INTRODUCTION TO FEMINIST JURISPRUDENCE

Hilaire Barnett BA, LLM
Queen Mary and Westfield College
University of London

Cavendish
Publishing
Limited

London • Sydney

INTRODUCTION TO FEMINIST JURISPRUDENCE

Cavendish
Publishing
Limited

London • Sydney

INTRODUCTION TO FEMINIST JURISPRUDENCE

Hilaire Barnett BA, LLM
Queen Mary and Westfield College
University of London

Cavendish
Publishing
Limited

London • Sydney

First published in Great Britain 1998 by Cavendish Publishing Limited, The Glass House, Wharton Street, London WC1X 9PX, United Kingdom
Telephone: +44 (0) 171 278 8000 Facsimile: +44 (0) 171 278 8080
e-mail: info@cavendishpublishing.com
Visit our home page on http://www.cavendishpublishing.com

Barnett, Hilaire A
Introduction to feminist jurisprudence
1. Feminist jurisprudence

I. Title
340.1'15'082

ISBN 1 85941 237 8

Printed and bound in Great Britain

In loving memory of my mother

PREFACE

Nothing evidences a subject's maturity so convincingly as the emergence of introductory texts. It may be said that over the past two decades feminist legal theory and jurisprudence[1] has come of age. The literature is now both extensive and impressive, although sometimes inaccessible to many students because it is dispersed amongst international journals. It is the objective of this book to introduce students to the major themes of inquiry and scholarship with which feminist scholars, many of whom are lawyers, are concerned. Feminist jurisprudence has many objects of inquiry, and seeks to answer many difficult, sometimes intractable, questions about law and society. If there is one single, unifying strand of thought amongst feminist legal scholars, it may be interpreted as the unmasking of the many inequalities based on gender, deriving from nature and culture and encapsulated in the law. Equally important are the practical implications of this area of study – nothing less than the search for equality for women under the law. The project is thus ambitious and all embracing, encompassing the unmasking of gender-based inequality in the substantive law, and the unravelling of the traditional exclusion of women in legal theory and jurisprudence. Feminist jurisprudence is at one and the same time an academic, legal and political enterprise.

While the focus of this book is necessarily legal, insights into the law derive from many other disciplines. Thus anthropology, economics, history, philosophy, politics, psychology and sociology all inform the many discourses of law. That law and legal theory cannot exist in a cultural or political vacuum is a simple truism, but its implications are complex. Feminist jurisprudence is no exception: its sweep is not only multidisciplinary but also universal, although crossing disciplines and geographical boundaries provides its own difficulties and pitfalls for the researcher. Feminist jurisprudence has evolved and continues to evolve at dramatic pace. It is hoped that this work will provide, for those interested in equality and justice, a window on the diversity and richness of feminist legal thought.

In Part I of the book, the foundations of feminist jurisprudence are discussed. The evolution of feminist jurisprudence and the methods employed by feminist scholars are discussed, as are the inequalities, both historical and contemporary, from which women have suffered. Chapter 3 introduces the concept of patriarchy and patriarchal manifestations in society and law. In Part II, the manner in which women have been marginalised or excluded from traditional or conventional masculine jurisprudence is considered. Because it is not assumed that all readers will be lawyers or that they will have studied conventional jurisprudence as an academic discipline, a brief overview – inevitably an unsatisfactory enterprise in an introductory work – of the central tenets of jurisprudential theories and schools of thought

1 Legal theory is concerned with theoretical constructions of the law; jurisprudence is concerned with theoretical explanations about law.

is offered. In Part III the focus is on the schools of thought which have dominated feminist legal scholarship. Part IV is devoted to key issues in feminist jurisprudence: women and medicine; women, violence and the legal system; women and pornography. Where relevant, reference is made to the *Sourcebook on Feminist Jurisprudence*, 1997, in which extracts from cited works will be found.

My thanks are due to many. To the Law Librarian, Bob Burns, for his calm and constructive responses to my several anxiety attacks, and to all the librarians, and particularly Susan Richards and her staff on Inter-Library Loans, for their efficiency and patience. My thanks also go to colleagues and friends, Ros Goode, Wayne Morrison and David Toube for reading assorted chapters and making constructive criticisms. To Jo Reddy and Sonny Leong and staff at Cavendish Publishing, my thanks for their patience and support. My thanks also, and yet again, to family and friends who have been understanding and allowed me the space in which to think and write. And to Matthew, my thanks, for 'being [t]here'.

Hilaire Barnett
Queen Mary and Westfield College
University of London
April 1998

CONTENTS

PART IV KEY ISSUES IN FEMINIST JURISPRUDENCE

PART I

THE FOUNDATIONS OF FEMINIST JURISPRUDENCE

CHAPTER 1

INTRODUCTION

THE EVOLUTION AND SCOPE OF FEMINIST JURISPRUDENCE AND FEMINIST LEGAL METHODS

The debate concerning the status of women dates back to the Ancient Greeks. Plato[1] and Aristotle[2] both sought to analyse the actual and appropriate role of women in society and from their writings may be discerned many of the ideas which continue to exercise feminist scholarship.[3] In ancient Greek thought can be found many of the ideas which have endured in later thought: the concepts of public and private life which are allegedly distinguishable, with the confinement of women to the private sphere;[4] considerations of equality based on gender; the concept of patriarchal ownership of, and/or authority and power over women.[5]

However, it is eighteenth, nineteenth and early twentieth century feminist campaigns[6] for the elimination of discriminatory laws which prevented women from participating fully in civic life which mark the origins of contemporary feminist thought.[7] The struggle for the franchise and the battle to be admitted to universities and the professions represented a seminally important, and ultimately largely successful, campaign on which subsequent work towards the full emancipation of women in society was founded.

In Europe, the First World War, the depression of the inter-war years, the Second World War and the subsequent struggle for economic recovery and the rebuilding of a viable peaceful society, resulted in a quiet phase for feminist endeavours, with one principal exception: in the United Kingdom the struggle for the vote for women over the age of 30 was finally achieved in 1918, and the full franchise for women on a basis of equality with men in 1928.

In 1949, Simone de Beauvoir's seminal work, *The Second Sex*, was published[8] and the movement revitalised. Simone de Beauvoir's work still

---

1 c 427–347 BC.

2 384–322 BC.

3 Subjected to feminist analysis, however, both Plato and Aristotle reveal a deep misogyny, as discussed in Chapter 4.

4 See Chapters 5 and 6.

5 See Chapter 3.

6 See Chapter 2 for further discussion of the early struggles for equality for women.

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

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

forms a foundation for much feminist analysis and a focus for differing approaches to the question of gender and its significance. The core theme running through de Beauvoir's work is that of women being the 'Other' (sex). By this de Beauvoir means that the construction of society, of language, thought, religion and of the family all rests on the assumption that the world is male. It is men who control the meaning given to society: man is the standard against which all is judged. Women, on the other hand, are excluded from these constructions: women is the 'Other'. Through nurturance and socialisation a female child learns to become a woman. Women, de Beauvoir argues, are socially constructed rather than biologically determined: '[O]ne is not born, but rather becomes, a woman.'[9] Being a woman – the Other – is reflected in law's construction. Law is male; the subjects of law are male. As de Beauvoir wrote:

> She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – she is the Other.[10]

The categories of Self and Other, de Beauvoir instructs, are as 'primordial as consciousness itself'. In all societies, there exists the essential and the inessential; the Self and Other, and all societies reflect this duality.[11] Considering this phenomenon in relation to law, it can be seen that traditionally law has been a male construct and that the subject of law is male. Women, being the Other, have been for long at worst oppressed, and at best ignored by the law. For women to be included as subjects of law, their voices have to be listened to and, more importantly, to be heard and acted upon. For too long the law, legal theory and jurisprudence has presented itself as a rational objective ordering of gender-neutral persons, while at the same time subconsciously addressing only the essential male.

Feminist scholars in the liberating 1960s were dedicated to the political struggle for the equality of women in the family, in the work place and in politics. By identifying sites of exclusion and oppression, feminist scholars, whether writing from a social or political science or philosophical base, demonstrated further the supremacy which men have traditionally assumed and maintained in society. Feminist legal scholarship became a natural and integral part of this movement, although lagging behind the general movement.[12] Feminist jurisprudence is both simultaneously challenging and alternative, and reflects the demands of women – irrespective of race, class, age, or ability – to be recognised as an equal party to the social contract which is underpinned by law and legal systems.

---

9 *Op cit*, de Beauvoir, fn 8, p 293.

10 *Op cit*, de Beauvoir, fn 8, p 16.

11 See, further, Chapters 6 and 10.

12 See, further, Naffine, N, *Law and the Sexes*, 1990, Sydney: Allen & Unwin.

Subsumed within the quest for equality there exist many lines of inquiry. From what origins, for example, have the inequalities which have for long been enshrined in law derived? Or to rephrase the question, *why* is society and law – from a feminist perspective – a reflection of masculine power and authority? One aspect of feminist scholarship – whether engaged in from a political or legal perspective – seeks to understand and to develop a secure theoretical base of knowledge from which to press for reform. Other scholars have long been, and remain, primarily concerned with the analysis of specific inequalities based on gender. Thus, for example, the criminal justice system, the law relating to the family, employment law and other substantive areas of law form the focus for study with a view to the eradication of often subtle but pervasive gender-based inequalities.

Feminist legal scholarship is frequently presented as having differing phases or waves, although none of these is totally distinct or isolated from other phases.[13] First phase feminism which may be dated from mid Victorian times to the present time, although most vociferous from the 1960s through to the mid 1980s, is dedicated to unmasking the features which exclude women from public life. As Ngaire Naffine has written '... the first phase can be characterised by its concern with the male monopoly of law'.[14] The quest is for equality, whether in employment generally, or in the professions or in politics. First phase feminists work within the existing system in order to remove the inequalities of the system, without necessarily questioning the system itself. This liberally inspired enterprise undertaken by the women's rights' movement accepted law as traditionally portrayed: the rational, objective, fair, gender-neutral arbiter in disputes over rights which applied to undifferentiated but individual and autonomous legal subjects. The objections voiced by feminists in this phase was to not law *per se* but to 'bad law': law which operated to the exclusion or detriment of women.[15]

'Second phase feminism', which dominated the late 1970s and 1980s, addresses not so much the substantive (legal) inequalities under which women exist – although these remain a focus for action – but rather the legal and societal structure which perpetuates inequalities. Here the focus is less on the male monopoly of law and the correlative inequalities of women, but on understanding, 'the deep-seated male orientation which infects all its practices'.[16] First phase feminists had made many remarkable advances for female equality. However, despite these achievements, it remained the case

13 Feminist scholars differ on the interpretation of these phases, which may be no more than different emphases on differing aspects of the movement.

14 *Op cit*, Naffine, fn 12, p 2.

15 See, eg, on the male monopoly of law and the legal profession, Sachs, A and Hoff Wilson, J, *Sexism and the Law*, 1978, Oxford: Martin Robertson; Atkins, S and Hoggett, B, *Women and the Law*, 1984, Oxford: Basil Blackwell.

16 *Op cit*, Naffine, fn 12, p 2.

that women were treated differently and discriminated against. If women enjoy the same capacities and talents as men, and all that is required is an analysis, recognition and reversal of the existing inequalities, how is it that women remain, still, despite all the reforms, the 'second' and 'lesser sex'? The answer lies in the masculinity of law and legal systems. For second phase feminists, of differing political persuasions, the root problem with law lies in its pretended impartiality, objectivity and rationality. By assuming gender-neutral language, law masks the extent to which law is permeated by male constructs, male standards. The 'reasonable man' so beloved by the common law, does not include women. If women are to be 'reasonable', within the legal meaning of the term, they must adopt the male standard of reasonableness.

The analyses – and there is no single or simple analysis of this work – centres on the construction of society as patriarchal in its broadest sense. Radical feminists, Marxist/socialist feminists, all – in their differing manner – focus not on specific inequalities supported by law, but on the societal structure which forms the foundation for law.[17] Cultural, or difference feminism, on the other hand, focuses more specifically on the gender issue – on women's difference from men – and its ramifications. To take but one example for introductory purposes, radical feminists[18] argue that the true source of inequality lies not just in the failure of society (and law) to accommodate women on an equal basis, but rather that law and society is deeply gendered in all its aspects and that the relationship between the sexes is determined, not by some historical or cultural accident, but by the dominant position assumed by men which results in female subordination. Sexual relations – in the broadest sense – are explained not so much by biological or gender differences, but by the dominance of men and the subordination of women, a subordination supported, reinforced and maintained by men and which many women unconsciously also support. The patriarchal tradition may – as with so much of legal and political philosophy – be traced back to Ancient Greece. We find in Aristotle, for example, the clearest exposition of the view that the man is the head of the household; that it is he who holds authority over 'his' wife and children '... for the male is more fitted to rule than the female, unless conditions are quite contrary to nature ...'.[19]

This *assumption* about women's appropriate role, based on women's lesser physical strength and her role in childbearing, has carried forward throughout society, universally and from time immemorial, and remains a principal site of women's oppression. It is for reasons such as this that feminist Shulamith Firestone argued in the 1970s, that the essence of women's subordination

17 For further analysis, see Chapters 6–9.

18 See MacKinnon, C, *Feminism, Unmodified: Discourses on Life and Law*, 1987, Cambridge, Mass: Harvard UP; *Toward a Feminist Theory of the State*, 1989, Cambridge Mass: Harvard UP.

19 Aristotle, *The Politics*, Sinclair, TA (trans), 1962, London: Penguin, 1259a37. (See *Sourcebook*, pp 281–86.)

remains situated in women's biological role, and that until reproductive technology is developed to the point of freeing women from the oppression of the womb, women will never be truly free.[20] But, while medical science and technology come closer to the era of emancipating women from the tyranny of childbirth, and society recognises (even if it does not implement) the need for childcare facilities to release women's energies for other pursuits, there remains a deep social and political resistance to women abandoning or giving less priority to the traditional mothering role. Further, demands such as Firestone's, for the release of women from traditional roles, lead to spontaneous adverse reactions from those whose political agenda turns on the centrality of the family and 'family values' for the stability and health of society. Women making such demands are thus seen as threatening the traditional social order and the Moral Right is quick to deny the demands and cloak their denial in the rhetoric of biological determinism.

'Third phase feminism' goes beyond the analysis of law as male monopoly, and questions law's claim to objectivity and rationality:

> ... by maintaining the appearance of dispassionate neutrality, law is able quietly to go about its task of assisting in the reproduction of the conditions which subordinate women (as well as other social groups).[21]

Third phase feminism, while accepting the premise of law's maleness, questions whether – as second phase feminists submitted – law and legal systems operate in an *invariably* sexist manner. The perception of third phase feminists is that while law is gendered, and deeply so, this does not necessarily mean that law operates consistently, inevitably or uniformly to promote male interests. Rather, law is too complicated a phenomenon to be portrayed in this holistic manner. What needs to be understood, from this perspective, is the manner in which law responds to differing problems, and in its operation reveals its well concealed gender bias. The approach of third phase feminists is one which necessarily rejects the 'grand theories' of second phase feminism: law in the reflection of the society it serves, is as complex as that society. In Carol Smart's analysis of the family, for example, the author demonstrates that while the law relating to abortion,[22] the law relating to financial provision for women on divorce, and the law relating to domestic violence,[23] advance protection for women, it does so unevenly, and in a manner which conceals the patriarchal ordering of law and society.[24]

---

20 See Firestone, S, *The Dialectic of Sex: The Case for Feminist Revolution,* 1972, New York: Bantam.

21 *Op cit*, Naffine, fn 12, p 3.

22 On which see Chapter 10.

23 On which see Chapter 11.

24 Carol Smart's writing is prolific: see, eg, Smart, C, *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations,* 1984, London: Routledge and Kegan Paul; *Feminism and the Power of Law,* 1989, London: Routledge and Kegan Paul; *Law, Crime and Sexuality: Essays in Feminism*, 1995, London: Sage. See, also, Olsen, F, 'The family and the market: a study of ideology and legal reform' (1983) 96 Harv L Rev 7.

The dominant current phase of feminist thought reflects both the rejection of 'grand theory' and the uncertainties and doubts concerning the role of law. Arising out of the late 1980s and continuing through the 1990s, feminists adopt postmodernist philosophy which questions all 'meta-narratives' and denies the validity of global explanations. Postmodernist political and social theory is beset with doubt, uncertainty and fragmentation.[25] Grand theorising, whether in the form of liberalism or Marxist-socialist theory falls under attack, as do feminist theories which espouse monocausal explanations of women's inequalities.

Accordingly, and as is evident from the above introductory discussion, it cannot be assumed that feminist legal scholars adopt a united stance in relation to their subject over and above the unifying desire and quest for equality. Feminist jurisprudence, to use a much overused but nonetheless useful phrase, is a 'broad church'. As will be seen, within this 'church' co-exist, *inter alia*, liberal feminists, cultural or difference feminists, socialist feminists, Marxist feminists, radical feminists and feminists who centre their scholarship on particular issues raised by race and gender orientation.

The breadth of the avenues of inquiry should cause no surprise in a postmodern era in which traditional modes of thought about society and law have come under analytical scrutiny, leading to a denial that society can be understood through the 'grand theories' which have hitherto sought to explain the world. Fragmentation, individuation and uncertainty all portray postmodern thought. Within feminist scholarship, this postmodernist approach challenges the notion that women can be encapsulated within some single theory of society and law; denies that the interests of all women are the same, as if there is some 'essential women' imbued with the characteristics and needs of every woman, irrespective of age, race or class. There accordingly exists nowadays a rich diversity in feminist writings.

Given the contemporary dominance of postmodern thought, with its overarching critique of monocausal and essentialist social and legal theory, and the postmodern emphasis on analysis untainted by philosophy and all forms of meta-narrative, it can be argued that to attach the label feminist jurisprudence to legal scholarship is to perpetuate the modernist mode of thought in a postmodern age. Postmodern analysis thus poses a challenge to feminist jurisprudence, but also offers much potential. Insisting on analysis of the local, and the specific, realities of women's lives rather than postulating monocausal explanations of women's inequalities facilitates a broadening of the boundaries of feminist scholarship, and a more comprehensive, inclusionary understanding of the relationship between law and women's lives. The postmodern critique does not deny the value of social and legal theory cast in modernist terms. Feminist scholarship, particularly since the 1960s, with its focus on the inequality of women in law and society, has,

25 See, further, Chapters 6 and 10.

notwithstanding its tendency to essentialism and monocausality, not only provided a wealth of theoretical analyses of women's condition, but also achieved much by way of achieving legal and political reform. The sheer growth in interest in feminist analyses within the academy is testament to the strength of feminist legal thought. Feminist scholarship, irrespective of its former modernist tendencies, has greatly advanced the equality of women across numerous spheres and retains, notwithstanding postmodern critiques, its critical force.

No school of thought can exist in an historical vacuum: each is dependent upon – and is a reaction against – preceding modes of thought. By way of example, Karl Marx could not have conceived his radical and original thesis which culminated in an enduring Marxist theory without a detailed analysis of industrialisation and the capitalist system. The charge that Marxism 'has not worked' and/or that this is now a 'post Marxist world' does not, however, signify the actual or imminent demise of the intellectual challenge posed by Marxist thought. Marxist theory continues to engage scholarship as a powerful challenge to and critique of liberalism. So too with feminism and feminist jurisprudence. The postmodern challenge denies the possibility of 'grand theory' and demands recognition that the construction of social reality is far more complex than any one modernist 'meta-narrative' could encompass. However, the meta-narratives of modern thought continue to exert their influence and to engage the imagination.

The postmodern challenge, while persuasive in its demand that feminist jurisprudence open itself up to the very differing conditions – social, economic and political – under which women exist, and recognise the diverse characteristics of different women – in terms of race, colour, age, class and gender orientation – does not, as will be argued further later in this book, necessarily lead to the inescapable conclusion that theorising on the grand scale has no continuing relevance to all women. As will be demonstrated throughout this work, women, as a class – though not a minority statistically – have been consistently subordinated throughout history by differing cultural, social, economic and political conditions, conditions which become supported by the governing legal regime. These forces, which may be subsumed within the term patriarchy, which is discussed principally in Chapter 3, continue to manifest themselves in the contemporary world, albeit under different guises. Within the Western industrial 'liberal' world, while women enjoy *de jure* equal economic opportunities, there nevertheless remain barriers to the *de facto* achievement of equality. Also within the Western 'liberal' world, women's rights to autonomy and equality are hampered by legal systems which reflect the characteristics of their predominantly male architects: the legislatures and judges.[26] A woman's right to control her own reproductivity – a primary

26 See Chapters 2 and 11.

feature of individual autonomy, equality and freedom – is by no means guaranteed. Those rights are determined by the framework of legal rules and medical practices relating to contraception, abortion and sterilisation. Law, religion, social policy and the medical profession combine to ensure that matters relating to women's fertility and capacity to reproduce are regulated by the State, regulation justified by its defenders as necessary in the interests of health, procreation, and by the competing claims of the moral rights of the foetus.

It is impossible in a brief introduction to demonstrate the many and differing cultural and political forces at work which have ensured women's inequalities. Each society is, quite simply, culturally and historically different. However, by way of introductory illustration, if one considers further for a moment, and this is discussed more fully in Chapter l0, the issue of reproductive control, and the converse side of the coin, that of women's right to control their own fertility, it becomes rapidly apparent that women's rights in some societies are subordinated to State policy. Population control programmes, encouraged by the United Nations and adopted by many 'Third World' countries, involve not only the use of contraceptive devices which women in the industrialised West have rejected on the basis of lack of safety, but also policies such as China's one-child policy, and, particularly in India and Pakistan, the forced sterilisation of women and men in order to control reproductivity. In Roman Catholic countries, by contrast, Church and State combine to deny women full autonomy over their own fertility by the institutionalised opposition, on doctrinal grounds, to contraception and abortion on demand.

It may perhaps be argued that the only political scenario in which feminist activity can be effective is within Western liberal democracies. It is true that the most dramatic advances in the rights of women – particularly in the sphere of politics and the economy – have been achieved under such conditions. Throughout much of the Western world, women have secured *de jure* equality in the public sphere of employment. In Europe, the Court of Justice of the European Communities,[27] in its interpretations of the right to equality,[28] has ensured that employers do not, and cannot, discriminate between men and women in terms of pay and conditions of work. Feminists in the United States of America, with its written Constitution and Bill of Rights, have achieved dramatic improvements in women's rights. Sexual harassment in the 1980s became judicially accepted to be a form of discrimination against women, contrary to the 'equal protection' clause of the

27 As the Court continues to be labelled, despite the Community now being singular and the advent of the European Union.

28 Treaty of Rome, Art 119.

Constitution.[29] Equally, the (limited) right to abortion was secured under the constitutional guarantee of the right to privacy. Feminist lawyer Catharine MacKinnon and author and activist Andrea Dworkin have long campaigned to bring pornography within the confines of legal protection for women against the discrimination allegedly caused by pornography.[30] While this campaign to date has been unsuccessful in terms of legal reform, it reveals not only the potential power but also limitations of a written constitution as an agent for legal reform.[31]

However, whilst the legal and political climate of Western democracies offers the greatest likelihood of legal reform for women, it should not be concluded that reforms cannot be secured for and by women in very differing societies.[32] Whilst women in many societies are powerless to oppose the combined forces of law, patriarchy and religion, the agencies of the United Nations have done much to reveal the nature and extent of women's inequalities in such societies, and remain constant in the quest for the improvement of women's position in society. In a world increasingly characterised by globalisation, no longer do the injustices suffered by women remain behind 'closed doors'.[33] If women have secured much in the West, although as will be seen, not yet *de facto* equality, there remain vast and intractable difficulties for women in all parts of the world.[34] The task for feminist jurisprudence – in all its manifestations – is to research and analyse the conditions of women under law, fully cognisant of the differing cultural, legal and political contexts, in order to improve the status of women.

The success of the women's liberation movement from the 1960s onwards in exposing patriarchal control and demanding equality in all spheres of life, was received neither with equanimity nor without resistance. A backlash set in. Feminism was explicitly and implicitly attacked: the average great Western male – irrespective of class – collectively declared himself to be an endangered species. Women were threatening the 'natural order': invading the (male) workplace; 'deserting the home'; breaking up families and neglecting husbands and children. As Susan Faludi has persuasively argued, the reaction was uniform and universal: women needed to be put back in 'their' place – the

29 See MacKinnon, C, 'Sexual harassment', in MacKinnon, 1987, *op cit*, fn 18; see, also, *op cit*, MacKinnon, 1989, fn 18.

30 See, further, Chapter 12.

31 The effect of differing constitutional arrangements in differing jurisdictions will become clearer in discussion of differing aspects of feminist jurisprudence.

32 Of paramount importance, however, is also to recognise the dangers of Western cultural and political imperialism in relation to women in very differing societies.

33 See, further, Chapter 2 for data published by the United Nations.

34 See Cook, R (ed), *Human Rights of Women: National and International Perspectives*, 1994, Pennsylvania: Pennsylvania UP.

home. Whether analysing the film industry, television industry, the press, the fashion and beauty industry, Faludi presents the same depressing chronicle of men in power, throughout the 1980s backlash, excluding women, opposing their advance, seeking to portray women not as achievers who had acquired equal status but misguided creatures who, in their lust for equality, had sacrificed themselves on the altar of success, in the process losing much which is deemed to be sacred in women's lives (namely that which must be preserved if male supremacy is to be upheld).[35]

Feminism thus became blamed for women's perceived plight: that of spinsterhood, childlessness, psychological pressures: if only women had remained in 'their place', women – spurred on by the women's liberation movement – would not be suffering the stresses and strains of the contemporary, complex world (and men would continue to have enjoyed the luxury of the wife and mother at home, nurturing and caring for him and the children). But as Faludi argues, the march towards women's equality has never been a smooth passage, never enjoyed a continuum of success resulting in the achievement of full freedom and equality. Rather, the march has been disjointed and frustrated:

> An accurate charting of Western women's progress through history might look more like a corkscrew tilted slightly to one side, its loops inching closer to the line of freedom with the passage of time – but, like a mathematical curve approaching infinity, never touching its goal. Woman is trapped on this asymptotic spiral, turning endlessly through the generations, drawing ever nearer to her destination without ever arriving.[36]

The explanation for this erratic progress is fourfold. First, the early movement (especially before the Second World War), as with all political movements, depended on those vociferous activists who were prepared to challenge the existing social and legal order, and to pay a high price for so doing. The clearest evidence of this may be seen in relation to the struggle for the franchise, when members of the suffragette movement suffered harassment and imprisonment in pursuit of their goal of equality.[37] Secondly, in order to advance any political movement, there exists the need to raise the consciousness of those who are being oppressed. Feminism, like Marxism, adopts consciousness raising as a primary tool in the struggle for equality.[38] So ingrained has prejudice and discrimination against women been throughout history that the patriarchal order – the superiority of men and the inferiority of women – appears a 'natural' (and therefore 'right') ordering. Not only men but also women have needed to be made aware of the very deep-

35 See Faludi, S, *Backlash: The Undeclared War Against Women*, 1992, London: Vintage.

36 *Ibid*, p 67.

37 For an overview of the movement, see, further, Chapter 2. See, also, Strachey, R, *The Cause* (1928), 1978, London: Virago.

38 See below, pp 19–21.

rooted nature of the social and legal discrimination which has operated against women's interests. Thirdly, women have for so long been denied equal access to public offices and equal opportunities in the market place that it has been particularly difficult for women to find their voices. Women were silenced by inequality, and the acceptance, by the majority of society, that this equality was somehow 'natural'. The removal of legal disabilities and legal discrimination has proved an uphill struggle. The struggle for formal legal equality has been, in the industrialised, democratic West largely, but not yet totally, successful. While the legal barriers to full equality are progressively dismantled, social and economic barriers remain. The continued reliance on women's unpaid labour in the home; the high proportion of women in unskilled, part time, employment; the small percentage of professional women who struggle through the 'glass ceiling' in their careers all evidence the continuing difficulties which women seeking equality must overcome. Fourthly, and finally, it must be recognised that feminist jurisprudence is not a coherent, monolithic, unified endeavour. As noted above, within feminist jurisprudence there exist many differing areas of interests, specialisms, objectives. Not all feminist legal scholars agree on aims and objectives, other than as to the removal of remaining discriminations against women. The differing schools of thought[39] are testimony to the diversity of feminist scholarship. This diversity should not be regarded as a disadvantage or shortcoming of feminist scholarship, or indicating that feminist jurisprudential scholarship has somehow 'lost its way', but rather represents the wide and healthy diversity of the ongoing debates.

Feminist jurisprudence has also faced a different challenge. It has been argued that a feminist jurisprudence cannot come into being, let alone exist, given the gendered nature of conventional, male jurisprudence which forecloses or excludes a feminist analysis of law from a jurisprudential perspective. One analysis of this dilemma is that to enter into the world of jurisprudence is tacitly to accept the legitimacy of law, which is essentially male, and legal theory which is founded on the law it seeks to explain.[40] Thus it is argued that feminist jurisprudence suggests complicity with masculine jurisprudence. However, alternatively viewed, a feminist jurisprudence – which reflects the scholarship of half of the academy – women – has much to offer both as a critique of masculine legal theory, and more importantly as theorising about law from the perspective of the constituencies of law which have been traditionally excluded.[41] Thus continued feminist engagement with

39 Discussed in Part III.

40 See West, R, 'Jurisprudence and gender' (1988) 55 Chicago UL Rev 1; Litteton, C, 'In search of a feminist jurisprudence' (1987) 10 Harvard Women's LJ 1; Grosz, E, 'What is feminist theory?', in Pateman, C and Grosz, E (eds), *Feminist Challenges: Law and Social Theory*, 1986, London: Allen & Unwin, p 190; cf Smart, C, *Feminism and the Power of Law*, 1989, London: Routledge and Kegan Paul.

41 Constituencies, rather than constituency, is consciously formulated to avoid the impression that there is, can be, or should be, a universalising, totalising, meta-narrative feminist jurisprudence.

conventional jurisprudence, far from implying acceptance of its terms of reference, is both necessary and important. Feminist jurisprudence encompasses not 'just' 'women' – howsoever woman might be conceptualised[42] – but multivocal, multicultural, theorising of women within their own particular time and place. Jurisprudence is not, and never has been, a cohesive, coherent discipline. It has however, conventionally, been a male world. Feminist jurisprudence offers challenges to conventional male jurisprudence which that discipline cannot ignore.

THE FEMINIST GENDER DEBATE

While the aims and objectives of all feminist legal scholars are directed constantly towards the understanding of, and the removal of, inequalities and discriminations supported by law, as with any philosophical, political or legal movement differing approaches towards the subject can be discerned. The diversity within feminist jurisprudence – as with mainstream feminism – has significant implications for the analysis of women's condition in law and society. One of the most vociferous debates has taken place between feminists on perceptions about the nature of society, law and legal systems and the implications these bear for women's equality. Equally powerful has been the debate about gender: the analyses of the equality, sameness and/or difference of women from men and, more crucially, the difference that gender makes. This debate, which dominated the 1980s, emphasises the breadth of feminist scholarship while at the same time suggesting an ineradicable and inevitable diversity within feminist jurisprudence. Gender has been, and remains, an organising focus for feminist analysis. The gender question is thus central to all schools of feminist thought, whether liberal, Marxist-socialist, cultural, radical or postmodern.

What is a woman? The gender question

What is a woman? This question, posed by Simone de Beauvoir,[43] in her now seminal work, *The Second Sex*,[44] is answered by de Beauvoir, in part, in the following passage:

> ... humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being ... And she is simply what man decrees; thus she is called 'the sex', by which is meant that she appears essentially to the male as a sexual being. For him she is sex – absolute sex, no

42 On the complexities of this see, further, Chapter 9.

43 *Op cit*, de Beauvoir, fn 8, p 13.

44 *Op cit*, de Beauvoir, fn 8.

> less. She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute – she is the Other.[45]

Woman as 'Other'

The idea of woman as 'the Other' is representative of linguistic analysis which is premised on binary opposites. Each concept in language contains within itself a primary and subordinate characteristic. The meaning of a word cannot correctly be understood unless both the primary meaning and its (silent) opposite is considered. Thus to understand the word 'presence' an understanding of its opposite, 'absence' must be incorporated. When considering the term 'masculine', its oppositional 'feminine' must be incorporated; for 'man', 'woman'; for 'universality', 'specificity'; for 'unity', 'diversity'. As discussed further in Chapter 9, each term thus contains a binary opposite. In the analysis of poststructuralist Jacques Derrida, these opposites are both interdependent and hierarchically arranged, with the leading term being superior, the opposite being inferior and weaker. In order to fully comprehend the meaning of words and concepts, they must be deconstructed in order to tease out these oppositions.

From this perspective, 'woman' is socially constructed in relation to, and as inferior to, the superior male. The man – who from infancy has been nurtured to assume an unquestioned superiority[46] – defines women's role, creates and maintains a mythology of woman based on her femininity, weakness and subordination to his power. Citing de Beauvoir once more:

> One is not born, but rather becomes, a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilisation as a whole that produces this creature, intermediate between male and eunuch, which is described as feminine.[47]

Thus far 'woman' is defined as a socially constructed individual, differentiated from man. The characterisation of 'woman' in the linguistic tradition of binary opposites, as the polar opposite to man, represents woman as the 'alternative', 'weaker', 'Other', whose identity can only be determined in relation to the more powerful construct 'man' which stands as a referent for 'woman'.

In *The Second Sex*, the author analyses the manner and means by which women are considered the 'Other' (and inferior) sex. For de Beauvoir, the

---

45 *Op cit*, de Beauvoir, fn 8, p 16.

46 See, on this, *op cit*, de Beauvoir, fn 8, particularly Book II, Part IV, Chapter 1; see, also, Chodorow, N, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender*, 1978, Berkeley, California: California UP, Part II.

47 *Op cit*, de Beauvoir, fn 8, Part IV, Chapter 1, p 295.

standard by which all matters are judged is that of the male gender. If maleness is the automatic reference point for the assessment of societal status, it follows that woman 'being different' is the 'other' sex. To be a woman, de Beauvoir argued, is to be defined as a womb, an ovary, to be female, and to be so defined is 'to imprison her in her sex'. It is gender, the social construction of woman, as opposed to biological sex, which is the focus for feminist analysis.

The concept of woman as other explains much of the traditional and continuing stereotyping of women as the bearers of children, the nurturers of children, the homemakers and (unpaid) homekeepers. The categorisation based on sex facilitates the perpetuation of low expectations of and for women; explains the lesser involvement in all aspects of the workforce; the lower pay; the concentration in part time employment; the lesser chances of promotion – that glass ceiling through which so many women fail to pass. Society – or those with power in society – constructs gender by adopting the physical and psychological distinctions between men and women. Law, being largely the reflection of society, adopts the social construction of gender and translates it into legal norms.[48] In the course of the struggle for social and legal equality, the gender question was, predominantly in the late 1970s and 1980s, placed centrestage in the feminist debate, especially in the United States of America. While liberal feminists' primary focus had been on removing the social and legal obstacles to women's equal civil and political rights within the liberal democratic State, others turned attention on the analysis of de Beauvoir's perception of women as social construct and its relevance to the maintenance of women's inferior position within the patriarchal state. What cultural/social forces determine women's identity and role in society? How can the consequences of gender be determined?

While the distinction between 'sex' and 'gender' has provided and proven to be a useful tool for analysis for feminist scholarship – most particularly in modern thought – a postmodern deconstructionist analysis of gender reveals its own complexities and the disutility of the very term in socio-political and legal analysis.[49] As Judith Butler[50] states: '[T]he limits of the discursive analysis of gender presuppose and pre-empt the possibilities of imaginable and realisable gender configurations within culture.'[51] For the time being, however, to facilitate discussion of gender and its role in feminist jurisprudence, these analytical and theoretical difficulties are put aside, to be

48 On the difficulties caused by legal determination of gender at birth for the purposes of marriage law in England, see O'Donovan, K, *Sexual Divisions in Law*, 1985, London: Weidenfeld and Nicolson, Chapter 3. (See *Sourcebook*, pp 171–76.)

49 For a recent, in-depth postmodern analysis, see Heinze, E, 'Discourses of sex: classical, modernist, post-modernist' (1998) 67 Nordic Journal of International Law 37.

50 At the time of writing, Associate Professor of Humanities, John Hopkins University.

51 Butler, J, *Gender Trouble: Feminism and the Subversion of Identity*, 1990, New York: Routledge, p 9.

returned to in Chapter 9. The consequences of gender identity are conceptually very different from the question as to how women are socially and legally constructed. Much of the feminist debate in the 1970s and 1980s, which focused on the analysis of women's 'sameness' or 'difference' (to/from men), concentrating on the issue of whether and how men and women are 'different' or 'equal' or 'the same', distracted attention from the major issue: what difference does gender make? To life? To law?

At the heart of the gender debate lie the questions 'what difference – if any – does gender difference make?' and 'to what does gender difference make a difference?' In the third century BC, Aristotle formulated his central concept of justice: namely that equal cases should be treated alike, and that unequal cases should be treated differently.[52] In the case of women, it will be seen, this doctrine has had the effect of treating women not only differently, but as second-class citizens.

At this point, a word of caution concerning the merits of the gender debate is perhaps appropriate. On the one hand, embroilment in the sameness/difference debate may divert attention and valuable analysis away from the central task of redressing legal and social inequalities. On the other hand, the gender 'sameness versus difference' debate is both important and inevitable in the pursuit of an understanding as to why society and law have consistently denied to women an equal role and status in society, and in the movement towards the eradication of the discrimination(s) endured by women over the centuries. Understanding the 'difference that difference makes' has also facilitated analysis of the manner in which the operation of law is critically affected by gender difference. By way of example, feminist legal scholars have analysed the criminal law and criminal justice system and demonstrated convincingly how the law and legal system operates against the interests of women – how the law and legal system 'excludes' women and women's particular characteristics from its operational ambit.[53]

The differing schools of feminist thought, considered in Part III, adopt differing approaches to the issue of gender. For liberal feminists, gender *per se*, is theoretically unproblematic: what is required is the removal of such formal legal inequalities which bar women from entering public life on the basis of full equality. Marxist-socialist feminists[54] adopt Marxist political philosophy and accordingly theorise women's inequality within the context of class stratification. Difference, or cultural, feminist theory,[55] on the other hand, albeit in differing ways, focuses on the perception that women and men have

52 *Op cit*, Aristotle, fn 19.

53 See the discussion, eg, on the law relating to provocation, rape trials and marital rape in Chapter 11.

54 See Chapter 6.

55 See Chapter 7.

differing modes of reasoning, and different socially-constructed roles, which are explanatory of women's inferiority and exclusion from the gendered, male, world. By contrast, radical feminism,[56] epitomised by Catharine MacKinnon's jurisprudence, conceptualises the question of gender in the light of power relationships, and the disparity of power between men and women, supported by law and society. From this perception, woman's role is determined by her socially constructed gender, which ensures her inequality and subordination in relation to law and society which is characterised by male dominance.

Alternatively, in postmodern feminist thought, the gender question is altogether more complex and uncertain.[57] As seen above, postmodern feminist thought rejects any form of universalising theory, including theories of gender. Gender thus becomes a site of contestation, not only as to its interpretation, but also as to its significance in legal and social theory. The deconstruction of gender, and the rejection of totalising theories, leads to an understanding both of the indeterminancy and fragility of the very concept of gender, and of the need for feminist jurisprudence to avoid theory which adopts an essentialist view of woman as its focus.

The complaint made by many contemporary feminists is that the emphasis placed on the equality versus difference debate in the 1980s, and the concomitant discussion of relevant differences between men and women (the binary opposites) has caused feminist theorists to fall into the trap of universality and superficiality in relation to what the all-encompassing word 'woman' means. One consequence of this error has been the exclusion of many women's voices. For feminists of colour, for working-class feminists, for lesbian feminists, the writing of many feminists – particularly before the late 1980s – ignored them, failed to give them a voice, and accordingly was guilty of precisely that which feminists critique in their analyses of masculine jurisprudence and theory: namely exclusion.

Radical feminist analysis,[58] for example, has been criticised as most accurately representing principally the demands and interests of white, middle-class women. These claims, if substantiated, represent a powerful challenge to feminist scholarship, and suggest that an essential plurality and diversity characterises feminist thought more accurately. However, as will be seen in Chapter 9, there are dangers with overemphasising the force of anti-essentialist arguments. At the same time, however, it is undeniable that feminist theory must be inclusionary, not exclusionary. The strength of the anti-essentialists' argument lies in opening up further the frontiers for

56 See Chapter 8.
57 See Chapter 9.
58 See Chapter 9.

research and knowledge: the constructive analysis of specific inequalities suffered by different groups of women. The arguments become destructive of a coherent feminist analysis, whether the approach taken is that of cultural feminism, radical feminism or liberal feminism, if that analysis turns its back on the central organising concept: that of woman. For all its deficiencies as a tool for analysis, the concept of woman is one which is central to an understanding of the inequalities perpetuated by patriarchal society and law. The term 'woman' is thus a central organising construct. It is as unrealistic to argue that the effect of pollution on trees cannot meaningfully be discussed without understanding the extent to which beeches, conifers, elms and oaks suffer from that pollution, as it is to abandon the intellectual and political quest for women's equality under law.

FEMINIST LEGAL METHODS

The Western liberal tradition, the laws which serve that tradition and legal theory which presents analyses of law, portray themselves as class-, age-, race- and gender-neutral. It is this well sustained myth of law's neutrality to gender (in particular) which feminist legal theorists seek to unmask and bring into the clear light of day in order to bring about societal change. As has been seen, the task is both legal and political. In order to achieve the objective of full equality for women, feminist legal scholars adopt a number of methods. Each of these, notwithstanding the complexity inherent in the analysis of gender, is inextricably linked to the issue of gender equality sameness and difference. These methods, which intersect and are by no means mutually exclusive, may be labelled:

(a) consciousness raising/unsilencing women;

(b) asking 'the woman question'/critique/textual deconstruction;

(c) theorising law's gendered nature;

(d) feminist practical reasoning.

Consciousness raising

Women will not demand, and will not achieve, substantive (as opposed to formal) equality unless and until the substantive and procedural legal disabilities under which women have laboured since time immemorial are understood. Consciousness raising is a process whereby women become aware, through discussion and debate of their own and others' situations and the disabilities which are imposed by society and law. There is again a parallel here with the techniques of Marxism – that of raising the awareness of those who accept the ordering of society as somehow 'natural' when in fact that

ordering is the product of societal forces. In the case of Marxism, the explanation for the class structure, and the capitalist system which maintains that structure, is explained by the relations of production and the economic system prevailing at any point in time in history. This 'historical materialism' determines societal structure and an individual's place within that structure. Thus an understanding of class, and class domination, is explained by socio-historical economic development. Only when this is understood will the 'working class' – the proletariat – shake off an acceptance of the given order as 'natural' and press for the change necessary to free them from capitalist domination. With feminism, the process of consciousness raising is analogous. Unless and until women understand why their position in society has come to be, and why women's inferiority is both systematically sustained and sustainable, there will not exist sufficient awareness raised for pressure for change. In one sense, consciousness raising represents an overarching method under which other methods are subsumed.

In order to create the climate for change, women's voices must be heard: their experiences recounted and the commonalities and differences between those experiences perceived. Moreover, in the process of this 'story telling', the individual and the group becomes empowered through the release from isolation. Consciousness raising is a process which may take place in private group settings, but is also one which operates on a public, institutional level, in the analysis of, for example, the manner in which the State and its laws, discriminate against women, exclude them from the public domain, or, when including them, do so in a discriminatory and patriarchal manner. Leslie Bender describes the process as follows:

> Feminist consciousness raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts individually suffered reveal themselves as a collective experience of oppression.[59]

There are difficulties entailed in this analysis, not least the risk of 'essentialism' or 'ethnocentrism': that is to say the assumption that the experience of all women, irrespective of race, age, sexual orientation, ability or class may be 'represented' by one, or any one, woman.[60] As the self-styled black lesbian feminist socialist writer Audrey Lorde argued in 1984:

> ... [b]y and large within the women's movement today, white women focus upon their oppression as women and ignore differences of race, sexual preference class, and age. There is a pretence to a homogeneity of experience covered by the word sisterhood that does not in fact exist.[61]

59 Bender, L, 'A lawyer's primer on feminist theory and tort' (1988) 38 J Legal Educ 3, p 9.

60 For discussion, see Chapters 6, 9 and 10.

61 Lorde, A, 'Age, race, class and sex: women redefining difference', in *Sister Outsider*, 1984, Trumansburg: Crossing, pp 114–15.

And consciousness raising has given rise to disputes between feminists as to their commonality. As Katharine Bartlett has written:

> Feminists disagree, for example, about whether women can voluntarily choose heterosexuality, or motherhood; or about whether feminists have more to gain or lose from restrictions against pornography, surrogate motherhood, or about whether women should be subject to a military draft. If they disagree about each other's roles in an oppressive society, some feminists accuse others of complicity in the oppression of women.[62]

Notwithstanding these difficulties, consciousness raising provides a forum for women's voices which might otherwise have remained silent or unheard; it also provides the means by which the many common experiences of women – despite their diversity – such as sexual harassment, rape and other violence, may be shared. If the feminist movement of the 1960s and 1970s was rightly charged with 'essentialism', the corrective voices have surely now been heard and acknowledged. Heterosexual women may experience patriarchal domination within the family; lesbian women arguably do not. White women may be oppressed by gender and class, but they are not, in Western societies, oppressed also by race; women of colour on the other hand, experience oppression not just on the basis of gender but also on the basis of race and class. The value of consciousness raising, however, should not be lost within the feminist debate on essentialism and diversity: rather women's diversity must be accommodated within the debate in order to further the dismantling of inequality.

Asking the 'woman question'

The woman question demands explanations for women's exclusion from all areas of life: it demands justification from those who perpetuate women's exclusion. The woman question asks: why is it that despite more or less equal employment opportunities, it is still women who undertake the child-rearing and domestic responsibilities within the home? It asks, in relation to medical issues, by what right the law prohibits or limits abortion against a woman's wishes; or sanctions sterilisation of women without their consent; or sanctions coerced caesarean sections. The woman question also asks how politicians, in their role of law makers, constructs the image of woman in the law. Remaining within the field of law and medicine, an analysis of the parliamentary debates preceding the English Abortion Act 1967 reveals that women were constructed as, *inter alia*, 'irresponsible, immature and emotional', in contradistinction to the (predominantly male) doctors who were portrayed as, *inter alia*, 'responsible, mature, professional, rational and

62 Bartlett, K, 'Feminist legal methods' (1990) 100 Harv L Rev 829. (See *Sourcebook*, pp 94–105.) On 'collaboration', see *op cit*, MacKinnon, 1989, fn 18, pp 637, 639.

objective'.[63] Only by asking the woman question, by deconstructing texts and institutional practices, can the position of women be revealed; can justifications and rationalisations be demanded and the discriminations and disabilities be removed.

The woman question is asked also when women demand explanations as to why it is that they may not serve in an equal capacity in the armed forces; or as prison guards; or (historically) why they were not allowed to vote, or to own private property after their marriage, or to have custody of their children, or to enter into contracts as free and independent individuals. The question is also addressed when, having gained formal access to previously excluded categories of employment, women find themselves subject to discrimination in the form of sexual harassment.[64]

Rules of law and institutional practices are most generally cast in gender-, race-, class- and age-neutral terms.[65] While the criminal law relating to crimes of violence ranging from assault through grievous bodily harm to murder are framed in gender-neutral language, when subjected to feminist analysis the law is deeply imbued with masculinity. Equally, the definition of crimes and defences to criminal charges are cast in neutral language. Thus, for the most part, the appearance which law presents is one of gender-blindness. The reality of law, however, is that it operates in many respects in a manner which places gender centrestage. As has been well documented, for example,[66] the English law of provocation which operates as a partial defence to a charge of murder, is constructed in such a manner as to be appropriate to male responses to threats of violence, but is wholly inappropriate in its application to women victims of violent assaults which most often occur within the family and are inflicted by a male spouse, father or other male relation.

As the recent cases of *R v Ahluwalia*[67] and *R v Thornton*[68] so eloquently testify, female victims of domestic violence who live in fear of their lives from assaults by their husbands, do not react in the spontaneous manner which the English law of provocation requires. Neither has English law, until recently,

63 See Sheldon, S, 'Who is the mother to make the judgment? Construction of women in English abortion law' [1993] 1 Feminist Legal Studies 3. (See *Sourcebook*, pp 507–18.)

64 In 1997, a former Navy wren was awarded £65,000 by an industrial tribunal for assault and harassment; another won £85,000 from the Ministry of Defence for sexual harassment, and a Lieutenant was given £100,000 by the Ministry of Defence in compensation for sexual harassment. Twenty three cases for sexual harassment are pending against the Ministry of Defence, and *The Sunday Times* estimated that a further 15 cases remain pending against the Navy: *The Sunday Times*, 4 January 1998.

65 Exceptions of course exist. Under English law, eg, until 1994, the crime of rape could only be committed against a woman: see now the Criminal Justice and Public Order Act 1994, ss 142 and 143.

66 And see, further, Chapter 12.

67 [1992] 4 All ER 889.

68 [1992] 1 All ER 306; (No 2) [1995] NLJ Rep 1888; (1995) *The Times*, 14 December.

even acknowledged 'battered woman syndrome' and its relevance within the context of defences to a prosecution for murder.[69] 'Asking the woman question' involves, within this context, unmasking the 'maleness' of the defence of provocation and pressing for reform which makes such a defence applicable to both men and women on equal terms.

The criminal justice system – in terms of its procedures – has also fallen for analysis by asking the woman question. In rape trials, for instance, it is well documented that, whereas the male defendant is on trial for the offence, and his liberty is at risk, women's perception of the legal process is that it is they – the rape victims – who are in fact on trial. Whereas it is the man's actions and state of mind which are primarily in issue when the matter is perceived in gender-neutral terms, when the victim's perspective and perceptions are seriously considered it becomes apparent that it is she, the victim, whose lifestyle is under scrutiny, whose consent or non-consent to sexual intercourse is centrestage of the proceedings.

Feminist practical reasoning

Feminist practical reasoning furthers the enquiry into the operation of law by unmasking the juridical techniques employed in the courts: techniques which have the effect of reinforcing women's inequality.

Conventional (male) legal reasoning, like language, is characterised by abstraction, objectivity, rationality and deductive logic. Legal reasoning is also cast in a binary mould:[70] right and wrong, lawful and unlawful, just and unjust. Rules of law, while they have a 'core of certainty and penumbra of doubt',[71] and may be more or less specific, have certain definable boundaries. If applied in a mechanical fashion – irrespective of, or ignoring the individual subject of law – laws can operate harshly and unjustly. No form of legal reasoning takes place in a vacuum and the application of law must be placed within its wider context.[72] If the context within which law is analysed and applied is one constructed from one dominant perspective – man's – the law risks operating in an exclusionary fashion. We can return to the example of the law of provocation for an illustration of this phenomenon. As the case law reveals the application of (male) standards to the circumstances facing battered women, ignored or excluded their own particularised subjectivity. A genuinely gender-neutral law of provocation would find room to accommodate women's subjectivities: their differing reactions to a violent

69 See Edwards, S, *Sex and Gender in the Legal Process,* 1996, London: Blackstone. See, also, Hordern, J, *Provocation and Responsibility,* 1993, Oxford: Clarendon, Chapter 9.

70 On which see Chapters 6 and 10.

71 See Hart, HLA, *The Concept of Law*, 1961, 2nd edn, 1994, Oxford: OUP.

72 *Ibid*.

situation. The law would then be transformed from one which excludes women to one which includes them.[73]

Supposedly gender-neutral language became a defence in the late nineteenth and early twentieth century for the exclusion of women from the legal profession, from the franchise and from political office.[74] In England, as discussed in Chapter 2, the right to vote was won only after years of legal and political struggle. The view adopted by the court in *Chorlton v Lings*,[75] namely that as a matter of legal interpretation the word 'man' does not include 'woman' – contrary to normal canons of statutory interpretation as set out in the Interpretation Act 1889 – was a form of reasoning adopted by the Canadian courts when challenges were presented to the exclusion of women from the profession and from public office. In the case of *In re French*[76] the court explicitly enunciated its views on the 'proper' role of women, namely within the private, domestic sphere of life. The differences between men and women, Mr Justice Barker argued, were such that '[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life'.[77] In Mary Jane Mossman's view, such reasoning was out of step with the demands of legal method: those of reliance on relevant evidence, the use of legal precedents and a 'rational conclusion supported by both evidence and legal principles'. What the dictum reveals, in her view, is that legal method gave way to Mr Justice Barker's perceptions of women's 'proper' role, perceptions which were instilled in him by the 'cultural and professional milieu in which he lived'. Not that precedent was ignored: indeed the court relied on the earlier case of *Bradwell v Illinois* decided in 1873,[78] and followed it without consideration of the social change occurring in relation to women and women's employment. It was to be in 1930 that the Privy Council finally laid to rest the mythical exclusion of women from public life. In the *Persons* case,[79] Lord Sankey stated that:

> The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in later years were not necessary.[80]

73 But cf *op cit*, Hordern, fn 69, in which it is argued that the defence of provocation should be abolished.

74 See the analysis of Mary Jane Mossman on the Canadian cases on entry to the legal profession and public office in 'Feminism and legal method: the difference it makes' (1987) Wisconsin Women's LJ. (See *Sourcebook*, pp 107–19.)

75 (1868) LR 4 CP 374.

76 (1905) 37 NBR 359.

77 *Ibid*, p 365.

78 83 US (16 Wall) 130 (1873).

79 *Reference re: Meaning of the Word 'Persons' in section 24 of the British North American Act* [1928] SCR 276; *Edwards v AG for Canada* [1930] 1 AC 124.

80 [1930] 1 AC 124, p 128.

What becomes clear from an analyses of these cases is that the judges were, until the Privy Council decision, concerned not just with the techniques of legal method – the rational, objective determination on relevant facts and the application of justifiable precedent – but by their own subjective intuitions about 'women's place'. A feminist deconstruction on the legal reasoning reveals the damaging assumptions and presumptions which led the judges to their discriminatory decisions.

In Chapter 7, Carol Gilligan's research on the differences in girls' and boys' moral and psychological development is discussed.[81] Sufficient here for the discussion of feminist legal methods, Gilligan's research findings revealed that whilst boys reason in a logical, deductive manner, the development of girls is more influenced by relational concerns, by their 'connectedness' with others. Despite the controversy surrounding Gilligan's findings, her research carries implications for feminist legal method. How, if as the research demonstrates, girls and boys reason differently, can such evidence be incorporated within law and the legal system? As every first year student of law knows, under common law legal systems, both the interpretation of statutes and the evolution of the common law are constrained by so called 'rules' of statutory interpretation and the doctrine of *stare decisis* (precedent). The law employs the adversarial method, as opposed to the civil law inquisitorial method. Legal reasoning is characterised by deductive logic, the identification of relevant facts and the application of precedent to those facts. Objectivity and rationality are the hallmarks of legal practice:

> Traditional legal methods place a high premium on the predictability, certainty, and fixity of rules. In contrast, feminist legal methods, which have emerged from the critique that existing rules overrepresent existing power structures, value rule-flexibility, and the ability to identify missing points of view.[82]

Feminist legal method does not ignore, nor exclude, the necessity of predictability and certainty in law which is facilitated by the application of rules and principles. Nor, necessarily, does feminist legal method offer an exhaustive alternative to 'traditional' legal methods. Rather, feminist legal method seeks to complement traditional legal method by incorporation of alternative views, experiences, perceptions and values which traditional method, in its insistence on logic and deductive thought, may exclude.

If, adopting the results of Gilligan's research, the findings are applied to law and legal practice, what difference, if any, would occur? This issue has been explored by Carrie Menkel-Meadow,[83] and Leslie Bender.[84] In 'Portia in

81 Gilligan, C, *In a Different Voice: Psychological Theory and Women's Development*, 1982, Cambridge, Mass: Harvard UP.

82 *Op cit*, Bartlett, fn 62.

83 Professor of Law, University of California, Los Angeles.

84 At the time of writing, Associate Professor, Syracuse University College of Law.

a different voice: speculations on a woman's lawyering process',[85] Menkel-Meadow considers the potential impact of the increasing number of women entering into the legal profession, and the impact which women's distinctive moral reasoning has on legal practice. As is documented in Chapter 2, women were long excluded from higher education and from the professions. While women comprise some 50 per cent of law graduates and entrants into the legal profession, there remain obstacles to their advancement at the same rate as their male colleagues even today. Nevertheless, with an increasingly significant proportion of women legal practitioners, it is legitimate to consider the impact women can and do make on legal practice. One question raised is whether women's distinctive voices will be heard at all, given that to succeed in the male dominated world of law it is necessary to absorb the ethos of law – a professional ethos fashioned by men in the previously exclusionary professional era. If, however, women are to make an impact on the legal process, Menkel-Meadow argues that it is most likely to be in influencing the adversarial process, in 'softening' the hard, cold logic of male reasoning, of incorporating Amy's[86] concern for fairness and for relationships. A more co-operative and conciliatory legal process could be the outcome.

In 'From gender difference to feminist solidarity: using Carol Gilligan and an ethic of care in law',[87] Leslie Bender acknowledges the charges levelled at difference theorists,[88] while accepting that gender remains an 'organising concept' in society. Rather than rejecting gender difference theory as both perpetuating women's inequality and stereotyping and arguably being 'essentialist', Bender argues that women's distinctive reasoning has an important and legitimate role to play in law. The concern for interconnectedness, for relationships through an 'ethic of care' has a valuable contribution to make to the justice system. A justice system based primarily on cold rationality will not benefit all in the community. A legal system which incorporates women's insights and experiences, women's ethic of care and responsibility, is far more likely to exhibit humanity and justice.

Gilligan's research findings place women in a paradoxical position. Some go further and regard such findings as (a) perpetuating the myth that women are equal but different, or (b) perpetuating a debate on difference in which the only referent is always male,[89] or (c) portraying an unacceptable essentialism by portraying 'women' as a homogeneous group the components of which share the essential characteristics of being white, heterosexual and

85 [1985] Berkeley Women's LJ 39.

86 Amy was one of Gilligan's research subjects.

87 (1990) 15 Vermont L Rev 1.

88 See, further, Chapter 7.

89 See, eg, MacKinnon, C, 'Difference and dominance: on sex discrimination', in MacKinnon, 1987, *op cit*, fn 18.

privileged.[90] On the other hand, as the discussion above demonstrates, 'woman' as an organising concept is a constructive platform from which to advance arguments for equality and equal treatment under law. While the arguments against 'woman' as organising concept have substance, and the concept needs in particular to be an inclusionary and not exclusionary construct, it represents nevertheless a starting point for much of the analysis of social and legal disabilities.

90 See, eg, Spelman, E, *Inessential Woman: Problems of Exclusion in Feminist Thought*, 1990, London: The Women's Press.

CHAPTER 2

GENDER INEQUALITIES AND LAW

Disadvantages and inequalities supported by law do not exist in a cultural vacuum. Before, therefore, consideration can be given to the many facets of feminist jurisprudence, it is both instructive to illustrate the cultural origins of inequalities, and to review the contemporary state of women's equality as a background to the feminist campaigns for equality. Inequalities, in differing societies, naturally take many different forms, dependent upon many factors: cultural, historical, political, religious and legal. It is both dangerous and presumptive to suggest that women's inequality has a single explanation, let alone manifests itself in uniform ways. However, from time immemorial, woman's reproductive and nurturing role has resulted in women being viewed as 'the Other' of the male: as different, as unequal.

In the 1920s, anthropologist Bradislaw Malinovski was to analyse the position of women, arguing that women from the earliest times had been assigned – by men in the position of power in society – a predominantly child-bearing and child-nurturing role.[1] Although matrilineal[2] societies have existed in the past, they have been few. Moreover, even where such a political arrangement existed, it did not have the same political implications as does a patrilineal society. Property, for example, was not vested in the female, but rather controlled by male kin. Thus, a brother or husband rather than the sister or wife would have the power over property. In the view of the nineteenth century Marxist political philosopher Friedrich Engels, it was the introduction of private – as opposed to communal – property which conclusively consigned women to the 'private sphere' of life, and denied them full participation in civic life.[3]

However, as feminist anthropologists have demonstrated, the relationship between kinship structures and gender is more complex than these introductory remarks might suggest. Whilst early social scientists focused on human reproduction as a 'natural' biological function which represented the universalist foundation of all societies, thus aligning women's social role with her maternal function, feminist anthropologists have more recently revealed the inadequacies of such causal explanations of women's inferiority. Anthropological explanations of gender relations, developed from empirical

1 See Malinowski, B, *Sex and Repression in Savage Society* (1927), 1960, London: Routledge and Kegan Paul.

2 That is to say, societies in which women hold political power and succession is determined through the female line.

3 Engels, F, *The Origins of the Family: Private Property and the State* (1884), 1940, London: Lawrence & Wishart. See, further, Chapter 6.

research in multifarious societies exhibiting very differing levels of 'development', are relied upon by feminists and others who seek to unmask the universality of women's inequality, and to seek an answer to Simone de Beauvoir's fundamental question: '[W]hat is a woman?'[4] As Michelle Zimbalist Rosaldo has explained, Victorian social theorists such as Herbert Spencer,[5] Emile Durkheim,[6] and Georg Simmel[7] recognised that women's social position and role was determined by her biological function, and while variously recognising that this function resulted in inequalities in public life, nevertheless accepted the 'naturalness' of women's inferiority as a result of her biological function: thus woman is reduced to her 'essence', her biological function. Moreover, according to Rosaldo, more modern social theorists have adopted the assumptions of earlier theorists unthinkingly and thereby 'reproduce what many recognise as outdated contrasts and conceptually misleading terms'.[8]

In 1974, Michelle Rosaldo had argued that gender inequality could be explained by understanding that woman's 'natural role' in reproduction was not merely biological, but rather a social construction of women, and that the identification of women with the home (the private sphere of life) and that of men with the public sphere (with employment, politics, law and public administration) was a by-product of the assumptions made about women's 'natural' role.[9] Thus, at this point Rosaldo was postulating a universalist explanation of women's inferiority. However, in 'The use and abuse of anthropology',[10] Rosaldo recognises that whilst there remains 'much that is compelling in this universalist account', the 'two spheres' model – of the public and the private – 'assumes ... too much about how gender really works'.[11] Whilst Rosaldo, in her research, found that patriarchy was a universal phenomenon, and that 'human and cultural forms have always been male dominated', it does not follow from that conclusion that the manifestation of male dominance assumes the same form in every society. Thus universalising anthropological theory must give way to theory which is culturally specific, and which is based on empirical research in order to

4 See, eg, de Beauvoir, S, *The Second Sex*, (1949), Parshley, H (ed and trans), 1988, London: Picador; Firestone, S, *The Dialectic of Sex: The Case for a Feminist Revolution,* 1974, New York: Bantam.

5 Spencer, H, *Principles of Sociology,* 1892–93, New York: D Appleton.

6 Durkheim, E, S*uicide (*1858), 1951, Glencoe, Illinois: Free Press.

7 Simmel, G, *Conflict and the Web of Group Affiliations*, 1955, New York: Macmillan.

8 Rosaldo, M, 'The use and abuse of anthropology: reflections on feminism and cross-cultural understanding' (1980) 5, 3 Signs: Journal of Women and Culture in Society 389, p 405.

9 See Rosaldo, M, 'Women, culture and society: a theoretical overview', in Rosaldo, M and Lamphere, L (eds), *Women, Culture and Society,* 1974, Stanford: Stanford UP.

10 *Ibid*, Rosaldo, fn 8.

11 *Ibid*, Rosaldo, fn 8, p 399.

explicate the forms in which male dominance is manifested in any particular society. Gender inequalities therefore cannot be explained, as earlier anthropologists and social scientists theorised, by either the biological fact of women's role in mothering and nurturing, or in universal theorising about the consequent relegation of women to the private sphere of life. Biological roles must be understood within the context of the social milieu: inequalities are not determined by biology but rather as social and political constructions of women which deny women a role in political life and thereby reinforce male dominance, which is reflected in differing ways in differing societies but remains universal in its manifestation in some form.[12]

From this brief introduction to early political thought and later anthropological research it can be seen that power in society has been accorded to men and women have been traditionally confined to the domestic sphere of life. Society is thus 'patriarchal' – a central concept which will be further examined in Chapter 3. Bearing in mind Rosaldo's caution about generalisation in theory, it is interesting to note the differing means by which patriarchy has been expressed in differing societies at differing times.[13]

Patriarchy assumes many and varied forms. Patriarchal attitudes are evident in the violent treatment of women, whether this treatment takes the form of sexual violence outside the home, sexual harassment in the workplace, domestic violence, or pornographic representations of women in 'art', or 'literature'. Patriarchy exhibits itself also in the manner in which women have traditionally been denied full participation in public life, whether that participation is represented by unequal positions in the employment sphere, or in democratically elected legislative bodies. Each of these aspects of the subject will be more fully explored later in the book. Our current concern is to consider cultural practices which reveal deeply ingrained patriarchal attitudes which have been manifested, in different times and places.

EMPIRICAL EVIDENCE OF CULTURAL PATRIARCHY

Chinese footbinding

In China by the twelfth century, the practice of 'footbinding' – whereby young girls' feet are bound in order to limit the size of the foot – had become established as 'correct' among 'higher society' and the practice was slow to

12 See, for more recent anthropological analyses, Fishburne Collier, J and Junko Yanagisako, S (eds), *Gender and Kinship: Essays Toward a Unified Analysis*, 1987, Stanford: Stanford UP.

13 See Daly, M, *Gyn/Ecology: the Metaethics of Radical Feminism*, 1979, London: The Women's Press. (See *Sourcebook*, pp 26–35.)

pass. The traditional explanation for the practice was that women were kept 'pure', 'delicate' and 'precious', and therefore more 'desirable' with small feet which caused the body to sway in a 'feminine' manner as it moved. That the practice resulted in severe disfigurement and pain for the victims was of little consequence to the men who demanded 'delicate' womenfolk.[14] In *Gyn/Ecology*,[15] feminist theologian Mary Daly[16] evaluates the practice, and concludes that in reality footbinding involved masculine control over women and girls, a control which was hidden by the fact that women themselves engaged in the practice in relation to their own children, for to refuse to do so would imperil their children's chance of a 'good marriage'.

Female circumcision

Similar arguments concerning female 'purity' and hence desirability may be found in relation to female circumcision reportedly still practised throughout Africa, in the Middle East[17] and amongst Indian tribes in South and Central America.[18] Circumcision may take three differing forms: the removal of the tip of the clitoris (sunna circumcision); excision of the entire clitoris, labia minora and most of the external genitalia; excision and infibulation (Pharaonic circumcision), the excision of the entire clitoris, labia minora and parts of the labia majora and the joining together (through stitching) of the two sides of the vulva, or as an alternative to stitching, the binding of the limbs until the wound heals. The purpose of this practice, as with footbinding, is tied in with female 'purity'. With circumcision, the removal of the clitoris symbolises the removal of an organ of purely female sexual gratification. The binding of the vagina ensures that no one other than the chosen husband will have access to the woman. Girls' (sometimes as young as the age of two) and young women's purity is thus ensured. A further comparative feature of circumcision with footbinding is that of the female relatives involvement in the practice. Men do not carry out circumcision: mothers and female relatives do so, in order to ensure the future desirability of their child(ren). With the myth of purity so firmly entrenched, what mother would dare not to circumcise her child?[19]

14 See, eg, Chan, J, *Wild Swans: Three Daughters of China*, 1991, London: HarperCollins.

15 *Op cit*, Daly, fn 13.

16 At the time of writing, Associate Professor, Boston College.

17 Yemen, Saudi Arabia, Iraq, Jordan and Syria.

18 The following African countries have been cited: Kenya, Tanzania, Ethiopia, southern Egypt, Sudan, Uganda, northern Zaire, Chad, northern Cameroon, Nigeria, Dahomey, Togo, northern Ghana, Upper Volta, Male, northern Ivory Coast, Liberia, Sierra Leone, Guinea, Guinea Bissau, the Gambia, Senegal, Mauritania; Hosken, F, 'Women's international news' 1976, cited in Daly, *op cit*, fn 13, p 161.

19 In Somalia, failure to circumcise a daughter is a ground for divorce.

Hindu suttee

In Hindu culture, upper caste widows were traditionally denied the right to remarry and until 1829, when the practice was officially banned, burned to death on their husband's funeral pyre. Mary Daly describes this barbaric practice of female slaughter[20] and provides evidence that, whilst confined to the upper classes, the practice 'spread downwards' into the 'lower classes' and moreover, affected other female family members: mothers, aunts, sisters, mistresses, all in the name, according to one (male) interpreter of 'sending the family or part of it "into the other world along with the chief member"'.[21]

European witch-murders[22]

It is unnecessary, however, to travel to once distant parts of the world for evidence of cultural male dominance and the suppression of women as second-class citizens and property of their male kinsfolk. In England, Scotland and continental Europe in the sixteenth and seventeenth centuries, women were persecuted, prosecuted, convicted and put to death on charges of being witches. Witchcraft was regarded as the means to do evil through the use of occult powers, or the belief in *maleficium*.[23] Between 1542 and 1739, almost 1,000 women were executed for witchcraft.[24] Two principal explanations exist for the persecution of witches. The first explanation is the 'traditional male' explanation, namely that witches were a threat to the established order of society and to religious beliefs.[25] Thus, Kramer and Sprenger, authors of *The Malleus Maleficarum*[26] first published in 1486, state that '[A]ll witchcraft comes from carnal lust which is in women insatiable'. In 1597, King James VI of Scotland wrote that witches were a 'threat to the social order, and that they

20 See *op cit*, Daly, fn 13, Chapter 3.

21 Campbell, J, *The Masks of God: Oriental Mythology*, 1962, New York: Viking, p 62, cited in Daly, *op cit*, fn 13, p 116.

22 See *op cit*, Daly, fn 13, and, also, Hester, M, *Lewd Women and Wicked Witches: A Study of the Dynamics of Male Domination*, 1992, London: Routledge and Kegan Paul. (See *Sourcebook*, pp 35–39.)

23 See, eg, Thomas, K, *Religion and the Decline of Magic*, 1971, London: Weidenfeld and Nicolson; Cohn, N, *Europe's Inner Demons*, 1975, London: Chatto, Heinemann.

24 See Ewen, L, *Witch Hunting and Witch Trials* (1929), 1971, Frederick Miller; MacFarlane, A, *Witchcraft in Tudor and Stuart England, a Regional and Comparative Study*, 1970, London: Routledge and Kegan Paul; Monter, E, *Witchcraft in France and Switzerland*, 1976, New York: Cornell UP cited in Hester, *ibid*, p 128.

25 The last woman to be convicted of witchcraft in England was Helen Duncan, who in 1944 stood trial at the Old Bailey on charges under the Witchcraft Act 1735, and served a term of imprisonment of nine months. Her prosecution was prompted by the fear that she represented a threat to national security in wartime. The Witchcraft Act was repealed in 1951, to be replaced by the Fraudulent Mediums Act. Between 1980 and 1996 there were seven prosecutions under this Act, six of them leading to convictions.

26 Kramer, H and Sprenger, J, *The Malleus Maleficarum* (1928) Summers, Rev M (trans), 1971, New York: Dover.

should preferably be eradicated'.[27] The second, and more radical interpretation, is feminist. The well documented phenomenon of the murder of women for witchcraft has been interpreted by Mary Daly, for example, as representing the 'purification' of society of women – especially spinsters and widows – who were outside patriarchal control and thus a threat to the established (male) supremacy.[28] Marianne Hester[29] agrees, stating that witch murder represented 'an instance of male sexual violence against women, relying on a particular sexual construct of female behaviour. The hunts were a part of the apparently on-going attempt by men to control women socially, and to reimpose the male-dominated status quo in a period of many changes including economic restructuring and pressure on economic resources. In other words, the witch-hunts of the sixteenth and seventeenth centuries were a part of the "dynamics of domination" whereby men at the time maintained dominance over women'.[30]

Thus, from a feminist perspective it may be argued that the witch-hunts provided one means of controlling women socially within a male supremacist society, using violence or the threat of violence, and relying on a particular construct of female sexuality. Only certain women – usually older, lower-class, poor, and often single or widowed – were directly affected. Witch murder was a form of social control over women who were outside the control of some man and therefore represented a threat to society.[31]

Wife sale in England[32]

There can surely be no more poignant example of the notion that women have traditionally been regarded as the property of their husbands than the practice of 'wife sale'. Immortalised in Thomas Hardy's *The Mayor of Casterbridge*,[33] wife sale represented a semi-formal means of transferring the 'property' in the wife to a new freeholder, where the marital relationship had broken down and where divorce was either unavailable or too costly.

---

27 James VI, *The Daemonology* (1597), cited in Hester, *op cit*, fn 22, p 129. See, also, Larner, C, *Witchcraft and Religion*, 1984, Oxford: Basil Blackwell; Robbins, RH, *The Encyclopedia of Witchcraft and Demonology*, 1959, London: Peter Nevill.

28 *Op cit,* Daly, fn 13, Chapter 6.

29 University of Exeter.

30 *Op cit*, Hester, fn 22, p 199.

31 Extensive legislation was introduced in England to regulate witchcraft from the time of Henry VIII until 1736. The penalty for being found guilty of witchcraft in Europe and Scotland was death by burning; in England those sentenced to death were hanged.

32 See Kenny, C, 'Wife selling in England' (1920) 45 LQR 496; Menafee, S, *Wives for Sale,* 1981, Oxford: OUP; Stone, L, *Road to Divorce: England 1530–1987*, 1992, Oxford: OUP, Chapter 43.

33 Hardy, T, *The Mayor of Casterbridge* (1886), 1975, London: Macmillan, pp 32–36. (See *Sourcebook*, pp 39–43.)

The practice of wife sale varied. As Lawrence Stone records,[34] in some instances, the 'sale' would be effected with the consent of the wife who had formed another attachment. In other cases, however, the husband would unilaterally dispose of the wife, at an auction sale, to the highest bidder. In order to emphasise the property aspect of the transfer, the husband would attach a leather collar around the wife's neck and lead her ceremoniously to the auction.

Women in marriage[35]

Traditionally, women have been treated under English law in a manner which stresses the cultural, economic, political and legal supremacy of the husband. For example, English law regarded the fact of marriage as representing a woman's implied consent to intercourse with her husband whenever he so desired. Moreover, under English law, until 1882,[36] upon marriage the husband became the sole owner and manager of the previously held wife's property. The official ideological rationale for this latter rule lay in the perception of women having a 'special status' (for this read inferior status). Thus, for example, Sir William Blackstone in his *Commentaries on the Laws of England 1765–69,* was to comment that on marriage the husband and wife are 'one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated into that of the husband: under whose wing, protection, and cover she performs every thing'. Here confirmed is Aristotle's concept of the woman as chattel. Furthermore, in order to protect the husband's property via the succession through legitimate heirs, any man found guilty of adultery with the wife could be sued for criminal conversion and substantial damages awarded; and any woman guilty of adultery could be divorced 'without more'.

Gender-based violence against women in contemporary society

One of the remaining inequalities against women remains that of violence. In Chapter 11, the international and United Kingdom data on gender-based violence is considered. However, as will be seen, while any precise measurement of the incidence of violence in society is problematic,[37] what is clearly established from all the research data is that gender-based violence is universal. Irrespective of geography or politics, discrimination against

34 See *op cit*, Stone, fn 32, pp 141–47.
35 See, further, Chapter 3.
36 The Married Women's Property Act 1882.
37 Due largely to under-reporting.