between law and cultural – patriarchal – values, and the manner in which law is grounded in society. Once this is appreciated, the sheer magnitude of the feminist endeavour becomes starkly clear: the endeavour is one which requires the realignment of deeply held patriarchal attitudes and arrangements which have become translated into law as a natural outcome of the evolution of society from nature to culture to law. The central tenets of these theorists will be considered before considering the implications of such theories from a feminist perspective.

THE DIVISION OF LABOUR IN SOCIETY[94]

Emile Durkheim[95]

The French sociologist Emile Durkheim was principally concerned with an examination of the manner in which societies are bound together, and the evolution of society from its early form in which shared values predominate to more complex society where there will be demonstrated a diffusion of values. In seeking to explain societal bonding and change, Durkheim employs two principal concepts: organic and mechanical solidarity. Because cultural values, or the morality of society, cannot be empirically quantified, Durkheim utilises law as a visible symbol of society's solidarity: law is thus a reflection of the 'consciousness' of society. In 'simple' societies, exemplified by an absence of division of labour, Durkheim believes, the law will be predominantly repressive, for law is used to uphold and reinforce the collective conscience of society. Penal law serves this purpose: where deviant behaviour is experienced the law and legal process will step in to reaffirm society's values through punishing the offender. As society diversifies and becomes more complex and the division of labour becomes more marked, the need for predominantly penal, repressive law diminishes. The law in a complex society will be increasingly concerned with restitutive law – that is to say laws which do not express the 'collective vengeance' of society, but laws which are designed to realign relationships in order to provide restitution for wrongs suffered. Durkheim's empirical work has been subjected to much academic criticism. It has been demonstrated, for example, that 'simple' societies have a significant degree of division of labour which Durkheim denies;[96] and that societies do not evolve from 'organic solidarity' to 'mechanical solidarity' in the manner in which Durkheim suggests.[97] Nevertheless, Durkheim's thought continues to exert a powerful influence on sociological jurisprudence, and the core of his thought illustrates vividly the linkage between culture and law. In *The Division of Labour in Society* Durkheim writes that:

> We have not merely to investigate whether in [complex] societies, there exists a social solidarity arising from the division of labour. This is a self-evident truth, since in them the division of labour is highly developed, and it engenders

94 1893. See generally, Alpert, *Emile Durkheim and His Sociology* (1961); S Lukes and A Scull, *Durkheim and the Law* (1983); RBM Cotterrell (1991) 25 *Law and Society Review* 923.

95 1858–1917.

96 See Stanislaw Malinowski, *Crime and Custom in Savage Society* (1926).

97 See, *inter alia*, RD Schwarz and JC Miller (1964) 70 *American Journal of Sociology* 159.

> solidarity. But above all we must determine the degree to which the solidarity it produces contributes generally to the integration of society. Only then shall we learn to what extent it is necessary, whether it is an essential factor in society cohesion, or whether, on the contrary, it is only an ancillary and secondary condition for it. To answer this question we must therefore compare this social bond to others, in order to measure what share in the total effect must be attributed to it. To do this it is indispensable to begin by classifying the different species of social solidarity. …
>
> However, social solidarity is a wholly moral phenomenon which by itself does not lend itself to exact observation and especially not to measurement. To arrive at this classification, as well as this comparison, we must therefore substitute for this internal datum, which escapes us, an external one which symbolises it, and then study the former through the latter.
>
> That visible symbol is the law. Indeed, where social solidarity exists, in spite of its non-material nature, it does not remain in a state of pure potentiality, but shows its presence through perceptible effects. Where it is strong it attracts men strongly to each other, ensures frequent contacts between them, and redoubles the opportunities available to them to enter into mutual relationships. Stating the position precisely, at the point we have now reached it is not easy to say whether it is social solidarity which produces these phenomena or, on the contrary, whether it is the result of them. It is also a moot point whether men draw closer to one another because of its dynamic effects, or whether it is dynamic because men have come closer together. However, for the present we need not concern ourselves with elucidating this question. It is enough to state that these two orders of facts are linked, varying with each other simultaneously and moving in the same direction. The more closely knit the members of a society, the more they maintain various relationships with one another or with the group collectively. For if they met together rarely, they would not be mutually dependent, except sporadically and somewhat weakly. Moreover, the sum of these relationships is necessarily proportioned to the sum of legal rules which determine them. In fact, social life, wherever it becomes lasting, inevitably tends to assume a definite form and become organised. Law is nothing more than the most stable and precise element in this very organisation. Life in general within society cannot enlarge in scope without legal activity similarly increasing in a corresponding fashion. Thus we may be sure to find reflected in the law all the essential varieties of social solidarity.[98]

As for Emile Durkheim, for Eugen Ehrlich the law is grounded in society. Ehrlich is less concerned with the 'positive law' – the law of the State – than with the 'living law' – those rules which arise out of society and which in fact regulate social relations. This living law represents the real law for differing groups in society, for which the positive law of the State may have little practical relevance. If, therefore, the sociologist is to understand the forces which control the life of differing groups, he or she must seek the empirical evidence of the living law: merely to expound a positivistic theory of State law is, from this perspective, a sterile activity. Ehrlich developed his theory through studying nine differing 'tribes' living in Bukowina, a remote area of the Austro-Hungarian empire. The central thrust of Ehrlich's work is revealed in the following passage.

98 At pp 24–25.

FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW[99]

Eugen Ehrlich[100]

The legal proposition is not only the result, it is also a lever, of social development; it is an instrumentality in the hands of society whereby society shapes things within its sphere of influence according to its will. Through the legal proposition man acquires a power, limited though it be, over the facts of the law; in the legal proposition a willed legal order is brought face to face with the legal order which has arisen self-actively in society.[101]

The sociology of law then must begin with the ascertainment of the living law. Its attention will be directed primarily to the concrete, not the abstract. It is only the concrete that can be observed. What the anatomist places under the microscope is not human tissue in the abstract but a specific tissue of a specific human being; the physiologist likewise does not study the functions of the liver of mammals in the abstract, but those of a specific liver of a specific mammal. Only when he has completed the observation of the concrete does he ask whether it is universally valid, and this fact, too, he endeavours to establish by means of a series of concrete observations, for which he has to find specific methods. The same may be said of the investigator of law. He must first concern himself with concrete usages, relations of domination, legal relations, contracts, articles of association, dispositions by last will and testament. It is not true, therefore, that the investigation of the living law is concerned only with 'customary law' or with 'business usage'. If one does any thinking at all when one uses these words – which is not always the case – one will realise that they do not refer to the concrete, but to that which has been universalised. But only the concrete usages, the relations of domination, the legal relations, the contracts, the articles of association, the dispositions by last will and testament, yield the rules according to which men regulate their conduct.[102]

But the scientific significance of the living law is not confined to its influence upon the norms for decision which the courts apply or upon the content of statutes. The knowledge of the living law has an independent value, and this consists in the fact that it constitutes the foundation of the legal order of human society.[103]

FOLKWAYS[104]

William Graham Sumner

Definition and mode of origin of the folkways. If we put together all that we have learned from anthropology and ethnography about primitive men and primitive society, we perceive that the first task of life is to live. Men begin with acts, not with thoughts. Every moment brings necessities which must be satisfied at once. Need was the first experience, and it was followed at once by a blundering effort to satisfy it. It is generally taken for granted that men inherited some guiding

99 Trans WL Moll (1936). See Littlefield (1967) 19 *Maine Law Review* 1; and D Nelken 'Law in Action or Living Law?' (1984) 4 *Legal Studies* 157.

100 1862–1922.

101 At p 203.

102 At pp 501–02.

103 *Ibid*.

104 1906.

instincts from their beast ancestry, and it may be true, although it has never been proved. If there were such inheritances, they controlled and aided the first efforts to satisfy needs. Analogy makes it easy to assume that the ways of beasts had produced channels of habit and predisposition along which dexterities and other psychophysical activities would run easily. Experiments with newborn animals show that in the absence of any experience of the relation of means to ends, efforts to satisfy needs are clumsy and blundering. The method is that of trial and failure, which produces repeated pain, loss, and disappointments. Nevertheless, it is a method of rude experiment and selection. The earliest efforts of men were of this kind. Need was the impelling force. Pleasure and pain, on the one side and the other, were the rude constraints which defined the line on which efforts must proceed. The ability to distinguish between pleasure and pain is the only psychical power which is to be assumed. Thus ways of doing things were selected, which were expedient. They answered the purpose better than other ways, or with less toil and pain. Along the course on which efforts were compelled to go, habit, routine, and skill were developed. The struggle to maintain existence was carried on, not individually, but in groups. Each profited by the other's experience; hence there was concurrence towards that which proved to be most expedient. All at last adopted the same way for the same purpose; hence the ways turned into customs and became mass phenomena. Instincts were developed in connection with them. In this way folkways arise. The young learn them by tradition, imitation, and authority. The folkways, at a time, provide for all the needs of life then and there. They are uniform, universal in the group, imperative, and invariable. As time goes on, the folkways become more and more arbitrary, positive, and imperative. If asked why they act in a certain way in certain cases, primitive people always answer that it is because they and their ancestors always have done so. A sanction also arises from ghost fear. The ghosts of ancestors would be angry in the living should change the ancient folkways.

The folkways are a societal force. The operation by which folkways are produced consists in the frequent repetition of petty acts, often by great numbers acting in concert or, at least, acting in the same way when face to faced with the same need. The immediate motive is interest. It produces habit in the individual and custom in the group. It is, therefore, in the highest degree original and primitive. By habit and custom it exerts a strain on every individual within its range; therefore it rises to a societal force to which great classes of societal phenomena are due. Its earliest stages, its course, and laws may be studied; also its influence on individuals and their reaction on it. It is our present purpose so to study it. We have to recognise it as one of the chief forces by which a society is made to be what it is. Out of the unconscious experiment which every repetition of the ways includes, there issues pleasure or pain, and then, so far as the men are capable of reflection, convictions that the ways are conducive to societal welfare. These two experiences are not the same. The most uncivilised men, both in the food quest and in other ways, do things which are painful, but which have been found to be expedient. Perhaps these cases teach the sense of social welfare better than those which are pleasurable and favourable to welfare. The former cases call for some intelligent reflection on experience. When this conviction as to the relation to welfare is added to the folkways they are converted into mores, and, by virtue of the philosophical and ethical element added to them they win utility and importance and become the source of the science and art of living.[105]

105 *Folkways*, pp 2–3.

Sumner goes on to explain that together with the development of folkways among the group, there develops a hostile, antagonistic view of member of 'other groups' who do not share the same folkways and mores.

> 'Enthnocentrism' is the technical name for this view of things in which one's own group is the centre of everything, and all others are scaled and rated with reference to it. Folkways correspond to it to cover both the inner and the outer relation. Each group nourishes its own pride and vanity, boasts itself superior, exalts its own divinities, and looks with contempt on outsiders. Each group thinks its own folkways the only right ones, and if it observes that other groups have other folkways, these excite its scorn.[106]
>
> As society and societal organisation develops, the folkways become the 'right' way of acting: whatever has proved to be the preferred manner of acting in a given situation will assume a moral force in the society.
>
> *The folkways are 'right'. Rights. Morals*. The folkways are the 'right' ways to satisfy all interest, because they are traditional, and exist in fact. They extend over the whole of life. There is a right way to catch game, to win a wife, to make one's self appear, to cure disease, to honour ghosts, to treat comrades or strangers, to behave when a child in born, on the warpath, in council, and so on in all cases which can arise. The ways are defined on the negative side, that is, by taboos. The 'right' way is the way which the ancestors used and which has been handed down. The tradition is its own warrant. It is not held subject to verification by experience. The notion of right is in the folkways. It is not outside of them, of independent origin, and brought to them to test them. In the folkways, whatever is, is right. This is because they are tradition, and therefore contain in themselves the authority of the ancestral ghosts. When we come to the folkways we are at the end of our analysis. The notion of right and ought is the same in regard to all folkways, but the degree of it varies with the importance of the interest at stake. The obligation of conformable and co-operative action is far greater under ghost fear and war than in other matters, and the social sanctions are severer, because group interests are supposed to be at stake. Some usages contain only a slight element of right and ought. It may well be believed that notions of right and duty, and of social welfare, were first developed in connection with ghost fear and other worldliness, and therefore that, in that field also, folkways were first raised to mores. 'Rights' are the rules of mutual give and take in the competition of life which are imposed on comrades in the in-group, in order that the peace may prevail there which is essential to the group strength. Therefore rights can never be 'natural' or 'God-given', or absolute in any sense. The morality of a group at a time is the sum of the taboos and prescriptions in the folkways by which right conduct is defined. Therefore morals can never be intuitive. They are historical, institutional, and empirical.
>
> World philosophy, life policy, right, rights, and morality are all products of the folkways. They are reflections on, and generalisations from, the experience of pleasure and pain which is won in efforts to carry on the struggle for existence under actual life conditions. The generalisations are very crude and vague in their germinal forms. They are all embodied in folklore, and all our philosophy and science have been developed out of them.[107]

106 *Folkways,* p 13.

107 *Folkways,* pp 28–29.

As society progresses from 'folkways' to 'mores', the need for institutions and laws arises. It is imperative that law rest firmly on the mores in society:

> *Laws*. Acts of legislation come out of the mores. In low civilisation all societal regulations are customs and taboos, the origin of which is unknown. Positive laws are impossible until the stage of verification, reflection and criticism is reached. Until that point is reached there is only customary law, or common law. The customary law may be codified and systematised with respect to some philosophical principles, and yet remain customary. The codes of Manu and Justinian are examples. Enactment is not possible until reverence for ancestors has been so much weakened that it is no longer thought wrong to interfere with traditional customs by positive enactment. Even them there is reluctance to make enactments, and there is a stage of transition during which traditional customs are extended by interpretation to cover new cases and to prevent evils. Legislation, however, has to seek standing ground on the existing mores, and it soon becomes apparent that legislation, to be strong, must be consistent with the mores.[108]
>
> *How laws and institutions differ from mores*. When folkways have become institutions or laws they have changed their character and are to be distinguished from the mores. The element of sentiment and faith inheres in the mores. Laws and institutions have a rational and practical character, and are more mechanical and utilitarian. The great difference is that institutions and laws have a positive character, while mores are unformulated and undefined. There is a philosophy implicit in the folkways; when it is made explicit it becomes technical philosophy. Objectively regarded, the mores are the customs which actually conduce to welfare under existing life conditions. Acts under the laws and institutions are conscious and voluntary; under the folkways they are always unconscious and involuntary, so that they have the character of natural necessity. Educated reflection and scepticism can disturb this spontaneous relation. The laws, being positive prescriptions, superseded the mores so far as they are adopted. It follows that the mores come into operation where laws and tribunals fail. The mores cover the great field of common life where there are no laws or police regulations. They cover an immense and undefined domain, and they break the way in new domains, not yet controlled at all. The mores, therefore, build up new laws and police regulations in time.[109]

What can be gleaned from such theories from a feminist perspective? Over and above the centrally important fact that law arises out of society, and is thus culturally dependant, we may gain further insights. In Durkheim's work, for example, we find in the insistence on concentrating on law as a visible index of social solidarity existing in differing societies characterised by the extent of the division of labour, that women, unless they are equally economically active as men, fail to be considered at all. Given the time in which Durkheim was writing, 1936, there was be no society exhibiting organic solidarity, it was the solidarity of the economic or professional group, in which such conditions prevailed. Moreover, throughout his work, Durkheim is addressing the public sphere of life as the central determinant of the type of solidarity which exists in society at any one time. Accordingly there is no consideration whatsoever of the private domain in which most women laboured and lived. And, even if

108 *Folkways,* p 55.

109 *Folkways,* pp 56–57.

Durkheim were writing at a time in which there existed economic parity in the public domain between men and women, his theory would still not be able to explain the role of law in relation to the private domain in which women continue to labour in addition to their 'public' economic labour.

If the focus shifts to Eugen Ehrlich's work, we find different considerations. Ehrlich was concerned with the private domain: the manner in which the family regulated itself, the relationships between parents and children. However, despite this focus Ehrlich's work cannot accommodate the feminist perspective, for it takes the 'natural', patriarchal, ordering of society as a correct and necessary foundation for the enactment of State law. Ehrlich has been much criticised for failing to consider the role of State law in inculcating changing beliefs – its educative role[110] – but he may also be criticised for failing to direct attention to the justice of existing societal relations on which law should be based. Ehrlich's insistence that justice arises out of society – out of the living law – appears persuasive until viewed through feminist eyes. Through feminist eyes, Ehrlich's 'justice' looks very much like women's oppression and exclusion from that concept of justice. The same criticism must lie in relation to Sumner's thesis. What is natural – inequality and patriarchy – is viewed as a correct basis for legal ordering. That this cannot produce a society concerned for the needs and aspirations of women as equal citizens is all too obvious.

110 See, for example, R Mnookin and L Kornhauser (1979) *Yale Law Journal* 950 and H Jacob (1992) 26 *Law and Society Review* 565.

CHAPTER 3

THE EVOLUTION AND SCOPE OF FEMINIST JURISPRUDENCE

The position of the world's women has traditionally, historically and culturally been one of being consigned to the position of the 'second' – and inferior – sex. In this book the explanations for the discriminations and inequalities endured by women in the past and present are explored through the eyes of feminist scholars. It is the aim of feminist scholars both to explore the manner in which such discriminations may be identified and eliminated, to explore and seek to eliminate the inequalities which are created by, or supported by, law. Further than this, feminist legal scholarship is engaged in the task of theorising the origins and causes of the gendered nature of society and law. By what means did men assume 'superiority' in society? By what means is this assumed 'superiority' reflected in law and legal institutions? By what means can feminists in general, and feminist legal scholars in particular, not only throw light on the inequalities under which women exist, but also move forward to eradicate the inequalities and quicken the movement towards the full and equal participation in society?

There is no simple, or single, answer to the question 'what is feminist jurisprudence or legal theory?' There exists, however, a unifying strand of thought throughout the literature – that is, that law reflects the interests of men in society, largely although not totally, remaindering the position of women in society to that of second class citizens. Feminist jurisprudence – in its many guises – seeks to unmask the traditional and too often ignored inequalities in society which are supported by law, and to suggest – in differing ways – the manner in which such continuing inequalities may be redressed. Inequalities based on gender in many aspects of the substantive law have long been evident to feminist scholars. Whether it is the criminal law, family law, employment law or property law, discrimination based on gender has represented a real and problematic feature of law. As will be discussed later, the extent to which law creates and sustains inequalities in society is a complex matter. It must be recognised at the outset that it cannot be assumed that there is any true agreement between jurists concerning the role of law in society – or indeed agreement over the very meaning of the word 'law'. The academic debate concerning such large and intractable questions which form the core of traditional jurisprudence is reflected in feminist jurisprudence.

Feminist Legal Theory as an academic discipline took earliest root most firmly in the United States of America, in Canada and in Australia. Nowadays, some 50% of undergraduate law courses in Australia and Canada feature of feminist legal theory component, either as a discrete subject or as a core part of the Legal Theory or Jurisprudence curriculum.[1] The United Kingdom was slower to respond, and in 1991 Carol Smart was to argue that '[F]eminist jurisprudence has not been taken seriously' in traditional jurisprudence

1 See Hilaire Barnett, 'The Province of Jurisprudence Determined – Again!' 1995, 15 *Legal Studies*, p 88.

courses.[2] By 1995, however, feminist legal theory had taken firm root within the context of jurisprudential thought and study in United Kingdom universities.

There now exists a wide and diverse corpus of literature on feminist legal theory. While interest in the position of women in society has been evident since the time of Plato[3] and Aristotle,[4] the concern for the legal position of women may be traced to the late 18th century with the writing of Mary Wollstonencraft.[5] In England in the 19th century with the expansion of the electoral franchise, the traditional disenfranchisement of women formed a focus of attention for English writers such as John Stuart Mill and Harriet Mill.[6] The 'modern' feminist movement may be traced to 1949 with the classic work of Simone de Beauvoir.[7] In was not to be until the late 1960s and early 1970s, however, that sustained and systematic pressure grew for an improvement in the status of women in Western society. The focus of feminist writers such as Germaine Greer,[8] Betty Freidan,[9] Kate Millet,[10] Juliet Mitchell,[11] Eva Figes[12] and others was not directed specifically to the question of law and its relationship to the position of women in society, but rather represented a broad sociological and philosophical attack on the inequalities visited upon women in society.

Out of this broad ranging movement grew feminist jurisprudence. Feminist jurisprudence focuses on the manner in which law reflects and reinforces the position of women in society. As will be seen, feminist legal theorists take many differing approaches to the issue of equality of women. There exists, however, a common theme in feminist writings, namely the view that the law – variously and traditionally portrayed by Western 'liberal' jurists as a body of rules serving to regulate all members of society – is neither class- nor gender-neutral. Feminist jurisprudence seeks to explode the 'liberal' (male) mythology of law. By concentrating, in differing ways, upon the manner in which law supports and reinforces the inequalities and disabilities under which women labour in society, law is seen as anything but gender-neutral. Law becomes, from this particular perspective, a force in society created by men, practised by men, applied by men – for the (not necessarily conscious) purpose of maintaining traditional patriarchal dominance. Viewed from the feminist perspective, law,

2 Carol Smart, 'Feminist Jurisprudence' in P Fitzpatrick (ed), *Dangerous Supplements* (Pluto Press, 1991).

3 c 427–347 BC.

4 384–22 BC.

5 Mary Wollstonencraft, *A Vindication of the Rights of Women* (1792).

6 John Stuart Mill, *The Subjection of Women* (1869) and JS and Harriet Mill, 'The Enfranchisement of Women' (1851) in *The Westminster Review*.

7 *The Second Sex* (1949).

8 *The Female Eunuch* (1971).

9 *The Feminine Mystique* (1963).

10 *Sexual Politics* (1970).

11 *Woman's Estate* (Penguin Books, 1971) and *The Rights and Wrongs of Women*, J Mitchell and A Oakley (eds) (Penguin Books, 1976).

12 *Patriarchal Attitudes* (1970).

far from reflecting a gender-neutral liberally inspired body of rules reflecting societal values, becomes a force of oppression of women who comprise some 50% of the population.

WHAT IS FEMINIST JURISPRUDENCE?

On the tenth anniversary of the introduction of the *Harvard Women's Law Journal*, Christine Littleton took the opportunity to overview the development of feminist jurisprudence in the Journal's first decade:

IN SEARCH OF A FEMINIST JURISPRUDENCE[13]

Christine A Littleton

'Feminist jurisprudence' has certainly come of age. At the January 1987 annual meeting of the Association of American Law Schools, participants were offered a day long 'Mini-Workshop in Emerging Traditions in Legal Education and Legal Scholarship', including feminist jurisprudence. Like other contemporary movements, it can be viewed both as a critique within legal education and scholarship and as a direct challenge to their very structure.

First, feminist jurisprudence criticises the law's omission of and bias against women's concerns, offering its insights as a supplement and corrective. Simple inclusion is not, however, the primary goal of feminist jurisprudence.[14] Rather, feminist legal theorists routinely speak of challenging, subverting or transforming legal relations at their core. If feminist jurisprudence is not simply addition of missing pieces within legal education and scholarship, what is it?

We might begin with Catharine MacKinnon's suggested definition: 'Feminist jurisprudence is an examination of the relationship between law and society from the point of view of all women'.[15] This definition, while succinct and comprehensive, must be unpacked. Feminists have discovered the endless variety of women's experience[16] and the different ways in which law affects our experience.

Heather Wishik has proposed a framework of inquiry for feminist jurisprudence:

(1) What women's experiences are addressed by an area of law?

(2) What assumptions or descriptions of experience does the law make?

(3) What is the area of distortion or denial so created?

(4) What reforms have been proposed, and how will they affect women both practically and ideologically?

(6) In an ideal world, how would women's situation look?

(7) How do we get there from here?[17]

13 Christine A Littleton,' In Search of a Feminist Jurisprudence' (1987) 10 *Harvard Women's Law Journal*, p 1.

14 See H Wishik, 'To Question Everything: The Inquiries of Feminist Jurisprudence' (1986) 1 *Berkeley Women's Law Journal* 64 (describing 'compensatory scholarship' as a necessary but insufficient development in legal scholarship about 'women and law').

15 CA MacKinnon, Panel Discussion, 'Developing Feminist Jurisprudence' at the 14th National Conference on Women and Law, Washington DC 1983, quoted in H Wishik, *op cit*, p 64.

16 See H Eisenstein and A Jardine, *The Future of Difference* (1980).

17 H Wishik, *op cit*, pp 72–75.