Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

There are, however, several important pitfalls for feminist legal theory in some of the arguments deriving from Gilligan's research.[38] One way of reading the implications for law of Gilligan's approach is that legal issues, indeed the conceptualisation of legal subjects themselves, should be recast in less formal and abstract terms. But such a strategy of recontextualisation may obscure the (sometimes damaging) ways in which legal subjects are already contextualised. In the sentencing of offenders, or in the assumptions on which victims and defendants are treated in rape cases, for example, we have some clear examples of effective contextualisation which cuts in several political directions – not all of them appealing to feminists. In certain areas, it may be that legal reasoning is already 'relational' in the sense espoused by many feminists, but that it privileges certain kinds of relationships: ie proprietary, object relations.[39] A general call for 'contextualisation' may also be making naive assumptions about the power of such a strategy to generate real change given surrounding power relations: as the case of rape trials shows all too clearly, the framework of legal doctrine is not the only formative context shaping the legal process. The important project, I would argue, is that of recontextualisation understood not as reformist strategy but rather as critique: in other words, the development of a critical analysis which unearths the logic, the substantive assumptions, underlying law's current contextualisation of its subjects, and which can hence illuminate the interests and relationships which these arrangements privilege.[40]

2. Law's autonomy and discreteness

Another standard assumption of mainstream legal scholarship is that law is a relatively autonomous social practice, discrete from politics, ethics, religion. An extreme expression of this assumption is found in Hans Kelsen's 'pure' theory of law,[41] but weaker versions inform the entire positivist tradition. Indeed, this is what sets up one of positivism's recurring problems – that is, the question of foundations, of the boundaries between the legal and the non- legal; of the source of legal authority, and the relation between law and justice.

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

3. Law's neutrality and objectivity

As I have already mentioned, difference feminism has developed a critique of the very idea of gender neutrality, of gender equality before the law, in a sexually

38 For a useful discussion, see Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1992), Chapter 3.

39 For further discussion see Jennifer Nedelski,' Reconceiving Rights as Relationship' [1993] *Review of Constitutional Studies*, 1; Luce Irigaray, *I Love to You* (trans Alison Martin) (Routledge, 1996).

40 See further Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 *Social and Legal Studies*, 131.

41 H Kelsen, *The Pure Theory of Law* (University of California Press, 1967).

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

patterned world. Feminist legal theory deconstructs law's claims to be enunciating Truths, its pretension to neutral or objective judgement, and its constitution of a field of discrete and hence unassailable knowledge.

This argument takes a number of forms in contemporary feminist legal theory. One derives from the Foucaultian critique of feminist writers such as Smart.[42] The argument is that law, by policing its own boundaries via its substantive rules and rules of evidence, constitutes itself as self-contained, as a self-reproducing system. There is, hence, a certain 'truth' to this aspect of law. But by standing back so as to cast light on the point of view from which law's truth is being constructed, we can undermine law's claims to objectivity. Another, rather different, example is Catharine MacKinnon's well known epistemological argument.[43] In MacKinnon's view, law constructs knowledge which claims objectivity, but objectivity in fact expresses the male point of view. Hence 'objective' standards in civil and criminal law – the 'reasonable person' – in fact represents a position which is specific in not only gender but also class, ethnic and other terms. The epistemological assertion of 'knowledge' or 'objectivity' disguises this process of construction, and writes sexually specific bodies out of the text of law. The project of feminism is to replace them. The difficult trick is to do so without fixing their shape and identity within received categories of masculine and feminine. Hence not all feminists endorse the idea of abandoning 'reasonableness' tests or the appeal to otherwise universal standards.[44]

4. Law's centrality

In stark contrast to not only a great deal of positivist legal scholarship but also much 'law and society' work, feminist writers have often questioned law's importance or centrality to the constitution of social relations and the struggle to change those relations. Clearly feminist views diverge here. Catharine MacKinnon, for example, is optimistic about using law for radical purposes; but many other feminists – notably British feminist Carol Smart – have questioned the wisdom of placing great reliance on law and of putting law too much at the centre of our critical analysis. Perhaps this is partly a cultural difference: the British women's movement has typically been relatively anti-institutional and appositional. Yet even in the USA, where there is a stronger tradition of reformist legal activism, feminists associated with critical legal studies have been notably more cautious about claims advanced in some critical legal scholarship[45] about law's central role in constituting social relations. Feminists have thus tended further towards a classical Marxist orientation on this question than have their non-feminist critical counterparts. In terms of analytic focus, however, this has led feminists to address a range of social institutions – the family, sexuality, the political realm, bureaucracies – well beyond the Marxist terrain of political economy. Feminists writers continue to be ambivalent about whether and how law ought to be deployed as a tool of feminist action, practice and strategy. To the extent that feminist critique identifies law as implicated in the construction of existing gender relations, how far can it really be used to change them, and do strategic attempts to use law risk the danger of reconfirming law's power?

42 See Carol Smart, *Feminism and the Power of Law* (Routledge, 1989); Michel Foucault, *Discipline and Punish* (Penguin, 1977).

43 Catharine MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, 1989).

44 See for example Drucilla Cornell, *The Imaginary Domain* (Routledge, 1995), Chapter 1.

45 See for example, Roberto Unger, 'The Critical Legal Studies Movement in America' (1983) 99 *Harvard Law Review*, 561.

5. Law as a system of enacted norms or rules

Typically, feminist legal theory reaches beyond a conception of law as a system of norms or rules – statutes, constitutions, cases – and beyond 'standard' legal officials, such as judges – to encompass other practices which are legally relevant or 'quasi-legal'. For example, the Oslo school of Women's Law had a main focus on administrative and regulatory bodies such as social welfare agencies, the medical system and the family.[46]

This institutional refocusing is also connected with poststructuralist ideas, and notably with Michel Foucault's reconceptualisation of power, and the implications of this reconceptualisation for law.[47] Foucault distinguished between sovereignty power – power as a property or possession; and disciplinary power – the relational power which inheres in particular practices and which flows unseen throughout the 'social body'. His basic argument was that the later modern world was gradually seeing the growth of subtle, intangible, disciplinary power, at the expense of the old sovereignty power. Since Foucault associated legal power with sovereignty power, he also tended to think that law was waning in importance. Smart, however, uses his argument about power in a different way in relation to law: she points out that law itself has not only sovereignty but disciplinary power. For one of the distinguishing features of disciplinary power is its subtly normalising effect, and as soon as we look beyond a narrow stereotype of law as a system of rules backed up by sanctions, we begin to see that one of law's functions is precisely to distribute its subjects with disciplinary precision around a mean or norm. For example, the way in which legal rules distribute social welfare benefits or allocate custody of children (on divorce or via adoption) reflects judgements about the right way to live; it expresses assumptions about 'normality'. A yet more spectacular example is that of the construction of gay and straight sexualities in criminal laws and in family and social welfare legislation. These 'normalising' assumptions have a pervasive power which also structures the administration of laws – eg of social welfare benefits and policing policies – at the bureaucratic level, generating phenomena such as reluctance to prosecute in 'domestic violence' cases, the oppressive policing of gay sexuality, and the discriminatory administration of welfare benefits. Feminist (like other critical) analyses are interested here in not just legal doctrine but also legal discourse – ie how differently sexed legal subjects are constituted by and inserted within legal categories via the mediation of judicial, police or lawyers' discourse. The feminist approach therefore mounts a fundamental challenge to the standard ways of conceptualising law and the legal, and moves to a broader understanding of legally relevant spheres of practice.[48]

6. Law's unity and coherence

Readers of both student texts and legal cases will be familiar with the very high importance attached by lawyers and legal commentators to the idea (perhaps the ideal) of law as a unitary and a coherent system of rules or norms. It is an idea which informs legal theory in a number of ways. Once again, Kelsen provides a

46 See Tove Stang Dahl, *Women's Law* (Norwegian University Press, 1986).

47 Michel Foucault, *The Archaeology of Knowledge* (Tavistock Press, 1972); *Discipline and Punish* (Penguin, 1977); Carol Smart, *Feminism and the Power of Law* (Routledge, 1989).

48 For further discussion, see Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5 *Social and Legal Studies*, 131.

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

spectacular example[49] his *Grundnorm* had to be hypothesised precisely because otherwise it would have been impossible to interpret law as a coherent, non-contradictory normative field of meaning. As a law student, one of the first things one is taught to do is to hone in on contradictory or inconsistent arguments. The idea of coherence as the idea(l) which lies at the heart of law finds its fullest expression in Ronald Dworkin's idea of 'law as integrity',[50] but it also finds some support in procedurally oriented ethical and political theories, notably in critical theory of the Frankfurt School.[51]

Feminist scholarship, like much other critical legal theory, is concerned to unsettle this belief in law's coherence and rather to reconstruct the pretension to coherence as part of the ideology of both law and jurisprudence: as part of what helps to represent law as authoritative; adjudication as democratically legitimate and so on. The search for contradictions, and the unearthing of what have been called 'dangerous supplements' and hidden agendas, takes place both at the level of doctrine and at that of discourse.[52]

To take some specific examples, the assertion within legal doctrine of particular questions or issues as within public or private spheres is contradictory, question-begging, under-determined: sexuality, for example, is public for some purposes and private for others[53] the idea of the legal subject as rational and as abstracted from its social context is undermined by exceptions such as defences in criminal law, shifts of time frame in the casting of legal questions, and an arbitrary division of issues pertaining to conviction and those pertaining to sentence.[54] In contract law, one could cite shifts between a freedom of contract model and a model which views contract as a long term relationship within which, for example, loss occasioned by contracting parties' general reliance upon the contractual relationship can be recognised and compensated.[55] Nor are these incoherencies confined to the doctrinal framework: they mark also the discourse through which human subjects are inserted into that structure. For example, the rational and controlled male of legal subjectivity is, after all, also the rape defendant who is subject to feminine wiles and incapable of telling yes from no. The unearthing of such contradictions is not just a matter of 'trashing': it forms part of an intellectual and political strategy – of exposing law's indeterminacy, of emphasising its contingency, and of finding resources for its reconstruction in those doctrinal principles and discursive images which are less dominant yet which fracture and complicate the seamless web imagined and created by orthodox legal scholarship.

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

49 H Kelsen, *The Pure Theory of Law, op cit*.

50 R Dworkin, *Law's Empire* (Fontana, 1986).

51 See Jurgen Habermas, *Faktizitat und Geltung* (Suhrkamp Verlage, 1992).

52 Roberto Unger, *The Critical Legal Studies Movement in America* (1983) 99 *Harvard Law Review* 561.

53 See Frances Olsen, 'The Family and the Market' (1983) 96 *Harvard Law Review*, 1497; Nicola Lacey, 'Theory into Practice: Pornography and the Public/Private Dichotomy' (1993) 20 *Journal of Law and Society*, 93.

54 See Mark Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 *Stanford Law Review* 181; Nicola Lacey, 'Feminist Legal Theory: Beyond Neutrality' (1995) *Current Legal Problems*, 1.

55 See Hugh Collins, *The Law of Contract* (Butterworths, 2nd edn, 1993).

7. Law's rationality

Perhaps most fundamentally of all, it is argued that contradictions and indeterminacy in legal doctrine undermine law's supposed grounding in reason, just as the smuggling in of contextual and affective factors undermines law's apparent construction of the subject as rational, self-interested actor. Furthermore, in so far as law is successful in maintaining its self-image as a rational enterprise, this is because the emotional and affective aspects of legal practice are systematically repressed in orthodox representations. Once one reads cases and other legal texts not only for their formal meaning but also as rhetoric, one sees how values and techniques which are not acknowledged on the surface of legal doctrine are in fact crucial to the way in which cases are decided.[56]

Conclusion

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

SOCIAL CONTRACT THEORY

Theories of social contract and the rights of man derive in large measure from the political upheavals of the 18th century, and the American War of Independence[57] and the French Revolution.[58] The writings of John Locke,[59] Jean-Jacques Rousseau[60] and Thomas Paine[61] are all infused with the doctrine of the inalienability of individual human rights – rights which transcend the law of the State, which cannot be overridden by the State, and which affirm the supremacy of the law of the State with the important proviso that the law of the State is in compliance with individual rights. The questions which arise from a feminist jurisprudential perspective is whether the social contract as originally hypothesised by Locke, Paine and Rousseau and later interpretations – between government and citizen – is a contract in which women participate, or whether the 'social contract' is a male construct established to serve the needs of men to the exclusion – intentional or unintentional – of female participation in civic life.

Feminist scholars have examined the works of the social contractarian writers – most particularly those of John Locke, writing in the 18th century, and of John Rawls, a 20th century exponent of social contract theory.

56 See Mary Joe Frug, *Postmodern Legal Feminism* (Routledge, 1991); Peter Goodrich, *Reading the Law* (Blackwell, 1986).

57 1775–83.

58 1789.

59 *Two Treatises on Government* (1690).

60 *The Social Contract* (1762).

61 *The Rights of Man* (1791).

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

Early conceptions of limited governmental power

John Locke

In *Two Treatises of Government*,[62] John Locke claimed that sovereign power was limited and that the people had the right to resort to revolution against the sovereign if power was abused. Such writing was both revolutionary and seditious – challenging the very basis of state authority. Locke went into exile in 1683.[63] With the accession of William of Orange to the throne in 1689, Locke returned to England and his work – previously unpublished – reached the light of day, albeit anonymously. The timing of publication could not have been more forceful. An historic settlement between parliament and Crown had finally and recently been reached – resulting in the Bill of Rights 1689, thus ending centuries of conflict. However, Locke's writing presented a theory which asserted the rights of man against the sovereign power. Much of the first *Treatise* is an argument directed against absolute monarchical power and the use of the prerogative. By insisting that government held its power on trust Locke was indirectly asserting the sovereignty of the people over the sovereignty of government. Government had a legitimate right to rule, and to use the law for the good of the people; but that right was conditional and limited by the ultimate power of the people to overthrow a government which violated its trust. As Locke observed:

> … acting for the preservation of the community, there can be but one supreme power, which is the legislative, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them. For all power given with trust for the attaining an end being limited by that end, whenever that end is manifestly neglected or opposed, the trust must necessarily be forfeited, and the power devolve into the hands of those that gave it, who may place it anew where they shall think best for their safety and security. And thus the community perpetually retains a supreme power of saving themselves from the attempts and designs of anybody, even of their legislators, whenever they shall be so foolish or so wicked as to lay and carry on designs against the liberties and properties of the subject. For no man or society of men having a power to deliver up their preservation, or consequently the means of it, to the absolute will and arbitrary dominion of another, whenever any one shall go about to bring them into such slavish condition, they will always have a right to preserve what they have not a power to part with, and to rid themselves of those who invade this fundamental, sacred, and unalterable law of self-preservation for which they entered into society. And thus the community may be said in this respect to be always the supreme power, but not as considered under any form of government, because this power of the people can never take place till the government be dissolved.[64]

62 Assumed to have been in manuscript form by 1683.

63 Whilst in exile Locke wrote the essay *Concerning Human Understanding* and the *Letter on Toleration*.

64 *Two Treatises of Government*, Book II, Chapter XIII, para 149.

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

Despite the intuitive attraction of Locke's writing, when viewed from a feminist perspective, the question arises as to whether Locke would accord equal rights to women in civil society. Melissa Butler analyses the work of John Locke in the following manner.

EARLY LIBERAL ROOTS OF FEMINISM: JOHN LOCKE AND THE ATTACK ON PATRIARCHY[65]

Melissa Butler[66]

Social Relations in the Second Treatise

... From the very outset of the discussion of the parent-child relation, Locke rejected the terminology of patriarchy, claiming that:

> [paternal power] seems so to place the Power of Parents over their Children wholly in the Father, as if the Mother had no share in it whereas if we consult Reason or Revelation, we shall find she hath an equal Title … For whatever obligation Nature and the Right of Generation lays on Children, it must certainly find them equal to both the concurrent Causes of it.[67]

The basic argument at the root of his terminological objection was one familiar from the *First Treatise*. Patriarchal theory could not stand if power were shared by husband and wife. As Locke argued in the *Second Treatise*, 'it will but very ill serve the turn of those Men who contend so much for the Absolute Power and Authority of the Fatherhood, as they call it, that the Mother should have any share in it'.[68]

Locke's examination of the conjugal relationship demanded a more extensive analysis of the roles and status of women in society. He described conjugal society as follows:

> Conjugal Society is made by a voluntary Compact between Man and Women: 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.[69]

Conjugal society existed among human being as a persistent social relationship because of the long term of dependency of the offspring and further because of the dependency of the women who is 'capable of conceiving, and *de facto* is commonly with Child again, and Brings forth too a new Birth long before the former is out of a dependency'.[70] Thus the father is obliged to care for his children and is also 'under an Obligation to continue in Conjugal Society with the same Woman longer than other creatures'.[71]

65 Mary Lyndon Shanley and Carole Patemen (eds), *Feminist Interpretations and Political Theory* (Polity Press, 1991).

66 At the time of writing, Associate Professor of Political Science at Wabash College.

67 Locke, *Two Treatises*, II, 52.

68 *Ibid* at II, 53.

69 *Ibid* at II, 78.

70 *Ibid* at II, 80.

71 *Ibid*.

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

Though the conjugal relationship began for the sake of procreation, it continued for the sake of property. After praising God's wisdom for combining in man an acquisitive nature and a slow maturing process, Locke noted that a departure from monogamy would complicate the simple natural economics of the conjugal system.[72] Though conjugal society among human beings would be more persistent than among other species, this did not mean that marriage would be indissoluble. Indeed Locke wondered:

> why this Compact where Procreation and Education are secured, and Inheritance taken care for, may not be made determinable, either by consent or at a certain time, or upon certain Conditions, as well as any other voluntary Compacts, there being no necessity in the nature of the thing, nor to the ends of it, that it shall always be for life.[73]

Locke's tentative acceptance of divorce brought him criticism over 100 years later. Thomas Elrington commented that 'to make the conjugal union determinable by consent, is to introduce a promiscuous concubinage'. Laslett notes that Locke was prepared to go even further and suggested the possibilities of lefthand marriage.[74] In Locke's view, the actual terms of the conjugal contract were not fixed and immutable:

> Community of Goods and the Power over them, mutual Assistance and Maintenance, and other things belonging to Conjugal Society, might be varied and regulated by that Contract, which united Man and Wife in that society as far as may consist with Procreation and the bringing up of Children.[75]

Nevertheless, Locke described what he took to be the normal distribution of power in marital relationships:

> The Husband and Wife, though they have but one common Concern, yet having different understandings will unavoidably sometimes have different wills, too; it therefore being necessary, that the last Determination, ie the Rule, should be placed somewhere, it naturally falls to the Man's share, as the abler and the stronger.[76]

Clearly all forms of patriarchalism did not die with Filmer and his fellows. Here, the subjection of women is not based on Genesis, but on natural qualifications. Nature had shown man to be the 'abler and stronger'. Locke's patriarchy was limited though. The husband's power of decision extended only to those interests and properties held in common by husband and wife. Locke spelled out the limits on the husband's power:

> [His 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 that Contract be made by themselves in the state of Nature or by the Customs

72 *Ibid*.

73 *Ibid*, II, 81.

74 *Ibid* Laslett (ed) at p 364n.

75 *Ibid*, II, 83.

76 *Ibid*, II, 82.

> 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.[77]

In addition, Locke distinguished between the property rights of husband and wife. All property in conjugal society was not automatically the husband's. A wife could have property rights not subject to her husband's control. Locke indicated this in a passage on conquest: 'For as to the Wife's share, whether her own Labour or Compact gave her a Title to it, 'tis plain, her Husband could not forfeit what was hers.'[78]

There were several similarities between the conjugal and the political relationship. Both were grounded in consent. Both existed for the preservation of property. Yet conjugal society was not political society because it conferred no power of the life and death of its members. In addition, political society could intervene in the affairs of conjugal society. Men and women in the state of nature were free to determine the terms of the conjugal contract. But in civil society these terms could be limited or dictated by the 'Customs or Laws of the Country'.

The extent to which the participants in the parental and conjugal relationships could also participate in the political relationship remains to be considered. We may gain some insight into the matter by following Locke's route, that is, by tracing the origins of political power from the state of nature.

To Locke, the state of nature was a 'state of perfect Freedom' for individuals 'to order Actions and dispose of their Possessions, and Persons, as they think fit'. Furthermore, Locke also described the state of nature as:

> A State also of Equality, wherein all the Power and Jurisdiction is reciprocal, no one having more than another: there being nothing more evident, than that Creatures of the same species and rank promiscuously born to all the same advantages of Nature and the use of the same faculties should also be equal one amongst another without Subordination or Subjection, unless the Lord and Master of them all should by any manifest Declaration of his Will set one above another.[79]

Because of certain inconveniences, men quit the state of nature to form civil society through an act of consent. It was in criticising the formation of society by consent that Filmer's theory was most effective. Indeed, Locke found it difficult to show how free and equal individuals actually formed civil society. Ultimately he was forced to admit that the first political societies in history were probably patriarchal monarchies. He described the historic origins as follows:

> As it often happens, where there is much Land and few People, the Government commonly began in the Father. For the Father having by the Law of Nature, the same Power with every Man else to punish his transgressing Children even when they were Men, and out of their Pupilage; and they were very likely to submit to his punishment, and all join with him against the Offender in their turns, giving him thereby power to Execute his Sentence against any transgression [the] Custome of obeying him, in their Childhood made it easier to submit to him rather than to any other.[80]

77 *Two Treatises*, II, 82.

78 *Ibid*, II, 183.

79 *Ibid*, II, 4.

80 *Ibid*, II, 105.

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013

In this passage, Locke lumped paternal power and natural power together, allowed for the slightest note of consent, and – presto – civil society emerged. Even in a Lockean state of nature, paternal (parental?) power could be effective. Children growing up in the state of nature were under the same obligations to their parents as children reared in civil society ...[81]

... But what of women? Locke remained silent on the specific question of their participation in the founding of political society. Of course, it is possible Locke referred to the role of women in the lost section of the *Treatises*. Or, perhaps Locke understood that explicit exclusion of women seriously weakened a theory grounded in the natural freedom of mankind. Yet Locke was also a good enough propagandist to have realised how deeply ingrained patriarchalism was in everyday life. Locke had criticised Filmer's use of the fifth commandment – 'Honour thy father' – as a basis for political obligation. If the command were taken seriously, he charged, then 'every Father must necessarily have Political Dominion, and there will be as many Sovereigns as there are Fathers'. But the audience Locke was addressing was essentially an audience of fathers, household heads and family sovereigns. Locke had freed them from political subjection to a patriarchal superior – the king. He did not risk alienating his audience by clearly conferring a new political status on their subordinates under the patriarchal system, that is, on women. Nevertheless, despite the absence of any sustained analysis of the problem of women, we may draw some conclusions from an examination of Locke's scattered thoughts on women.

Though Locke gave the husband ultimate authority within conjugal society, this authority was limited and nonpolitical. Yet when Locke's account of the husband's conjugal authority was combined with his account of the historical development of political society, several questions occur which were never adequately resolved in Locke's moral theory. Did not the award of final decision-making power to the father and husband (in conjugal society) transform 'parental power' into 'paternal power'? Was the subsequent development of political power based on paternal power a result of that transformation? What was woman's role in the establishment of the first political society? Since her husband was to be permitted final decisions in matters of their common interest and property, and since political society, obviously, was a matter of common interest, would her voice simple by 'concluded' in that of her husband? If so, then Filmer's question recurs – what became of her rights as a free individual? Did she lose her political potential because she was deemed not as 'able and strong' as her husband? If this were the case, Locke would have had to introduce new qualifications for political life.

Locke portrayed political society as an association of free, equal, rational individuals who were capable of owning property. These individual came together freely, since none had any power or jurisdiction over others. They agreed to form a civil society vested with power to legislate over life and death, and to execute its decisions in order to protect the vital interests of its members, that is, their lives, liberties and estates. Yet John Locke was certainly no believer in the absolute equality of human beings. Indeed, on that score, he was emphatic:

> Though I have said … That all Men by Nature are equal, I cannot be supposed to understand all sorts of quality; Age or Virtue may give Men a just Precedency: Excellence of Parts and Merit may place others above the Common Level; Birth may subject some and Alliance or Benefits other, to pay

81 *On Locke*, pp 84.

> an Observance to those whom Nature, Gratitude, or other Respects may have made it due.[82]

But these inequalities in no way affect an individual's basic freedom or political capacity, for Locke continued in the same passage:

> … yet all this consists with the Equality which all Men are in, in respect of Jurisdiction or Dominion one over another, which was the Equality I there spoke of, as proper to the Business in hand, being that equal Right every Man hath, to his Natural Freedom, without being subjected to the Will or Authority of any other Man ...[83]

If 'Man' is used as a generic term, then woman's natural freedom and equality could not be alienated without her consent. Perhaps a marriage contract might be taken for consent, but this is a dubious proposition. Locke had indicated that a marriage contract in no way altered the political capacity of a queen regnant. While the decision-making power over the common interests of a conjugal unit belonged to the husband, Locke admitted that the wife might have interests apart from their shared interests. Women could own separate property not subject to her husbands' control. If a husband forfeited his life or property as a result of conquest, his conquerors acquired no title to his wife's life or property.

Did these capacities entitle women to a political role? Locke never directly confronted the question; nevertheless, it is possible to compare Locke's qualifications for political life with his views of women. Locke used the Genesis account to show that women possessed the name natural freedom and equality as men. Whatever limitations had been placed on women after the Fall could conceivable be overcome through individual effort or scientific advance. Furthermore, women were capable of earning through their own labour, of owning property and of making contracts.

Locke and the Rational Women

The one remaining qualification for political life is rationality. For Locke's views on the rationality of women it will be necessary to turn to his other writings, notably his *Thoughts on Education*.

In the published version of his advice on education, Locke mentioned that the work had been originally intended for the education of boys; but he added that it could be used as a guide for raising children of either sex. He noted that 'where difference of sex requires different Treatment, 'twill be no hard Matter to distinguish'.

Locke felt that his advice concerning a gentleman's education would have to be changed only slightly to fit the needs of girls. However, in a letter to a friend, Mrs Edward Clarke, Locke tried to show that his prescriptions were appropriate for her daughter and not unnecessarily harsh. On the whole, Locke believed that except for 'making a little allowance for beauty and some few other considerations of the s[ex], the manner of breeding of boys and girls, especially in the younger years, I imagine should be the same'...[84]

The differences which Locke thought should obtain in the education of men and women amounted to slight differences in physical training. While Locke thought that 'meat, drink and lodging and clothing should be ordered after the same

82 *Two Treatises*, II, 54.

83 *Ibid*.

84 Locke to Mrs Clarke, 1 January 1685, in *Correspondence*, Rand (ed).

Downloaded by [Saudi Digital Library] at 06:44 13 November 2013