836–1917.

90 Following her training, the college passed a resolution barring further women students.

91 It later became the Elizabeth Garrett Anderson Hospital.

92 *Jex-Blake v Edinburgh University Senatus* (1873) 11 M 784.

In the United States,[93] the proportion of women doctors has traditionally been lower than in other countries.[94] Women had always played an informal role in medicine – as midwives, as healers. The interesting historical question is, why did women find themselves denied entry to the emergent medical profession? The question is particularly interesting in relation to the United States of America, for while in Europe male university-trained physicians had long dominated the profession, in the United States around 1800 there were few such trained physicians: lay practitioners were the norm, specialists the exception, and women played an equal role in dispensing health care. In the early 1800s, however, the position appears to have changed. The increasing number of trained physicians distinguished themselves from the 'informal' medical profession (of lay practitioners, healers, nurses and midwives).

In the 1830s and 1840s, women reacted against the newly established male monopoly of medical practice by establishing the Popular Health Movement. Preventive measures formed a significant part of the movement. The Popular Health Movement was overtly feminist: demanding rights for women in general as well as the greater participation of women in the medical profession and the improvement in women's health. The Popular Health Movement later broke up into sectarian groups and lost its force. The male medical profession did not let its existence go unchallenged. In 1848 the American Medical Association was formed. Throughout the rest of the century the medical profession attacked lay practitioners, sectarian doctors and women medical practitioners. The attacks were overtly sexist and virulent: when women were eventually admitted to medical schools they faced the hurdles of male professors who would not discuss anatomy in front of women and of sexual harassment from male students. As women gradually succeeded in gaining entry into medical positions they distanced themselves from the Popular Health Movement and allied themselves with their new, male, colleagues. Class played its own role: those gaining entry were largely middle-class and those refused entry lower-class women.

Midwifery, traditionally practised by women denied entry to the 'profession', soon came under attack. In 1910, it is recorded that some 50 per cent of all babies were delivered by midwives, of whom a majority were black or working-class. With the emerging specialism of obstetrics and gynaecology under the control of the 'profession', midwifery as hitherto practised, became a threat to the profession. Midwifery was to become controlled by the profession. Throughout the early twentieth century State laws were passed to outlaw the practice of midwifery other than by an appropriately trained

93 For a full analysis see Ehrenreich, B and English, D, 'Women and the rise of the American medical profession', in McElroy, W (ed), *Freedom, Feminism and the State*, 1982, USA: Cato Institute, Chapter XXIV, which is relied on for this introduction.

94 In 1982, eg, in England, 24 per cent of doctors were women; in Russia, 75 per cent; whereas in the United States, only seven per cent of doctors were women.

member of the medical profession: one consequence of which was to deny medical care to poor and working-class women.

Thus excluded from the profession and their traditional role as midwives, the only remaining role for women was nursing. Florence Nightingale provided the example. Nursing schools in the United States started to be established after the Civil War. Recruitment was aimed at upper- and middle-class women, although when the reality of nursing (hard, heavy work) became known, colleges were forced to recruit from the 'lower classes', who were to be trained by those upper- and middle-class women who had preceded them. Nursing was stamped, both in England and the United States, with the mark of middle-class values: those of womanhood, motherhood, femininity, subservience and care. In contradistinction to this characterisation is that of the doctor: rational, objective, logical and professional.

No introductory overview of early feminist achievements would be complete without an appreciation of the pioneering work of Florence Nightingale: the 'Lady of the Lamp'.[95] Born into the upper-classes, Florence and her sister were groomed to become ladies of leisure. When she was 24 she was determined to pursue a career in nursing: an aspiration refused by her family. She initially studied privately, and subsequently continued in Germany. In 1853, she was appointed superintendent of the Institution for the Care of Sick Gentlewomen in Distressed Circumstances in Harley Street, London.

In 1854, however, she became aware of the situation of troops in the Crimea. A lack of adequate medical treatment was causing widespread death. At the Secretary of State for War's[96] request, Nightingale led a party of British nurses to the Crimea. For two years, Nightingale and a team of 38 nurses struggled with the organisation of supplies and the treatment of the sick, wounded and dying. She also organised a reading room, organised classes, schools and plays. In 1856, Florence Nightingale fell ill, and returned home to England. Concerned over the situation she had left behind, Nightingale pressed for a Royal Commission on barracks, military hospitals and the Army Medical Department, which was eventually established under the chairmanship of Sidney Herbert. For the next 50 years, Florence Nightingale was seriously ill, believed to be on the point of death. From her sickbed in 1860, she established a school for nurses at St Thomas's Hospital and raised £45,000 of public money to finance its cost. She also supervised nurses' training; worked on Poor Law reform; gathered statistics on childbirth and campaigned for ventilation and drainage. In 1907, Florence Nightingale became the first woman to be awarded the Order of Merit. It was Florence

95 1820–1910.

96 Sidney Herbert.

Nightingale's example which inspired Henri Dunant to found the International Red Cross.[97]

The legal profession

In England, Canada and the United States, women were long denied entry to the legal profession. Two primary explanations suggest themselves. First, men had a personal interest in maintaining their privileged position. Secondly, women's exclusion was justified on the pretext of 'maintaining professional standards'. The first application from a woman to be enrolled as a solicitor in England was made in 1886, some seven years after Arabelia Mansfield had been admitted to legal practice in the United States. The application was rejected. In 1903, when Bertha Cave applied for admission to the Bar on behalf of herself and other law graduates, the Bar and the judges decided that the Bar should remain confined to men only. The first woman to be called to the Bar in England was Ivy Williams who succeeded in 1921. The first woman solicitor was Carrie Morrison who was admitted to practice in 1923. With the introduction of the female franchise, the Sex Disqualification Act of 1919 expressly stated the right of women to become barristers and solicitors. In that year, there were 20 women barristers. By 1955, there were 64, some 3.2 per cent. By 1976, the figure had reached 313, or 8.1 per cent and, in 1997 2,272, or 24 per cent. In 1995, of 63,628 practising solicitors in England and Wales, a mere 18,417, or 28.9 per cent, were women. In 1998, that figure has risen to 23,700, or nearly 33 per cent of the profession.

THE TWO WORLD WARS AND WOMEN'S EQUALITY

The First and Second World Wars[98] were to provide a major opportunity for women to participate in the public world previously almost exclusively occupied by men. With the outbreak of war in Europe in 1914, the suffrage movement found itself occupied with an altogether different challenge. Feminist strategists divided. On the one hand there were those women who saw in the war effort an opportunity for women to prove themselves worthy of the vote. On the other hand, there were feminists who adopted a pacifist stance, a difficult and personally dangerous position to adopt in the face of the threat to national freedom.

97 Marie Curie, 1867–1934, was the first outstanding woman scientist, winning the Nobel Prize twice: once with her husband in physics, once alone in chemistry. Born in Warsaw, which at the time was occupied by Russia, Marie Curie studied at the Sorbonne in Paris. She was to become the first woman professor at the Sorbonne. She died in 1934 as a result of years of exposure to radium.

98 See Rowbotham, S, *A Century of Women: The History of Women in Britain and the United States*, 1997, New York: Viking.

The contribution of women to the war effort, notwithstanding differences between suffragist activists, was seminal. Many upper- and middle-class women became nurses. Women not accepted by official organisations joined together on a voluntary basis. The Women's Land Army Service Corps, a voluntary organisation, became adopted officially and became the Women's Land Army. In 1917, the Women's Army Auxiliary Corps (WAAC) and the Women's Royal Naval Service (WRNS) were founded, to be followed by the Women's Royal Air Force in 1918. Women who had previously been employed in domestic service or as dressmakers joined the workforce. As the men left work for the services, the demand for female labour intensified, often in the face of strong opposition from male trade unions. But the demand for equality for women in the workplace grew: in 1918, women transport workers demanded equal pay – a demand which was not to be conceded.

In November 1918, peace was declared. With the return of the men from the war came the pressure for women to give up their employment in order to free the jobs for the men. But a fundamental shift in attitudes had occurred. No longer were women prepared to go back into domestic service: they had experienced the 'male' world, and demanded to remain included in it on an equal basis. The trades union movement became attractive to women: organisation was power. The Lord Chancellor established a Women's Advisory Committee. When the International Labour Organisation met for the first time in 1918, two women delegates were among the four delegates from Britain.

In the United States of America, there existed strong opposition against involvement in a European war. The conflict for women activists lay in the question of priority for the right to the vote and the need for peace. In 1917, the President[99] declared that those opposed to the war were disloyal citizens, and the Espionage Act introduced a new criminal offence of speaking or writing or organising against the war, and carried a possible prison sentence of 20 years and heavy fines.

In the post-war years of the 1920s in Britain, two principal strands of feminist thought emerged. On the one hand, the National Union of Societies for Equal Citizenship[100] (NUSEC) argued not for equal rights for women on the same basis as men, but on the basis of women's particular characteristics and needs. The Women's Co-operative Guild, which by 1930 had a membership of 66,566, also called for the recognition of women's differing needs, demanding better housing, health and maternity welfare services, libraries and municipal baths.

99 Woodrow Wilson.

100 Previously the National Union of Women's Suffrage Societies.

THE POSITION OF WOMEN IN CONTEMPORARY SOCIETY

The unlocking of the doors to the public world of work in Western societies has not resulted in equality within the world of work. Two factors dominate this unequal position: continuing discrimination against women in the workplace and in relation to promotion – covert if not overt – and the role of women as primary child carers.

A detailed study of patterns of work in four countries[101] – China, Japan, the United Kingdom and the United States of America – reveals not only a wealth of comparative statistical data, but also the extent to which work patterns are institutionalised and supported by State ideology. The data also indicates the extent to which the separation of the 'private sphere' (home and the family) from the 'public sphere' (work) has become institutionalised in Western capitalist industrialised societies. It was Max Weber who identified the necessity of the separation of the 'household' from the 'enterprise', in the interests of rational bureaucracy.[102] Stockman, Bonney and Xuewen state, in considering the analyses of Talcott Parsons, that there are two possible interpretations of the consequences of this separation in terms of the social roles of men and women. On the one hand, it can be argued that this separation fuels the evolution of the 'isolated nuclear family', which is functionally efficient for industrial capitalism, because it is mobile and also well adapted to fulfil 'socialisation functions'. Industrialisation and the growth of the nuclear family also, in Parsons' analysis, reinforces the division of labour within the family and the primary role of women as carers and the role of men as the primary earner.[103] The second interpretation concerns the rise in individuation and the recruitment of personnel on the basis of merit, and the correlative decline in the significance of race, ethnicity or gender. If this interpretation is adopted, it should follow that women enter the workplace on the basis of complete equality with men. The statistical data supports the former interpretation rather than the latter.

Participation in employment

Stockman, Bonney and Xuewen's comparative research reveals the extent to which political ideology affects the role of women in employment. In China, for example, with its emphasis on Chinese socialism, women's equality is a

101 Stockman, N, Bonney, N and Xuewen, S, *Women's Work in East and West: The Dual Burden of Employment and Family Life,* 1995, London: UCL Press.

102 Weber, M (1864–1920), *Economy and Society*, 1987, Berkeley: California: California UP. See, also, Parsons, T, *Societies: Evolutionary and Comparative Perspectives*, 1966, New Jersey: Prentice Hall.

103 Parsons, T, Bales, J, Olds, M, Zelditch, P and Slater, E, *Family, Socialisation, and Interaction Process,* 1955, New York: Free Press.

central feature of government policy. The participation of women in the workforce is the highest of the four countries studied, the State provides extensive child care facilities and there is an extensive sharing of domestic roles between husband and wife. By contrast, in Japan, an economy characterised by the large corporation, life-long employment (of men) and corporate provision of housing (for men and their families), women who are employed by the large corporation are taken on under very different conditions from men: '[T]heir position is much more marginal, temporary and peripheral.'[104] Whereas women may be recruited as full time employees initially, women will be expected to leave work after either marriage or childbirth. If they re-enter employment, it will be as temporary workers or on a part time basis: '[A] woman's career is seen as being based in the home as a wife and mother.'[105]

Of the four countries studied, China reveals the least gender discrimination, followed by the United States of America, the United Kingdom and Japan. In the United Kingdom, 61 per cent of women under the age of 65 are employed, against 64 per cent in the United States of America.[106] The employment rates of women dip markedly in Japan and the United Kingdom, but less so in the United States, and hardly at all in China, during the primary childbearing years of 24 to 35.

Occupational differences

In terms of occupational differences between the United States and the United Kingdom, women are under-represented in production, transport and labouring. In both countries women are concentrated in services and clerical and related occupations. In 1990, an estimated 78 per cent of women were in clerical and related occupations in Britain:[107] in the United States this figure rises to between 80 and 90 per cent.[108] In the top two occupational groups – professional, technical-related and administrative and managerial, 32 per cent of American women are employed, whereas in the United Kingdom that figure is only 19 per cent.[109]

104 *Op cit*, Stockman, Bonney and Xeuwen, fn 101, p 42.

105 *Op cit*, Stockman, Bonney and Xeuwen, fn 101, p 42.

106 *Op cit*, Stockman, Bonney and Xeuwen, fn 101, p 61, citing Blachflower, D and Oswald, A, 'International patterns of work', in Jowell, R, Witherspoon, S and Brook, L (eds), *British Social Attitudes: Special International Report*, 1989, Aldershot: Gower.

107 British Labour Force Survey, 1992, OCPS.

108 US Bureau of the Census, 1991.

109 *Op cit*, Stockman, Bonney and Xeuwen, fn 101, p 69, citing Dale, A and Glover, J, *An Analysis of Women's Employment Patterns in the UK, France and the USA*, 1990, London Employment Department Group, Research Paper 75. See, also, Dex, S and Shaw, L, *British and American Women at Work*, 1986, London: Macmillan; Brinton, M, *Women and the Economic Miracle: Gender and Work in Postwar Japan*, 1993, Berkeley, California: California UP.

Part time work

Part time work for women, particularly in the child-rearing years, is a feature of Japanese, United States and United Kingdom employment practices, but does not feature largely in Chinese society. Each of the capitalist countries, but not the communist-socialist, thus retains the distinction between the gendered role of mothering and the traditional significance of the 'private' as the place in which children are reared. Stockton, Bonney and Xeuwen reveal that in China, women are entitled to up to two years of maternity leave, although in practice, in the sample studied, three-quarters of women took six months or less. On their return to work, Chinese women are entitled to resume their careers at the same seniority level. By contrast in Japan, as noted above, women are expected to leave employment for child-rearing purposes, and if they return to the workforce, it will be at a much lower level.

Women's pay

In Japan, women's annual income amounts to only 47.58 per cent of men's income. In Britain, women's weekly earnings in 1987 were 67 per cent of men's. Part time female workers earned just 57 per cent of men's income, whereas full time working women earned 74 per cent of men's income.[110] Full time women workers in the United States earn 70 per cent of male earnings.[111] In China, by contrast with Japan the United States and the United Kingdom, there is very little difference in rates of pay between men and women. In Britain, part time work is heavily concentrated among married women with young children. Women who continue in full time employment with young children are generally those in the higher occupational jobs. In 1989–91, 34 per cent of women with children under the age of five in the highest occupations (ie, professions, employer or managerial), remained in full time work, compared with only 13 per cent of all mothers with children under the age of five. Of unskilled manual women workers only two per cent remained in full time employment.

The British Central Statistical Office Report 1995[112]

One of the most fundamental changes in the United Kingdom labour market this century has been the increasing participation of women, particularly the extent to which they have taken up part time work.[113]

110 *Op cit*, Stockton, Bonney and Xeuwen, fn 101, p 74.
111 *Op cit*, Stockton, Bonney and Xeuwen, fn 101, p 74, citing US Bureau of Census 1991.
112 Whitmarsh, A, *Social Focus on Women*, 1995, London: HMSO.
113 *Ibid*, p 21.

In 1971, 44 per cent of women were 'economically active' (in either full time or part time employment); in 1994 53 per cent, and the figure projected for the year 2006 is 57 per cent. By contrast, between 1971 and 1994, the economic activity rate for men fell to 73 per cent, and is projected to fall to 70 per cent by the year 2006. Of mothers with children between the ages of five and 10, in 1994, 20 per cent were working full time, 44 per cent part time, six per cent were unemployed[114] and 30 per cent were 'inactive'. The number of women working part time in the United Kingdom between 1984 and 1994 rose by 19 per cent, whereas the increase in women's full time employment was only 12 per cent. In 1994, 45 per cent of economically active women worked part time, nearly twice as many men as women worked full time, while five times as many women as men worked part time.

Childcare looms large in the explanations for economic activity, full or part time, or inactivity, and a woman's economic activity is also affected by the number of children she has. Of women with three or more children, over 50 per cent were economically inactive in 1994, compared with less than one-third of women with one child. Moreover, where there is more than one child the mother is most likely to be working part time, if at all. The number of places in registered day nurseries in the United Kingdom in 1993 was over 120,000, compared with 1981 when there were less than 20,000. The number of total day places available for children under five in 1993 was close to one million.[115] Given the number of women who could potentially be in the workforce, and compared with the position in China, women's poverty and economic underactivity is most clearly explained by the failure of successive governments to invest in childcare facilities.

Women's earnings

Women remain lower paid than men in the United Kingdom according to the Government's statistics. In 1994, one-third of women earned £190 per week or less, compared with only 13 per cent of men. On the other hand, 75 per cent of men earned over £230 per week compared with only 50 per cent of women.

Occupational data

Clerical and secretarial remains the highest source of employment for women, with nearly 80 per cent of active women being in such employment. Personal and protective services is second, with just under 65 per cent, sales only

114 In 1994, 885,000 women were unemployed.

115 The Labour Government elected in 1997 is committed to greater childcare facilities, and to introducing a legal right to enable both mothers and fathers to take unpaid leave to care for children.

slightly lower. Under 50 per cent of women are in associated professional and technical employment, and 40 per cent in professional employment. Just over 30 per cent of women are managers and administrators; 20 per cent plant and machine operatives, and approximately 10 per cent are in craft and related occupations. Women outnumber men by four to one in the health sector and by two to one in the education sector. However, when it comes to seniority of employment position, the statistics reveal another picture.

In primary schools in England, Wales and Northern Ireland in 1991–92, women represented 81 per cent of all teachers, but only 57 per cent of head and deputy head teachers. In secondary schools, women represent 49 per cent of all teachers, but only 30 per cent are head and deputy head teachers. In the police force, where women have traditionally been under-represented, 13 per cent (or nearly 20,000) of police officers in the United Kingdom in 1994 were female. In 1994, of Chief Constables, Deputy Chief Constables and Assistant Chief Constables of approximately 42 police forces, only six were women. There were nine Chief Superintendents, 36 Superintendents, 70 Chief Inspectors, 285 Inspectors, 1,330 Sergeants and 18,245 Constables. Among the officers of the armed forces in the United Kingdom in 1995, seven per cent were women.

CHAPTER 3

PATRIARCHY

Aristotle, *The Politics*:[1]

For the male is more fitted to rule than the female, unless conditions are quite contrary to nature ...

Bacon, *Abridgement of the Law*:[2]

... the husband hath by law the power and dominion over the wife, and may beat her, but not in a violent or cruel manner.

Luce Irigaray, 'The bodily encounter with the mother':[3]

Their discourses, their values, their dreams and their desires have the force of law, everywhere and in all things. Everywhere and in all things, they define women's function and social role, and the sexual identity they are, or are not, to have.

While the theme of patriarchy runs throughout this book, it is useful to focus on the concept at this early stage.[4] Patriarchy and patriarchal theory, originating in ancient Greek thought, may be traced in English political theory at least to the seventeenth century which represented its high watermark. Notwithstanding its demise as a dominant political philosophy, however, patriarchy remains evident in both the public and private spheres of life and in the laws and legal institutions regulating society.

EXPLAINING PATRIARCHY

Patriarchy represents one of the most conceptually and analytically complex theoretical constructs and lies at the heart of traditional jurisprudence and the feminist critique. Not only is the concept difficult, but there exist also differing contemporary interpretations of it. Thus liberal feminists, cultural feminists, radical feminists, Marxist-socialist feminists, black feminists, lesbian feminists all have perceptions regarding patriarchy which while often overlapping, by no means converge into a coherent agreed definition. Thus the paradox exists:

---

1 Aristotle, *The Politics*, Sinclair, TA (trans), 1962, London: Penguin, Bk I xii, 1259a37.

2 1832.

3 Irigaray, L, 'The bodily encounter with the mother', in *Sexes et Parentés*, Macey, D (trans), 1993, New York: Columbia UP.

4 Patriarchy: a form of social organisation in which a male is the head of the family and descent, kinship, and title are traced through the male line; any society governed by such a system: *Collins English Dictionary*, 3rd edn, 1991, HarperCollins, p 1143.

patriarchy represents a core concept within feminist analyses of society and law, yet the content and meaning of that core concept remain contentious.

Theoretical explanations of the origins of patriarchy

Early political conceptions of patriarchy

In *Leviathan,* 1653, political philosopher Thomas Hobbes[5] laid to rest the confusion between adherence to the law of God and the law of man. The time of the 'Divine Right of Kings', in which the monarch claimed absolute power over and allegiance from his subjects on the basis that monarchical power was derived directly from God, had passed. In its place, Hobbes posited the Mortal God, the Leviathan, sovereign over all his subjects and to whom all subjects owed allegiance in return to the protection of the sovereign. In the turbulence of Hobbes' times, the Leviathan offered both security and social stability. Laws are but the commands of the sovereign to his subjects. The key to understanding sovereignty lies in the core concept of power – absolute power. In Wayne Morrison's assessment, 'Hobbes ushers in the modern subject-sovereign relationship and provides a new epistemological configuration and legitimacy for the power to command'.[6] That power, albeit gained through the consent of the governed, is patriarchal.

Hobbes appears ambivalent about the status of women. In *Elements of Law,* for example, Hobbes writes that 'the father or mother of the family is sovereign of the same'.[7] Elsewhere, it appears that only fathers have patriarchal right.[8] In *Leviathan,* Hobbes discusses the concept of equality. It is clear at this point that this equality – which stems from the ability of each individual to injure or kill another – includes women. The significance of the individual power to harm others is the basis of his political philosophy: in order to prevent harm and to ensure social stability, power must be conferred, through consent, to a sovereign: a Leviathan. In relation to children, the mother is 'sovereign'.[9] In Susan Moller Okin's analysis, this sovereignty later disappears from view, and Hobbes 'proceeds to present the family as a strictly and solely patriarchal institution'.[10]

5 See Morrison, W, *Jurisprudence: From the Greeks to Post-modernism,* 1997, London: Cavendish Publishing, Chapter 4.

6 *Ibid*, p 99.

7 Hobbes, T, *De Corpore Politico,* Chapter IV, p 158, and see Sommerville, JP, *Thomas Hobbes: Political Ideas in Historical Context,* 1992, Basingstoke: Macmillan.

8 For discussion of Hobbes' views, see Pateman, C, *The Sexual Contract,* 1988, London: Polity, Chapter 3; Moller Okin, S, *Women in Western Political Thought,* 1979, Ewing, New Jersey: Princeton UP, Chapter 9.

9 Hobbes, T, *De Cive,* repr 1972, Garden City: Doubleday & Co, IX, 3.

10 *Ibid*, Moller Okin, fn 8, p 198.

Patriarchy was central to the work of Sir Robert Filmer writing in the seventeenth century,[11] and to John Locke who launched a devastating attack on Filmer's work.[12] As political theory, patriarchalism reflected the view of society being ruled by an absolute ruler, to whom all subjects were subservient. No individual was free: each was subordinate to a superior political force. Patriarchy explained all social relations: sovereign/subject, father/child, master/servant. Each has his or her assigned role, not predicated on choice but on some form of natural allocation of societal roles. The rationale for patriarchal power lay, for Filmer, in his interpretation of the scriptures, and the role assigned to Adam by God:

> By the appointment of God, as soon as Adam was created he was monarch of the world, though he had no subjects; ... Adam was a King from his creation ... Eve was subject to Adam before he sinned; the angels who are of a pure nature, are subject to God ...[13]

For Filmer, the idea of some form of social contract between the people and the sovereign was mythical.[14] Firmly opposed to the idea of social consent, and the notion that citizens somehow, somewhere, at some time, agree to be governed on certain contractual terms, Filmer mounted a fierce attack. If the consent of the people is required, who are these people? Do they include women and children? Are children to be included in the votes of their parents, as if they had 'tacitly consented'? Such an argument could not, in Filmer's view, be sustained with logic. Men were not born free at birth, as social contract theory insisted, rather men are born into a preordained subject status: for men subjection to the monarch, for women subjection to the monarch and her father and husband.

John Locke took issue with Filmer on a number of fronts. On the sovereignty accorded to Adam by Filmer, Locke took issue with Filmer's use of biblical sources,[15] arguing that the references provided no authority for the sovereignty of man alone. Locke, however, also remained ambivalent about women, seemingly accepting the 'natural' inferiority of women's social status, but always insisting that women could overcome their 'natural' disabilities.

It is with the *Second Treatise* that Locke develops his own distinctive theory of social relations rooted firmly in social contract theory. Men and women enter into a voluntary contract with each other:

---

11 Filmer, R, *The Anarchy of a Limited or Mixed Monarchy*, 1648; *The Freeholder's Grand Inquest*, 1648; *Observations upon Aristotle, Touching Forms of Government*, 1652; *Patriarcha*, 1680. See Laslett, P (ed), *Sir Robert Filmer, Patriarcha and Other Political Works of Sir Robert Filmer*, 1949, Oxford: Basil Blackwell.

12 Locke, J, *Two Treatises on Government* (1690), 1924, London: JM Dent.

13 *Ibid*, Laslett, p 289.

14 On social contract theory see, for further discussion, Chapter 6.

15 Specifically, *Genesis*, 3:16.

> Conjugal Society is made by a voluntary Compact between Man and Woman: tho' it consist chiefly in such a Communion and Right in one another's Bodies, as is necessary to its chief End, Procreation; yet it draws with it mutual Support and Assistance, and a Communion of Interest too, as necessary not only to unite their Care, and Affection, but also necessary to their common Off-spring, who have a Right to be nourished and maintained by them, till they are able to provide for themselves.[16]

However, there remains within Locke's writing hints of patriarchy. Whereas husband and wife are equal, there will be occasions when a 'last Determination' must be made. That last Determination falls to the husband, by virtue of his greater 'ability and strength'. This power of decision arises in matters pertaining to jointly held properties and interests. In Locke's view, the husband's power leaves the wife:

> ... in the full and free possession of what by Contract is her Peculiar Right, and gives the Husband no more power over her Life, than she has over his. The *Power of the Husband* being so far from that of an absolute monarch that the *Wife* has, in many cases, a Liberty to *separate* from him; where natural Right or their Contract allows it, whether Customs or Laws of the Country they live in; and the Children upon such Separation fall to the Father or Mother's lot, as such contract does determine.[17]

In relation to civil society, man is originally born into a 'state of nature'. The transformation from a state of nature to civil society is brought about, through the consent of its members, in order to provide the rules necessary for the governance of all people. Locke's position on women within the political society remains obscure. On the one hand, Locke is clear as to women's natural equality. On the other hand, ultimate decision making power over matters of common interest is accorded to the husband. The question then arises as to whether women are accorded political equality alongside their husbands, or whether it is the husband who is deemed to be representative of the family in political life. Locke separates paternal right within the family from political right. By means of this separation, woman is excluded from the political sphere and confined, in the 'natural subordination' within the private sphere of the family.[18]

In the nineteenth century, John Stuart Mill was to consider the status of women in society. Mill regarded the relationship between the sexes as one characterised by the 'legal subordination of one sex to the other'.[19] In his view, this subordination of women by men, came about not by any conscious thought or experimentation with differing forms of social organisation, but rather through the unreflective acceptance of the status quo handed down

16 *Op cit*, Locke, fn 12, Pt II, p 78.

17 *Op cit*, Locke, fn 12, Pt II, p 82.

18 See *op cit*, Pateman, fn 8, Chapter 4.

19 Mill, JS, *The Subjection of Women* (1869), 1989, Cambridge: CUP, p 119.

through history. In the 'earliest twilight of human society' women were subjugated by men on the basis of their physical inferiority, and that state of subjection had simply continued and become translated into rules of law. With slavery abolished, the state of marriage, for Mill, remained the last vestige of slavery in society.

Lawful patriarchy within the family in earlier times

Women in the nineteenth century, governed by the doctrine of 'one flesh', found themselves tied to husbands whose every whim – violent or sexual – could be forced upon her, with no legal rights over her children whatsoever, thus tying her more firmly into a state of dependency in the condition of slavery.[20] This view is endorsed by Sir Henry Maine:

> I do not know how the operation and nature of the ancient Patria Potestas can be brought so vividly before the mind as by reflecting on the prerogatives attached to the husband by the pure English Common Law, and by recalling the rigorous consistency with which the view of a complete legal subjection on the part of the wife is carried by it ...[21]

The legal subjection included the right of the husband to sexual intercourse with his wife. Under the one flesh doctrine (and the flesh was his) enshrined in law, on marriage the wife impliedly consented to sexual intercourse 'on demand' (the converse position did not, of course, pertain). Until 1884, a wife refusing her husband's sexual demands could find herself imprisoned for such refusal, and the husband could apply for an order of restitution of conjugal rights against his wife. Moreover, until 1891, in order to enforce his rights, the husband was entitled to imprison his wife in the matrimonial home.

In earlier times, the English church courts had jurisdiction over matters of morals. The underlying rationale for such involvement in private morality, enforced predominantly against women, and most especially married women, lay in the need to preserve legitimate lines of succession to family property, and to uphold the authority and superiority of men. Up until 1746, adultery could be prosecuted as a misdemeanour. By 1670, if a woman was found to have committed adultery, the husband could pursue a claim against the seducer of his wife for criminal conversation: 'crim con'.[22] Criminal conversation was a common law adaptation of the law of trespass, and was tried in the King's Bench Division of the High Court. The wife played no role in the proceedings, and was unable either to testify on her own behalf or call witnesses: she, after all, had no legal personality. Trial was by jury. The award

20 On women's former legal disabilities, see, further, Chapter 2.

21 Maine, H, *Ancient Law,* 1972, London: JM Dent, pp 93–94.

22 For a detailed history of this action, see Stone, L, *Road to Divorce: England 1530–1987*, 1992, Oxford: OUP, Chapter IX.

of damages was high: in 1790, a jury awarded, without deliberation, £700; in 1802, £5,000, and in 1815, after an hour's deliberation, an award of damages was reduced from £30,000 to £15,000. The action for crim con was abolished in 1857, following fierce debate, when the first Divorce Bill was passed. Objections to the action included the publication of court proceedings which caused English law to come into disrepute, especially in Europe, and no doubt a degree of public hilarity at the expense of the parties. The action was also deplored for its representation of women as mere property, injury to which could be recompensed by an action for damages. Further, Lawrence Stone argues, there was a sense of concern over the confusion between the 'external world of commerce and the marketplace with the private world of Victorian domesticity and love', two spheres which the public mind was coming increasingly to view as entirely separate.[23]

The introduction of judicial divorce in 1857 did not mark the end of the patriarchal tradition. Despite strong advocacy for equality in the law of divorce between men and women, Parliament introduced divorce on restrictive discriminatory terms. Whereas a husband could sue for divorce on the basis of his wife's adultery, a wife could only petition on the husband's adultery if this were accompanied by incest, bigamy, cruelty, involuntary desertion or rape or an unnatural offence.[24] With the action for crim con abolished, some means was deemed essential to allow husbands to recover damages from a seducer: the concept of the 'co-respondent' was introduced. The rationale for the availability of divorce on the ground of adultery *simpliciter* against the wife continued to lie in the fear that a wife might try to foist an illegitimate child on the husband, thus threatening the line of the legitimate succession of property.

A further battle raging at the time of the divorce reform was over a woman's right (or non-right) to own or manage her property on marriage. For wealthy women, the device of settlement could be used, whereby a wife kept control over her property during marriage through trustees. For the bulk of the population, however, no such protection was available. On marriage wives could neither own nor manage property. Moreover on separation a husband remained legally entitled to seize his wife's property (juristically, the property became his on marriage, and hence it follows that it was 'his' property). The Divorce Reform Act 1857 secured the right for separated or deserted wives to hold and manage their own property, but did not extend the same right to women living in marriage: that was not to be achieved until 1882.[25]

---

23 *Op cit*, Stone, fn 22, p 291, citing Houghton, N, *The Victorian Frame of Mind*, 1957, New Haven: Yale UP, pp 348–93.

24 Matrimonial Causes Act 1857, s 27.

25 See the Married Women's Property Act 1882.

The availability of divorce, and the resort to divorce by women, was overshadowed by the number of women who applied for maintenance in the courts. In 1886, the Maintenance of Wives Act was passed, which provided that a magistrates' court had jurisdiction to award temporary order for maintenance for wives of deserted wives or victims of domestic violence. Stone records that in around 1900, some '10,700 wives applied on their own behalf' and 'another 4,000 or so applications were made on behalf of paupers by the Poor Law authorities'. At the same date, only 700 applications for divorce were made.[26]

It was in the Victorian era that English married women were first given the right to custody over their children. In relation to unmarried mothers, the law, since at least the time of Elizabeth I,[27] provided that children born outside marriage were under the sole control of their mothers: in relation to their natural fathers, such children were *fillius nulius.* Married women accordingly were discriminated against under the common law. A father's right to the physical possession of his child could only be lost if to enforce the right would lead to the child's moral or physical harm.[28] From 1660, if the father appointed a testamentary guardian, the guardian's rights superseded those of the mother which would otherwise have accrued on the death of her husband.[29] Talfourd's Act 1839 for the first time entitled a mother to claim custody of her children until they reached the age of seven and contact with them until the age of majority, provided that she had not been guilty of adultery. Mothers' rights were extended in 1873,[30] giving the courts jurisdiction to grant custody to a mother until the child reached the age of 16. The right of the father to defeat the mother's claim to custody by granting a testamentary guardian was abolished in 1886.[31] In 1925, the Guardianship of Infants Act provided that neither mother nor father had superior claims to their children before the courts. That Act also permitted mothers for the first time to appoint testamentary guardians. It was not to be before 1973 that the first statutory declaration was to be made as to the equality of mothers and fathers equal, separately exercisable rights.[32]

26 *Op cit*, Stone, fn 22, p 386.
27 Reigned 1558–1603.
28 See *Re Andrews* (1873) LR 8 QB 153, p 158.
29 Tenures Abolition Act 1660.
30 Custody of Infants Act 1873.
31 Guardianship of Infants Act 1886.
32 Guardianship Act 1973, s 1.

CONTEMPORARY PATRIARCHAL MANIFESTATIONS

The 'public' sphere

Patriarchy operates in both the 'public' and the 'private' sphere of life.[33] In the public sphere, one of the most enduring historical exclusions of women lay in the denial of the right to vote.[34] By denying, through law, the right to vote, women were denied the opportunity to influence the political process and the content of legislation, remaining dependent upon men to represent their interests. With the formal right to equality in the electoral process secured, however, the patriarchal tradition remains evident in the public sphere of politics and employment.

Women remain under-represented in the vast majority of legislatures around the world. In the United Kingdom, the current membership of the House of Commons is 547 men and 112, or 17 per cent, women, the latter figure being the highest proportion of women in Parliament in history. The highest figure for participation in the legislative process comes from Norway, with approximately 40 per cent of women in the legislature. Popularly regarded as 'one of the best (man's) clubs in London', Parliament is not organised to suit the needs of women. The hours of work are a principal problem, with late night, and occasionally all night sittings which disadvantage women who also carry family responsibilities. The major political parties, up until the 1997 election, placed little emphasis on the selection of women parliamentary candidates, and it is more than probable that constituency selection committees, whose membership is predominantly male, would be cautious in selecting a woman, particularly one with young children.

The legislature is not the only institution to reflect an exclusionary position in relation to female membership.[35] As the data provided in Chapter 2 reveals, despite the formal equality of women in the employment sector, women continue to earn less than men, continue to have less chance of promotion than men, and remain under-represented in the higher echelons of the professions, management and industry. Many women who have broken through the 'glass ceiling' have done so largely by conforming to male expectations and forfeiting their private lives, and in particular children.

33 On which distinction, see, further, Chapter 6.

34 On which struggle, see, further, Chapter 2.

35 A classic illustration of Victorian values is reflected in the fact that even Barbara Mills, the first female Director of Public Prosecutions in England, and a graduate and honorary fellow of her Oxford University college, has been denied full membership of the Oxford and Cambridge Club: see Figes, K, *Because of Her Sex*, 1995, London: Pan, p 49.

The 'private' sphere

The private sphere of life provides the backdrop for the public sphere: relations within the private sphere, and particularly the division of labour within the family, often if not invariably dictate the capacity of individuals to participate fully in the public world of government and employment.

The invisibility of women

Women's confinement to the 'private' – to the domestic world traditionally unregulated by law – ensured that women were largely invisible to the law. Women were the 'other sex', relegated to the control and sovereignty of the husband. Thus men were the subjects of law, women invisible. As seen above, English law has been slow to divest itself of this ideological stance. The invisibility of women masked the absence of women's rights. That the law only became alert to the problem of domestic violence in the 1970s attests to that invisibility.[36] Law's blindness to the private sphere explains the perpetuation of exploitation of and violence against women in the family. That which law does not explicitly proscribe infers implicit acceptance. The position of wives under English law with regard to marital sexual intercourse was determined by Sir Matthew Hale in *The History of the Pleas of the Crown*:[37]

> But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given herself up in this kind unto her husband which she cannot retract.[38]

The power of the husband to discipline his wife in marriage was propounded by Bacon writing in 1736: a husband might beat his wife, but not in a 'cruel or violent manner', and confine her in order to ensure her obedience.[39] While Sir William Blackstone, writing in the late eighteenth century, asserted that the practice of chastisement had died out in 'polite society', he accepted that 'the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege'.[40]

36 See Pizzey, E, *Scream Quietly or the Neighbours Will Hear*, 1974, London: Penguin; Domestic Violence and Matrimonial Proceedings Act 1975, s 1; Domestic Proceedings and Magistrates' Courts Act 1978, s 16.

37 Hale, M (Sir), *The History of the Pleas of the Crown* (1736), 1971, London: London Professional Books.

38 *Ibid*, Vol 1, Chapter 58, p 629. For a literary example of the assertion of husbands' rights, see Galsworthy, J, *The Man of Property, (The Forsyte Chronicles, I)*, (1906), 1951, London: Penguin, pp 264–65: 'The morning after a certain night on which Soames at last asserted his rights and acted like a man, he breakfasted alone ... [i]n the cool judgment of right-thinking men, of men of the world, of such as he recollected often received praise in the Divorce Court, he had but done his best to sustain the sanctity of marriage, to prevent her [Irene] from abandoning her duty, possibly, ... from [adultery].'

39 Bacon, *Abridgement of the Law*, 1736, Tit baron and Feme (B).

40 Blackstone, Sir W, *Commentaries on the Laws of England 1765–69*, 1978, New York: Garland.

That in the United Kingdom, domestic violence did not come to the renewed attention[41] of the legislature until 1975,[42] and the criminalisation of rape within marriage did not come about before 1992,[43] attests to law's seminal blindness to social fact and its disregard for male dominance within the private world of the family.[44]

It is to this classification of the private and the public spheres of life – the former largely unregulated, the latter closely regulated – that feminist legal scholars have devoted much analysis and discourse. In feminism's now seminal phrase, 'the personal is political'. From a feminist perspective, so-called 'private' life cannot be isolated from society's attention: the refusal of society and law to recognise the realities of patriarchy have for too long rendered women vulnerable to abuse, manipulation and violence.

However, whilst the germ of this thesis is relatively easy to digest, closer analysis reveals many complexities, for the matter in hand is crucially related to liberal political philosophy and to continued (male) resistance to the realisation of the full equality of women. It must be conceded that conceptualisation of the 'public' and 'private' spheres of life is by no means lacking in difficulty, as is the extent to which law exerts its regulation. The classic illustration of the 'private sphere' is that of the family. Yet, nowadays, the State increasingly impacts upon the family via, *inter alia*, the regulation of marriage and divorce; the treatment of children; financial provision; domestic violence; social security entitlements. Nor is the 'public sphere' more easily or more accurately definable: if the 'public' sphere is that area of life which is regulated by law, as one conceptualisation insists, we may then be clear that matters such as employment, the provision of goods and services (including health and education), for example, fall clearly within the public sphere.

41 See Power Cobbe, F, *Wife Torture in England,* 1878, which led to the Matrimonial Causes Act 1878, giving a criminal court the power to make a separation, maintenance and custody order in favour of a wife whose husband had been convicted of aggravated assault on his wife, if her future safety was in doubt.

42 See the *Report of the Select Committee on Violence in Marriage,* HC 553, 1974–75. See, also, *op cit*, Pizzey, fn 36; Maidment, S, 'The law's response to marital violence in England and the USA' (1977) 26 ICLQ 403; Eekelaar, JM and Katz, SN, *Family Violence*, 1978, Toronto: Butterworths; Hoggett, B, Pearl, D, Cooke, E and Bates, P, *The Family, Law and Society: Cases and Materials,* 4th edn, 1996, London: Butterworths, Chapter 9.

43 *R v R* [1992] 1 AC 599; *SW v United Kingdom; CR v United Kingdom* [1996] 1 FLR 434; [1996] Fam 275. See the Law Commission's response in *Rape Within Marriage,* Working Paper No 116, 1990, London: HMSO.

44 On domestic violence, see, further, Chapter 11.

Extending the private sphere?

There is now a well documented movement in the West, and particularly in the United Kingdom, towards 'privatisation' of the ownership and management of public service provision.[45]

Furthermore, the privatisation movement may be viewed as extending to previously regulated areas of the 'private' which have formerly been regulated by law. If one takes by way of example the law relating to divorce, financial provision and property settlements on divorce, up until the present time these have been largely regulated by the Matrimonial Causes Act 1973, which provides a detailed scheme of the facts sufficient to evidence the breakdown of marriage, and an equally detailed statutory scheme for the settlement of disputes/claims over ancillary matters relating to financial provision and matrimonial property. It is true that the law allows – even encourages – parties to a marriage to reach agreements over such matters which can then be incorporated into an order[46] endorsed by the court. Thus, increasingly, parties to a marriage are seen to be 'bargaining in the shadow of the law'. In the 1990s, however, the Government has been seeking to roll back the frontiers of State regulation of divorce and its implications. Privatisation is again the key word: the facts evidencing the breakdown of marriage are to be removed from the statute book. From 1999 in England, divorce will become available at the instigation of either party following the filing of a declaration that the marriage has irretrievably broken down, followed by a substantial period of reflection during which agreements must be reached, with the assistance of some form of mediation, as to the arrangements for any children of the marriage and matters pertaining to financial provision and property distribution.[47] While in practice the current law has, in the view of the Law Commission, proved 'misleading, discriminatory and unjust',[48] the privatisation of divorce under the reformed law may prove equally disadvantageous for women seeking to reach fair agreements about finance, property and children following divorce unless the mediation process provides the requisite protection for the economically weaker party.[49]

45 See, eg, the privatisation policy of the Conservative Government, 1979–96, during which British Gas, British Rail, the British Nuclear Industry, British Telecom have all been privatised.

46 A 'consent order'.

47 Family Law Act 1996.

48 Law Commission, *Facing the Future: A Discussion Paper on the Ground for Divorce*, Law Com No 170, 1998, London: HMSO; Law Commission, *Family Law: The Ground for Divorce*, Law Com No 192, 1990, London: HMSO.

49 This fear is borne out by evidence from Australia and New Zealand. See Neave, M, 'Private ordering in family law – will women benefit?', in Thornton, M (ed), *Public and Private: Feminist Legal Debates*, Melbourne: OUP, p 144.

A similar philosophy may be found in the law relating to children. Until the Children Act 1989 was brought into force, the guiding principle was that where parents separated, it was a matter for the courts to determine – utilising the concept of the best interests of the child – the future arrangements regarding children.[50] Under public law provisions, the grounds on which local authorities could intervene to protect children from poor parenting (whether evidenced by neglect, ill-treatment or abuse) were stringently defined by statute and the courts.[51] The policy of local authorities was geared primarily to the protection of the child and their powers both sweeping and severe. Under the Children Act 1989, however, the protection policy has given way to a policy which attempts to promote the idea of a partnership between local authority social services departments and the parents of children, whereby local authorities may provide advice and assistance, and if necessary voluntary accommodation for children in need.[52] Where, however, a local authority wishes to protect a child through taking it into non-voluntary care, and under the old law there existed numerous grounds on which this could be effected against the parents' wishes, there exists nowadays a single criterion on which children may be removed from their parents: that of avoidable 'significant harm' attributable to the parents' care.[53]

In relation to both the private and public law relating to children, where matters come before a court of law, the court is directed both to give paramountcy to the welfare of the child,[54] but also not to make any court order unless so to do would make a significant contribution to the child's welfare.[55] That there is a potential for a conflict between these two guiding principles is evident. It is not intended here to pursue a detailed analysis of family law, but rather to demonstrate that, at differing times, employing differing philosophies, the 'private' area of life may be both significantly regulated and then deregulated according to prevailing political philosophy.

Moreover, it is not necessarily the case that regulation or deregulation is uniform in respect of the private area of life. Law may regulate by deliberate statutory or common law control, but it may equally be regulated by *ignoring* certain aspects of private life. An illustration of such 'non-control' may be seen in relation to homosexuality. The law is clear, for example, that the only persons eligible to marry under English law are respectively male and female.

50 See, eg, Guardianship of Minors Act 1971; Guardianship Act 1973; Matrimonial Causes Act 1973; Domestic Proceedings and Magistrates' Courts Act 1978.

51 See, eg, the Custody of Children Act 1891; Children and Young Persons Acts 1933 and 1963; Children and Young Persons Act 1969; Children Act 1975.

52 See Pt II and Sched II of the Act.

53 See the Children Act 1989, s 31; see, also, for the House of Lords' interpretation of this section, *Re M (A Minor) (Care order: threshold conditions)* [1994] 2 AC 424; [1994] 2 FLR 577.

54 Children Act 1989, s 1.

55 Children Act 1989, s 1(5).

Consistently, the law has refused to recognise the validity of a purported marriage between persons of the same sex, and furthermore, even where one of the parties has undergone a sex change operation, the law will not recognise – for the purposes of the law relating to marriage – that a person's gender has been changed and may be recognised.[56]

By refusing to recognise a person's individual human right to marry according to the law,[57] that individual is rendered non-existent, an 'outsider', a non-person in the eyes of the law. Even the law's refusal to recognise the existence of certain categories of person is inconsistent. As Katherine O'Donovan has argued,[58] male homosexuality is regulated by law, whereas female lesbianism is unregulated, and through regulation homosexuality is defined by concepts of 'circumscription of areas of privacy' whereas female lesbianism may be categorised as 'invisible' to the law.[59]

Abortion law also represents an area which straddles the public and private. Whereas, *par excellence,* the legal right to abortion should be viewed as a matter for a woman's determination alone, the cultural and religious sensitivities towards abortion intrude. In the United Kingdom, the Abortion Act 1967[60] provides that an abortion is available on medical (psychological and physical) and social grounds for a woman up to 22 weeks of pregnancy, upon the certification of two doctors.[61] Thus, the availability of abortion – dependent upon medical approval – confers not an absolute right but rather a conditional claim. In the Republic of Ireland, with the close nexus between Church and State, abortion remains unavailable. In the United States of America, the abortion issue has become one of fierce constitutional and feminist debate. From a feminist standpoint, the mother's 'right' to control her own body is circumscribed by external – public – factors represented by the interest of the State and society and the interests of the genetic or social father of the foetus.

Despite conceptual difficulties, however, the notions of the public and the private retain a central importance to feminist legal theory, an importance which transcends analysis of purely domestic law and may been seen also in relation to international law. Hilary Charlesworth, for example, has argued that the public/private dichotomy explains the differing treatment under

56 See *Corbett v Corbett* [1971] P 83; *Rees v United Kingdom* [1987] 2 FLR 111; *Cossey v United Kingdom* [1991] 2 FLR 492.

57 See the European Convention on Human Rights and Fundamental Freedoms, Art 12.

58 See O'Donovan, K, *Sexual Divisions in Law,* 1985, London: Weidenfeld and Nicolson, especially Chapter 1.

59 *Ibid*, O'Donovan, p 7. See also, Mason, G, '(Out)Laws: acts of proscription in the sexual order', in Thornton, *op cit*, fn 49.

60 As amended by the Human Fertilisation and Embryology Act 1990.

61 Abortion Act 1967, s 1(1)(a), as amended by the Human Fertilisation and Embryology Act 1990.

international law of differing crimes.[62] Thus genocide, torture, violence in armed conflict may all attract sanctions. However, international law has been slow and cautious in its approach to the specific problems which women suffer in wartime: in particular rape by members of armed forces. International law has also proven inept in changing cultural practices which particularly affect women. Whether the practice be that of the footbinding of women, or Hindu suttee – the burning of the widow on the funeral pyre of the husband – or that of the circumcision of young girls and women, international law has shown a willingness to consign such practices to the private sphere which is 'not the law's business'.

INEQUALITY IN THE PUBLIC AND PRIVATE SPHERES

The struggle for the enfranchisement of women has been discussed in Chapter 2. As noted there, the right to vote is the hallmark of citizenship, of full participation in the *polis*. However, whilst the vote for women was finally won across the Western world, that right did not automatically confer full and equal rights upon women in other spheres of life. The legal and medical professions represented two of the most, but certainly not the only, intractable bodies which opposed women's entry. As Kate Millett has written:

> [O]ur society, like all other historical civilisations, is a patriarchy. The fact is evident at once if one recalls that the military, industry, technology, universities, science, political office, and finance – in short, every avenue of power within the society including the coercive force of the police, is entirely within male hands.[63]

The significance of patriarchal attitudes within both the public and private spheres has a resonance far greater than simply the statistical representation of women in differing walks of life. The historical fact of gendered inequality, absorbed into law, explains the phenomenon of hierarchy within law – man as the subject of law, women the 'other'. While the law speaks in gender-neutral language, deconstructing the language of law reveals that the primary subject of law is male.[64] Man is the referent by which woman is judged. It is by the imposition of male standards that a woman is constructed. In the public sphere of paid employment, man is the paradigmatic subject of the law. Manifestations abound: for women to succeed, they must succeed by male standards and on male terms; sexual harassment in all sectors of employment remains largely unabated, notwithstanding its legal proscription; in the

62 Charlesworth, H, Chinkin, C and Wright, S, 'Feminist approaches to international law' (1911) 85 AJIL 613. (See *Sourcebook*, p 537.)

63 Millett, K, *Sexual Politics* (1972), 1977, London: Virago, p 25.

64 See, further, Chapter 1 on feminist legal methods.

United Kingdom, women but not men are entitled to maternity leave, thus perpetuating the notion that women alone should bear the practical responsibility of nurturing and the inevitable consequence of career disruption and the problem of re-entry into employment at the same level. Women's work in the private sector has profound implications for her work in the public sphere. Women continue to bear the brunt of domestic and childcare responsibilities, irrespective of their role in paid employment. The female paid employee does not leave work in the public sphere for relaxation in the private sphere. For here too she toils. Of the four societies studied by Stockton, Bonney and Xuewen,[65] only in China do women participate on equal terms in the public sphere of work and enjoy a significant sharing of responsibilities in the private sphere of the family.[66] By contrast in Japan, the United States and the United Kingdom, women, irrespective of their employment status, continue to undertake the role of primary domestic worker. It is this responsibility which contributes so significantly to women's low employment status and the predominance of women in part time employment, and the designation of so many low status jobs as 'women's work'.

The Subject of law: woman as 'Other'

It is to Simone de Beauvoir[67] that credit is due for her perceptions about women as 'Other':

> Now, what peculiarly signalises the situation of woman is that she – a free and autonomous being like all human creatures – nevertheless finds herself living in a world where men compel her to assume the status of the Other.[68]
>
> History has shown us that men have always kept in their hands all concrete powers; since the earliest days of the patriarchate they have thought best to keep woman in a state of dependence; their codes of law have been set up against her; and thus she has been definitely established as the Other.[69]

In the linguistic tradition of binary opposites,[70] subject/object, self/other, male/female, public/private, power/powerlessness, dominance/subordination etc the former half of the pair is the dominant, the latter half the subordinate. The self of law is the male self. The status of 'manhood', according to Hegel, was acquired by 'the stress of thought and much technical

65 The United States of America, United Kingdom, Japan and China. The research is discussed in Chapter 2.

66 Stockton, N, Bonney, N and Xuewen, S, *Women's Work in East and West*, 1995, London: UCL Press.

67 See de Beauvoir, S, *The Second Sex* (1949), Parshley, H (ed and trans), 1989, London: Picador.

68 *Ibid*, p 29.

69 *Ibid*, Part III, Chapter 1, p 171.

70 See on this, further, Chapter 9.

exertion'.[71] That male selfhood, manhood, required clear delineation from woman. The male is depicted universally as powerful, rational, logical, reasonable and non-affective (in public). The universal depiction of woman, on the other hand, is as emotional, irrational, lacking reason and powerless. Thus woman's construction, as the Other, and against the male standard, defines what men are not. Woman is thus, in Luce Irigaray's analysis,[72] a man's mirror, a mirror which in the words of Ngaire Naffine, 'reflects him back whole, as a clearly defined image'.[73]

Where the legislature acts ostensibly to eliminate through law those practices which discriminate against women, or which disable women – physically, emotionally or psychologically – the ironic consequence is that the law is framed either in male language, or cast in terms which ignore the effect of such practices on women by introducing legal standards which deny women's subjectivities. Three examples of this phenomenon will be considered here. The first is the law relating to physical violence against women and the treatment of women by the legal system who respond with violence to the infliction of violence upon them; the second the law relating to sexual harassment; the third the law relating to pornography. While each of these examples are discussed more fully elsewhere in this work, their relevance to the issue of patriarchy and the public/private debate demands introductory coverage at this point.

Physical violence against women

Prior to the introduction of specific domestic violence legislation, English criminal law provided (and of course continues to provide) a range of charges regulating violent behaviour: ranging from assault and battery through to rape, manslaughter and murder. It is the law relating to domestic violence and rape which is particularly revealing of law's exclusion of women's subjectivities.

Domestic violence – statistically most frequently inflicted by a man on a women – may be represented as the successor to, or perpetuation of, the formerly socially accepted right of men to control their wives; rape as the manifestation of male power over women. As a phenomenon, domestic violence is inherently and inseparably connected to male power and female powerlessness; male dominance and female subordination.

Criminologists and psychologists seek rational explanations for the phenomenon regarded as one of the most widespread and under-reported crimes throughout the world.[74] Thus, social deprivation, economic

71 Hegel, G, *Philosophy of Right,* Knox, T (trans), 1952, Oxford: OUP, p 33.

72 See Irigaray, L, *Speculum of the Other Woman,* Gill, G (trans), 1985, New York: Cornell UP.

73 Naffine, N, 'Sexing the subject (of law)', in Thornton, *op cit*, fn 49, p 36.

74 See the United Nations Reports, *The World's Women 1970–90,* 1991, London: HMSO; *The World's Women 1995: Trends and Statistics,* 1995, London: HMSO.

depression, personality disorders, experientially learned violence, are offered to explain – and thus partially to exclude – the perpetrator, as if somehow circumstances or factors external to the violent man reduce his liability for the violent acts.

To cast around for such near-justificatory explanations, from a feminist perspective, is to miss – not necessarily deliberately, but almost certainly subconsciously – the central explanatory feature of domestic violence: male control and its maintenance.[75] That other factors play a part in explaining such violence is undeniable, but as Dobash and Dobash have argued, alone they have insufficient explanatory power.[76]

From this perspective, domestic violence, perpetuated in the private sphere of life, the home, is a prime manifestation of patriarchal authority. The gender inequality of the public world becomes reinforced in the 'private' world of the family. In addition to controlling women through repeated physical assertions of power, violence against women has the effect of silencing women and thereby reinforcing, through women's silence, male authority. Catharine MacKinnon's perceptive words are particularly apt within this context:

> ... when you are powerless, you don't just speak differently. A lot, you don't speak. Your speech is not just differently articulated, it is silenced. Eliminated, gone.[77]

As Martha Mahoney reveals through her research into the experience of battered women,[78] the most dangerous time for a victim of violence is when she seeks to leave the perpetrator of that violence. When a man's power and identity and self-esteem is dependent upon his authority over his partner, expressed through violence, the threat to leave is a direct challenge to his authority over her.[79]

---

75 See, *inter alia,* Dobash, R and Dobash, R, *Women, Violence and Social Change,* 1992, London: Routledge and Kegan Paul; Edwards, S, *Sex and Gender in the Legal Process,* 1996, London: Blackstone; Freeman, M, 'Violence against women: does the legal system provide solutions or itself constitute the problem?' (1980) 7 British JL Soc 215; Pahl, J (ed), *Private Violence and Public Policy. The Needs of Battered Women and the Response of the Public Services,* 1985, London: Routledge and Kegal Paul.

76 Dobash, R and Dobash, R, *Violence Against Wives: A Case Against the Patriarchy,* 1979, New York: Free Press.

77 MacKinnon, C, *Feminism Unmodified: Discourses on Life and Law,* 1987, Cambridge, Mass: Harvard UP, p 39.

78 Mahoney, M, 'Legal images of battered women: redefining the issue of separation' (1991) 90 Michigan L Rev 1.

79 Statistical evidence from Australia and the United States of America supports this interpretation: in Australia, nearly half the female victims of spousal murder were either separated or in the process of separating at the time of their deaths. In the USA, violence against women occurred in 36–60% of divorcing spouses. See Wallace, A, *Homicide: the Social Reality,* 1986, Sydney: NSW Bureau of Crime Statistics and Research; *ibid*, Mahoney, both cited in Astor, H, *The Weight of Silence: Talking About Violence in Family Mediation,* in Thornton, *op cit*, fn 49, p 179.

Domestic violence also, however, reveals the limitations and deficiencies of the liberal insistence on separate public and private domains. Domestic violence is a matter for public concern, and attempted control, however inadequate, by the State.

In the case of rape, the same considerations apply: rape concerns control and the maintenance of patriarchal power. In Catharine MacKinnon's view, '[w]omen's sexuality is, socially, a thing to be stolen, sold, bought, bartered, or exchanged by others'.[80] For the victim of rape, the legal process itself contributes to the psychological pain. While the rapist is on trial for his actions, the requirements of *mens rea,* the guilty intent, require proof of the victim's lack of consent. Too often, almost inevitably and invariably, this places the woman's reaction to the attempted rape, and her sexual history, especially in relation to the defendant, on trial.[81] Thus the woman's sexuality is on trial, not the man's, and a finding of guilt is dependent upon the court's finding that the woman is 'innocent' enough in her private life to refute the defence's claim that her private life negates her credibility as a witness.

Sexual harassment

> Sexual harassment, the legal claim, is a demand that State authority stand behind women's refusal of sexual access in certain situations that previously were a masculine prerogative.[82]

If the world of work is classified as existing in the public (regulated) sphere, and sexuality classified as existing in the private (unregulated) sphere according to traditional liberal thought, sexual harassment presents complexities both for the role of law and for classical liberal theory. Employment law has long been characterised by the male subject of law. The admission of women to the male world of work, albeit in a selective and often discriminatory manner, introduces the possibility, and reality, of the sexual harassment of women, a manifestation of patriarchal attitudes exhibited in the public world of employment.

Sexual harassment in employment is both patriarchal and hierarchical. Patriarchal in that it manifests traditional male views as to what women either (a) deserve, or (b) expect; hierarchical in that it is so often inflicted on women in junior positions to men. As Helena Kennedy QC has commented, '[T]he combination of sex and power is a particularly destructive one'.[83]

---

80 MacKinnon, C, 'Rape: on coercion and consent', in MacKinnon, *op cit*, fn 77, p 172.

81 See Temkin, J, *Rape and the Legal Process,* 1987, London: Sweet & Maxwell. See, further, Chapter 11.

82 MacKinnon, C, 'Sexual harassment: its first decade in court', in MacKinnon, *op cit*, fn 77, p 103. See, also, MacKinnon's earlier work, *Sexual Harassment of Working Women,* 1979, New Haven: Yale UP.

83 Kennedy, H, *Eve Was Framed,* 1993, London: Vintage.

'Discovered' as a phenomenon in the 1970s, the law has reacted with relative pace to provide remedies. From a feminist perspective, sexual harassment replicates many of the problems faced by victims of race: the embarrassment and shame of reverbalising, and hence reliving, the experience in a court of law; the possibility of repercussions from the perpetrator; the possibility of being disbelieved and the correlative difficulties entailed in convincing a court of law that the plaintiff's demeanour, conduct or words did not actively encourage the conduct complained of.

From a feminist theoretical perspective, sexual harassment may be subsumed within both the 'gender difference' approach or the 'dominance' theory of Catharine MacKinnon. The law has chosen to categorise sexual harassment as a species of sexual discrimination.[84]

The law relating to sexual harassment reinforces feminist arguments which counter the liberal thesis of the public and private spheres of life. Sexuality is defined as being within the domain of the private: when sexuality in the form of sexual harassment enters into the workplace, the private has entered the public – and is regulated by law. Only where the law limits actions of sexual harassment, for example, by providing that the law does not extend to small businesses (but why should it not?), can the liberal thesis be sustained.

Pornography

The liberal thesis of the public and private also breaks down in relation to the legal regulation of pornography. Conversely, patriarchy does not. Pornographic representations of women are manufactured by the pornography industry for (mainly but not exclusively) male private consumption. The law defines what pornography is, and controls the distribution and sale of pornography. Thus consumption of pornography in the private sphere, produced in the public sphere, is controlled by law. As will be seen in Chapter 12, the legal response to the phenomenon of pornography has been ambivalent. In the United States of America, regulation of pornography comes into direct conflict with the First Amendment to the Constitution: the right to free speech. The definition of pornography judicially adopted in the United States in 1973 became whether:

> ... the average person, applying contemporary community standards, would find that, taken as a whole, appeals to the prurient interest; that which depicts

84 In the United Kingdom, the Sex Discrimination Act 1975 outlaws direct and indirect discrimination on the basis of sex. In Australia the Sex Discrimination and Other Legislation Amendment Act 1992 (Cwlth) is more explicit: defining sexual harassment as 'an unwelcome sexual advance and the target of that behaviour reasonably believed that, if the advance was rejected, employment disadvantage would follow'. In the United States of America, sexual harassment claims fall under Title VII of the Civil Rights Act 1964, which prohibits discrimination based on sex.

> and describes in a patently offensive way ... sexual conduct as defined by the applicable State law; and that which, taken as a whole, lacks serious literary, artistic, political or scientific value.[85]

Legislation dealing with pornography casts the terms of regulation not on the basis of violence or discrimination against women, but in terms of obscenity and pornography's capacity to deprave and corrupt the consumer – the approach adopted under Australian, English and United States' law. Pornography has thus been defined as an issue of morality, not an issue of discrimination against women, or incitement to sexual hatred.

From a radical feminist position,[86] pornography is a patriarchal manifestation, a political issue centrally concerned with women's status in society. From this perspective, pornography has little to do with free speech, as protected under the American Constitution, and everything to do with discrimination and violence against women. Pornography, in this view, represents male power over women, and the power of male pornography producers to perpetuate sexual inequality and discrimination through the constant representations of women violated and oppressed: as an object for the sexual use of men. Pornography is thus beyond all else, a manifestation of patriarchal power.

PATRIARCHY AND ESSENTIALISM

> Given the history of dominant Western feminist theory, it is not white middle-class women who are different from other women, but all other women who are different from them.[87]

The issue of essentialism is discussed more fully in Part III. Nevertheless, the question which needs to be addressed within the context of patriarchy and the public and private spheres of life, is the extent to which differing women experience patriarchy in differing forms. Race, class and non-heterosexuality all impact on women's experience of patriarchy. Moreover, nationality, religious and cultural mores each impose their own forms of domination.

Patricia Williams' writing reveals much about patriarchy from the perspective of an American woman of colour. In *The Alchemy of Race and Rights*,[88] for example, Patricia Williams discusses the importance of legal

85 *Miller v California* 413 US 15, 24 (1973).

86 See Dworkin, A, *Pornography: Men Possessing Women,* 1981, London: The Women's Press; MacKinnon, C, 'Francis Biddle's sister', in MacKinnon, *op cit*, fn 77; see, also, MacKinnon, C, *Only Words,* 1994, London: HarperCollins.

87 Spelman, E, *Inessential Woman: Problems of Exclusion in Feminist Thought,* 1990, London: The Women's Press, p 162.

88 Williams, P, 'The pain of word bondage', in *The Alchemy of Race and Rights*, 1991, Cambridge, Mass: Harvard UP.

rights for women of colour compared with the relative lack of legal formality which attended her white, male colleague's negotiation of a contract.[89] For Williams, with the lack of trust with which she perceived herself to be treated by the white landlord, the formality of the legal contract provided her with the security she needed, and security for the white landlord who, in the absence of the contract defining his rights and her liabilities, she felt, would not have been able to reach an agreement. The history and legacy of slavery and racial segregation also imposes its own burden on women of colour in the United States. Not only oppressed by patriarchal society, but also oppressed by racism from whites (including white women), the extent to which patriarchy may be argued to be the dominant form of oppression becomes unclear. When the issue of class is joined to sexism and racism, there appears to be a multiplicity of oppressive forces which is almost impossible to unravel.

With the wave of immigration into the United Kingdom in the 1960s, came different illustrations of women's unequal status in relation to men. Differing family forms exhibited among differing cultural groups also poses questions for the argued centrality of patriarchy as a form of women's oppression. The traditional separation of society into the world of the public and the world of the private, the family being the principal institution of the private sphere becomes more complex when differing contemporary family forms are considered.

The Judicial Studies Board's *Handbook on Ethnic Minority Issues*,[90] recognises the diversity of family forms. Its data reveals that the size of household in both Indian and Pakistani/Bangladeshi households average 3.8 and 4.8 persons respectively as compared with 'white' households the mean size of which is 2.5, whereas 'West Indian' households are almost identical to 'white' households, with a mean size of 2.6. Forty-one per cent of Pakistani/Bangladeshi households contain six or more persons, compared with only two per cent of white families.[91] The extended family is far more prevalent within Asian and African family systems than in the conventional British family. There is thus a more extensive support system within Asian and African families than in British families. Furthermore, there is evidence which reveals that among Afro-Caribbean immigrants, there is a far higher proportion of women as sole head of the household than is the case with 'British' households, even bearing in mind the high incidence of divorce in Britain. When speaking of 'the family' and 'family relationships', therefore, it is important to bear in mind the differing family forms. It cannot merely be

89 See *op cit*, Williams, fn 88.

90 1994, Chapter 6.

91 On the other hand, 60 per cent of Pakistani/Bangladeshi families and 84 per cent of Indian families are between one and five persons, the range that accounts for almost all 'white' families.

assumed that a woman is oppressed within the traditional family, structured on the lines of the nuclear family: one male, one female and two children.

Arranged marriages among the Asian population in Britain also raise issues for patriarchy. In *Singh v Singh,*[92] the orthodox Sikh petitioner in a suit for nullity of marriage had, at the age of 17, been through a ceremony of marriage to a 21 year old Sikh man whom she had never previously met. When she met her husband, she refused to live with him or to go through the religious ceremony as required by her culture. The Court of Appeal refused to grant her a decree of nullity, based on two grounds, namely duress (from her parents) and incapacity to consummate due to invincible repugnance, holding that her dislike for her husband did not amount to a psychological or sexual aversion on her part sufficient to establish incapacity to marriage.[93] By way of contrast, in *Hirani v Hirani,*[94] the Court of Appeal, on similar facts, granted a decree of nullity to the petitioning wife, a Hindu, on the basis that a case for duress was made out by reason of her parents threatening to throw her out of the family home should she refuse to go through with the marriage. The experiences of these petitioners reveals that the oppressive forces came not just from the patriarchal tradition, but also from the oppressive forces of religion and culture.

It has been claimed that first and second wave feminism ignored lesbian experience. From the perspective of lesbian feminists, the issue of patriarchy, especially within the private sphere of life, has little resonance: the experiential reality of lesbians is, for lesbian feminist Patricia Cain, one of non-subordination. She also views heterosexuality as playing a part in the maintenance of patriarchy[95] Whether the approach is cultural feminism or radical feminism, or Marxist-socialist feminism, no theory takes into account the reality of lesbian experience, or the significance of lesbian experience for feminist theory. Only with postmodernism does feminism start to be inclusive, to listen to the voices of lesbian feminists. And what lesbian feminists have to say on private patriarchy is relevant: as Cain asserts, while some lesbian relationships may, in terms of hierarchy, emulate heterosexual couples, for many they do not: lesbians live, for the most part, in private lives which are non-patriarchal. They cannot, in the public sphere, but be subjected to the same patriarchal manifestations as heterosexual women, coupled perhaps, with stigmatisation and discrimination because of their non-heterosexual gender.

92 [1971] P 226; [1971] 2 All ER 828; [1971] 2 WLR 963; 115 SJ 205.

93 See, conversely, *Kaur v Singh* [1972] 1 All ER 292, in which a decree of nullity was granted to the wife when following an arranged marriage the husband refused to arrange the requisite religious ceremony and was held, by analogy, thereby to have refused to consummate the marriage.

94 [1982] 4 FLR 232.

95 Cain, P, 'Feminist jurisprudence: grounding the theories' (1989) Women's LJ 191.

CONCLUSION

While patriarchy as the dominant political philosophy had 'had its day' by the end of the seventeenth century, the concept remains alive within society and law in both the public and private spheres of life, to the continuing detriment of women's equality. The task for feminist jurisprudence is to continue the research and debate to reveal the full extent of remaining patriarchalism and to press for legal and social change. While the majority of formal legal inequalities have been removed, at least in Western liberal democracies, institutional structures and practices continue to reveal both discriminatory and exclusionary treatment of women. Formal legal equality under employment law cannot alone achieve substantive equality for women in the public sphere unless and until women's traditional childcare and domestic unpaid work changes. As has been seen in Chapter 2, research conducted into women's employment patterns in China, Japan, the United Kingdom and the United States of America reveal that in China alone a woman's career path is only mildly affected by childbirth and childcare, with women able to return to their employment, supported by State and other institutional childcare facilities, at the same level at which her career was temporarily interrupted.[96] Women will only achieve substantive equality with men when the last vestiges of male patriarchal sexual attitudes are displaced – both within the public and the private sphere. Notwithstanding that, the concept of patriarchy must be understood within the diversity of women's lives, and against the multifarious factors which affect different women in different ways.

96 *Op cit*, Stockton, N, Bonney, N and Xuewen, S, fn 66.

PART II

CONVENTIONAL JURISPRUDENCE AND FEMINIST CRITIQUE

CHAPTER 4

CONVENTIONAL JURISPRUDENCE AND FEMINIST CRITIQUE: I

ANCIENT GREEK POLITICAL THOUGHT AND NATURAL LAW THEORY

INTRODUCTION

Throughout the centuries, from Ancient Greece to the current time, theorists have been analysing the structure of society and the system of legal rules which is part reflective, in part constitutive and in part supportive of the social structure. Irrespective of approach, or time, political and legal theorists have portrayed the individual subject of law in one of two ways. On the one hand, the legal subject is portrayed as a genderless individual. On the other hand, women have – where they have been considered at all – been portrayed as in some sense different (from men) and generally in an inferior social and legal position to men. Women, accordingly, have either been ignored or assumed to be inferior. It is with feminist scholarship, identifiable in its infancy in the time of Mary Wollstonecraft's writings in the eighteenth century,[1] and approaching maturity towards the end of the twentieth century, that the traditional assumptions about society and law have been challenged. Whether Ancient Greek theory, natural law, positivist analysis of law, liberalism, utilitarianism, social contract theory or the Marxist analysis of law is considered, from a feminist standpoint women are either *invisible,* or *excluded,* or *relegated to a position of social and political inferiority.* In this chapter, ancient Greek thought and natural law theory are considered.

THE GREEK PHILOSOPHERS

The writings of Plato[2] and Aristotle[3] have been characterised as displaying a deep misogyny.[4] The position is rather more complex than that, however, and

1 See Wollstonecraft, M, *Vindication of the Rights of Women* (1792), 1967, New York: WW Norton.

2 c 427–347 BC.

3 384–322 BC.

4 See, eg, Moller Okin, S, *Women in Western Political Thought,* 1979, Ewing, New Jersey: Princeton UP. (See *Sourcebook*, pp 286–300.)

there exist contradictions and complexities within the writing. While misogyny shines through from much of their writings, there is also an ambiguity about women's positions in society.

Reason in Greek philosophy

Plato and Aristotle both distinguish form and matter. Form corresponds with the rational mind: with Reason; matter is non-rational, it is the object of rational thought and knowledge. In the *Timaeus,*[5] Plato writes that mind, which participates in the cosmic Reason which infuses the world, is distinctive from opinion:

> But we must affirm them to be distinct, for they have a distinct origin and are of a different nature; the one is implanted in us by instruction, the other by persuasion; the one is always accompanied by true reason, the other is without reason; the one cannot be overcome by persuasion, but the other can; and lastly, every man may be said to share in true opinion, but mind is the attribute of the gods but of very few men.[6]

Reason is an attribute of the soul, and on death the soul frees itself from the earthly body: the soul thus rules over, dominates, the body:

> So it appears that when death comes to a man, the mortal part of him dies, but the immortal part retires at the approach of death and escapes unharmed and indestructible.[7]

In Genevieve Lloyd's analysis, this early separation of rationality and form, and the relation of dominance and inferiority between them 'has been highly influential in the formation of our contemporary ways of thinking about knowledge'.[8] It establishes the binary mode of thought – the rational and irrational – the superior and inferior – which infuses all later constructions of knowledge, and represents the early distinction between the rationality (and superiority) of man and the irrationality (and inferiority) of women.

Plato

In *The Republic,*[9] Plato sets out his vision of an ideal State. Speaking through the mouth of Socrates,[10] in debate with Glaucon, the subject of the appropriate

5 The *Timaeus* is Plato's account of the creation of the universe. It explains the manner in which the universe can be understood by the rational mind.

6 Plato, *Timaeus*, Jowett, B (trans), in Hamilton, E and Cairns, H (eds), *Plato: The Collected Dialogues,* 1963, Ewing, New Jersey: Princeton UP, p 1151, 51e.

7 Plato, *Phaedo,* in Hamilton and Cairns, *ibid,* pp 40, 106e.

8 Lloyd, G, *The Man of Reason: 'Male' and 'Female' in Western Philosophy,* 1984, London: Methuen, p 7.

9 Plato, *The Republic*, Lee, D (trans), 2nd edn, 1974, London: Penguin.

10 470?–399 BC.

role of women and the family is discussed. The starting point for discussion is equality between men and women, with women being trained 'physically and mentally' in the same manner. It is recognised, however, that women and men have different natures and that accordingly it is difficult to argue that they should fulfil the same functions. In Socrates' view, the only relevant difference between man and women is that the 'female bears and the male begets',[11] a difference which is not regarded *per se* as a determinative women's role. The 'best' women are to be treated as Guardians[12] and follow common occupations with men. The appropriate role of women is determined, not by biological characteristics, but by abilities: thus some women will be fitted to be physicians on the basis of equality with men.

As if this were not radical enough at the time, Plato goes on to consider the family and concludes that the private family presents an obstacle to the best service of the State, which requires both the production of the best children possible and the abolition of romantic ties between men and women. The Rulers must identify the couples whom they want to mate, and the children will be reared in State nurseries. Women Guardians have become the bearers of children for the State: the private family is abolished and women and children are owned in common. Woman's position, freed from the demands of domesticity, Plato tells us, through Socrates, is one of equality in which she is fitted to do all the tasks in society. The fact that the 'female bears and the male begets' is not a relevant difference for the purposes of assigning differing social roles. Men as well as women are fitted for childcare.[13]

'The three values on which both his ideal and his second-best cities are based are, rather [than happiness], harmony, efficiency and moral goodness.'[14, 15] Man's acquisitive nature, reflected in private property, is potentially damaging to the harmony, *eudaemonia,* of the city. The abolition of private property could only enhance harmony within the city. For Plato, the purpose of government is to ensure the harmony and well being of its citizens.[16] Plato, for example, in *The Republic* writes that women are twice as evil as men, and yet in both *The Republic* and the later *Laws,* considers that the physical differences between men and women had no greater significance than the biological fact that women bear children and men beget them. Aside

11 *Op cit*, Plato, fn 9, Bk V, 454e.

12 The ruling class.

13 *Op cit*, Plato, fn 9, 460b.

14 See *op cit*, Moller Okin, fn 4, Chapters 1 and 2. See, also, Lyndon Shanley, M and Patemen, C (eds), *Feminist Interpretations and Political Theory,* 1991, London: Polity.

15 Moller Okin, S, 'Philosopher Queens and private wives', in Moller Okin, *op cit*, fn 4, p 28.

16 Note that Plato throughout his writing, distinguishes between the 'ideal city' and the 'second-best city'. The highest stratum in society is that of the Guardian class, who alone has the capacity to rule.