from this child-bearing function, females – if properly educated and trained alongside males – should participate fully in civic and military life: '... women should in fact, so far as possible, take part in all the same occupations as men, both in peace within the city and on campaign in war, acting as Guardians and hunting with the men like hounds ...'[17] This equality, however, was to be confined to the Guardian class, the elite in society who alone had the power to rule. For other classes, the position of women remained unequal. The class distinction applied also to Plato's radical views on the abolition of both private property and the family which he advocated in order to avoid the evils of self-interest which he perceived to stem from the ownership of property. Accordingly, all property – of which women were a subclass – was to be owned in common. The establishing of private families was viewed as antithetical to civic harmony, encouraging selfishness and greed. With the communalisation of the property of Guardians in the 'ideal city' comes the communalisation of women: the private sphere is thereby abolished in Plato's writing on the ideal city.[18] With the abolition of the family among the Guardian class, women and men were to mate in order to produce children of the highest quality who would be fit to rule. Woman was thus both equal to and yet owned by men. Women as 'property' enters into political thought with Plato. With the private family abolished, women of the highest class were freed for service alongside men. While the nature and physical characteristics of men and women differ,[19] men and women of the Guardian class are equal in terms of employment: only relevant characteristics play a role in the assignment of appropriate tasks.

For women of the lower classes marriage was to remain in place and the traditional domestic role of women preserved: in the private sphere. The woman, however, here is not in any sense equal to her husband, but a subordinate. The husband has all the powers that her father had, plus the right to sexual intercourse on demand. Should her husband die, the wife returned to the custody of her father, whose power over her destiny was absolute. Here woman is most clearly identified as property: a 'thing' to be kept or given away. Women were not eligible to own property, being regarded by law as lacking legal capacity in the same manner as children.

A sophisticated interpretation of Plato's concept of woman is offered by French feminist psychoanalyst and philosopher Luce Irigaray. Among Irigaray's voluminous writings is her interpretation of classical myths. Here her deconstruction of Plato's myth of the cavern[20] is discussed in order to reveal Plato's attitude to women. In the Myth, Plato describes men dwelling in

17 *Op cit*, Plato, fn 9, Bk V, 466d.

18 On the 'public' and 'private' spheres of life see further Chapters 3, 5 and 7.

19 Woman's role in part being procreation and her lesser physical strength being acknowledged.

20 *Op cit*, Plato, fn 9, Bk VII.

a 'sort of subterranean cavern with a long entrance open to the light on its entire width'.[21] The men are shackled and their heads fettered so that they can neither move their arms or legs nor turn their heads. Behind and higher up from the prisoners is a fire burning. Between the fire and the prisoners, a 'road' has been built, from which exhibitors produce puppet shows. An opaque screen separates the prisoners and others in the cave. In addition to the puppets there are men carrying implements, and human images and animal images. All that the prisoners can see is the shadows of the reflections of the puppets, implements and human and animal images: this constitutes their 'real' world; their reality. The prisoners are then released and forced to leave the cavern, up the ascent which is 'rough and steep', and into the sunlight.[22] At first their eyes would be blinded by the sun and unable to see, only later would they adjust and be able to see the sun, not in reflections or phantasms, 'but in and by itself in its own place'. In Irigaray's interpretation, as the men emerge from the 'reality' of the cavern and enter into the world of Ideas, the images of the cavern start to fade and disappear, they are leaving the womb, leaving the mother's body behind as they enter into the world of Ideas.[23]

The cavern – with its shadows and reflections – is a reflection of the outside world, a reflection which becomes blurred and more distant in the ascent to the real world and to the world of Ideas. The cavern/womb is left behind. The cavern and the world of Ideas are imaginary mothers and fathers. In leaving the cavern, the mother is abandoned. In the world of Ideas, the physical origins of the prisoners are disconnected. As Margaret Whitford writes:

> The Platonic myth stages a primal scene in which Plato gradually manages to turn his back, like the pupil/prisoner, on the role of Mother altogether. From Irigaray's point of view, the consequences of this are not only philosophical but also social ...[24]

Thus the world of Ideas is the world of the father, the patriarchal world, from which the mother, the physical, the world of shadows in the cavern, is excluded. Women in Platonic philosophy, then, despite Plato's ostensible granting of equality to the highest class of women, are 'shadow' or 'fake' men. Philosophy is the male domain, women who have been 'downgraded' into the material world, are excluded.

---

21 *Op cit*, Plato, fn 9, 514b.

22 *Op cit*, Plato, fn 9, 515d, 515e, 516a.

23 For in-depth analysis, see Whitford, W, *Luce Irigaray: Philosophy in the Feminine*, 1991, London: Routledge, pp 105–13.

24 *Ibid*, Whitford, p 110.

## Aristotle

Like his predecessor Plato, Aristotle sought to analyse the 'ideal State' and 'ideal' constitution. In *The Politics*,[25] Aristotle claims that the State is a natural entity: human beings are human beings because they are political. There are a number of fundamental assumptions made by Aristotle, who, unlike, Plato is not seeking to change the world, but rather to explain the world as it exists. By comparison, Aristotle is an arch conservative. First the State is natural: 'man is born for citizenship'.[26] Secondly, happiness is the highest virtue and goal in life: what amounts to happiness, is defined by considering the characteristic functions of man.[27] Thirdly, men are naturally superior to women and slaves and children. Disassociating himself from Plato's call for the abolition of the private family and the ownership 'in common' of women and children, Aristotle reinstates the private family as the natural, and best, unit for the preservation of the State. Within that family unit, Aristotle makes it abundantly clear that it is the husband who is master of the household, for he is by nature 'more fitted to rule than the female ...'.[28]

Aristotle's views about women are complicated by his considerations of class. Slavery, for Aristotle, was a natural state. Equally natural is that the husband should be master of the slaves. Slaves could be either male or female. However, in his treatment of women and slaves, a distinction between the two enters the picture. A free woman is different from a slave woman. Neither women nor slaves participate in the *polis,* but in the private sphere of life each has a different role to play. Wives bear children who will become citizens, and act as companions to their husbands; slaves do the menial work in the household. What distinguishes the free individual (whether male or female) from the slave (whether male or female) is, in Elizabeth Spelman's analysis,[29] a combination of biological and psychological characteristics. Thus a free female (or woman) is characterised as having a female body and a deliberative capacity without authority; a female slave has a female body but no deliberative capacity; a male citizen has a male body and deliberative capacity with authority and a male slave has a male body and no deliberative capacity. These distinctions become important when considering just who it is that Aristotle is considering when he speaks of 'women', for it becomes clear that he is speaking only of a particular class of women: the free woman, and that 'slave women' are excluded.

---

25 Aristotle, *The Politics*, Sinclair, TA (trans), 1962, London: Penguin.

26 Aristotle, *The Nicomachean Ethics,* I.7 1097a34 (c 372–382 BC), Ross, D (trans), 1925, Oxford: OUP, p 12.

27 *Ibid*, *The Nicomachean Ethics,* 1097a15.

28 *Ibid, The Politics*, Bk I, xii, 1259a37.

29 See Spelman, E, *Inessential Woman,: Problems of Exclusion in Feminist Thought*, 1990, London: The Woman's Press, Chapter 2.

Aristotle[30] rejected Plato's 'extreme unity' in relation to property, including women. In *The Politics* Aristotle argues that private property should remain the favoured arrangement, and that in relation to the family the husband and father has absolute power. Slaves, a class of people whose inferior status is a natural condition, are distinguishable from females, not only in their status but also in their roles. The slave's primary function is to serve his or her master; the female's primary natural function is reproduction and the maintenance of the family home. The function ascribed to females determines the extent of their rationality, which is inferior to that of a man's: '... [T]he slave is entirely without the faculty of deliberation; the female indeed possesses it, but in a form which remains inconclusive; and if children also possess it, it is only in an immature form.'[31]

## NATURAL LAW THOUGHT

It is impossible to provide more than a mere sketch of the rich history of natural law in Western philosophy and political thought and the legacy it leaves to modern constitutions. Nevertheless, a basic understanding of its nature and evolution is instructive for it reveals the manner in which the requirements of good law – morally worthwhile law – have been stipulated over centuries. The question for feminist jurisprudence is whether the traditional conceptions of natural law thought are able to encompass the demands of women for equal respect.

### Natural law in ancient Greece and Rome

Aristotle[32] stated that 'the rule of law is preferable to that of any individual'. The appeal to law as a control over naked power has been apparent throughout history. At a philosophical level the natural law tradition – whether theological or secular – instructs that the power of man is not absolute, but is rather controlled and limited by the requirements of a higher law. To the ancient Greeks man was under the governance of the laws of nature – the natural forces which controlled the universe: although this view is more closely aligned to the 'law of nature' than 'natural law' as it came to be understood in later times. However, from the time of Socrates, Plato[33] and

30 *Op cit*, Moller Okin, fn 14, Chapter 4; Saxonhouse, A, 'Aristotle: defective males, hierarchy and the limits of politics', in Lyndon Shanley, M and Pateman, C (eds), *Feminist Interpretations and Political Theory*, 1988, London: Polity.

31 *Op cit*, Aristotle, fn 25, Vol I, 1260a.

32 *Op cit*, Aristotle, fn 25, Vol III, p 16.

33 427–347 BC.

Aristotle[34] the quest for virtue – or goodness or justice under the law – has been a recurrent theme.

An early – and famous – formulation of the dictates of natural law was offered by Cicero:[35]

> True law is right reason in agreement with Nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrong-doing by its prohibitions. And it does not lay its commands or prohibitions upon good men in vain, though neither have any effect on the wicked. It is a sin to try to alter this law, nor is it allowable to attempt to repeal any part of it, and it is impossible to abolish it entirely. We cannot be freed from its obligations by Senate or People, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God, over us all, for He is the author of this law, its promulgator, and its enforcing judge.[36]

It is from ancient Greek philosophy that natural law enters into Roman law. From the *Corpus Iuris Civilis*[37] is derived *ius civilis, ius gentium* and *ius naturale. Ius civilis* denotes the law of the State; *ius gentium* the law of nations; and *ius naturale* 'a law which expresses a higher and more permanent standard. It is the law of nature (*ius naturale),* which corresponds to "that which is always good and equitable"'.[38]

Natural law theory, whether theological or secular, is predicated upon an interpretation of a higher law, to which human law is subject for its authority. Theological natural law,[39] concerns the interpretation of God's will as interpreted through the scriptures. There exists, as with texts emanating from Ancient Greece, a deep ambivalence concerning the role of women in the scriptures.

## Christian natural law thought

Whether natural law, as interpreted by male philosophers, includes women in its lofty ideals is questionable. Feminist analysis of the Scriptures suggests that the position of women was rooted in inequality. St Paul, citing Genesis 2, states that while 'man is the image and glory of God', the 'woman is the glory

34 384–322 BC.

35 106–43 BC.

36 Cicero, *De Republica,* III, xxii, 33, cited by d'Entrèves, AP, *Natural Law*, 2nd edn, 1970, London: Hutchinson, p 25.

37 AD 534.

38 *Ibid,* d'Entrèves, fn 36, p 24.

39 *Ibid*; d'Entrèves, fn 36; Finnis, JM, *Natural Law and Natural Rights*, 1980, Oxford: Clarendon.

of man'; '... the man was not created for the woman's sake, but the woman for the sake of the man'.[40] The first and most obvious inequality lies in the gendered identity of God. As Elaine Pagels has written:

> ... while it is true that Catholics revere Mary as the mother of Jesus, she cannot be identified as divine in her own right: if she is 'mother of God', she is not 'God the Mother' on an equal footing with 'God the Father'.[41]

Moreover, Pagels argues that diverse Jewish and Christian Gnostic works, which are characterised by heterodoxy, rather than orthodoxy, 'abound in feminine symbolism that is applied, in particular, to God'. The fate of these Gnostic scriptures was, however, to be condemned as 'heretical' by around AD 200. Theologian Mary Daly has also analysed aspects of early Christianity. In her analysis of the myth of the Fall of Adam and Eve, Daly writes that Eve is characterised as the evil temptress, and that this characterisation:

> ... has affected doctrines and laws that concern women's status in society and it has contributed to the mind-set of those who continue to grind out biased, male-centred ethical theory ...[42]

It is with Augustine[43] that the debate concerning equality between men and women renews. In Genevieve Lloyd's analysis, Augustine opposed the now established acceptance of women's inferiority by virtue of her 'lesser rationality'.[44] While woman was spiritually equal, she was nonetheless unequal, and subordinate, to man in human nature, by virtue of 'the sex of her body'.[45] Woman is cast in the role of 'help-mate' to the man. Woman is equal to man in so far as she has been made in God's image, but in respect of her help-mate role she is not in God's image. This reconceptualisation of woman as different from man only in respect of her physical difference, while ostensibly granting women equal rationality in all other respects, is, Lloyd argues, a perpetuation of the alignment 'of maleness with superiority, femaleness with inferiority', despite Augustine's declared position that men and women are spiritually equal.

The Scriptures and Gospels provided the basis for Christian natural law thought which developed in the Middle Ages. Natural law was perceived as God-given, communicated to man by Revelation, and remaining absolutely binding upon man and unchanging in its content. As a result, the dictates of

---

40 1 Cor 11: 7–9.

41 Pagels, EH, 'What became of God the mother? Conflicting images of God in early Christianity', in Abel, E and Abel, EK (eds), *The Signs Reader: Women, Gender and Scholarship*, 1978, Chicago: Chicago UP. (See *Sourcebook*, p 44.)

42 Daly, M, *Beyond God the Father: Toward a Philosophy of Women's Liberation,* 1973, London: The Women's Press, p 44. (See *Sourcebook*, p 47.)

43 AD 354–430.

44 See *op cit*, Lloyd, fn 8, Chapter 2, on Philo who, writing in the first century AD, adopted Greek philosophical models in his interpretation of Jewish scriptures.

45 Augustine, *Confessions,* XIII, Chapter 32, cited in Lloyd, *op cit*, fn 8, p 29.

natural law take precedence over man-made laws. If the demands of the State conflict with the laws of God, the obligation to God must prevail. Undoubtedly the most powerful writing of the Middle Ages comes from St Thomas Aquinas:[46]

> This rational guidance of created things on the part of God ... we can call the Eternal Law. But, of all others, rational creatures are subject to divine Providence in a very special way; being themselves made participators in Providence itself, in that they control their own actions and the actions of others. So they have a share in the divine reason itself, deriving therefrom a natural inclination to such actions and ends as are fitting. This participation in the Eternal law by rational creatures is called Natural Law.[47]

The soul, for Aquinas, has a unity, comprising intellect, will and understanding. The senses are not part of the soul, but rather part of the soul in the body. However, when it comes to equality under God, while there is no distinction between men and women in the primary sense, in a secondary sense women are placed in a position of inferiority:

> ... for man is the beginning and end of woman; as God is the beginning and end of every creature.[48]

## Natural law and positive law[49]

The ancient concepts of natural law thus concern an evaluation of the validity of human law against some higher source of authority, whether theological or secular, which is both eternal and universal. The demands of natural law challenge the law of human rulers – demanding that law conform to higher principles. One such principle is the respect for individual rights and freedoms, and it may therefore be argued that the protection of human rights is a natural law concept. It should not be assumed, however, that the assertions that the rights of man derive from natural law has been completely or unequivocally accepted.

In the nineteenth century, for example, the rise of nationalism in the West challenged doctrines of natural law. The same century also witnessed the rise in *positivism* – the legal-theoretical schools of thought concerned solely to identify and define the concept of valid human law.[50] These two developments – nationalism and positivism – shifted the focus of attention

46 1225–74.

47 Aquinas, T, *Summa Theologica,* 1a 2ae, Q 91, Arts 1 and 2, cited in d'Entrèves, *op cit*, fn 36, p 43.

48 *Ibid*, Aquinas, I, Q 76, Art 4, Vol IV, pp 39-43, cited *op cit*, Lloyd, fn 8, p 35.

49 See *op cit* Finnis, fn 39; Hart, HLA, *The Concept of Law*, 1961, Oxford: OUP.

50 See, further, Chapter 5.

away from individual rights towards an analysis of State power. By way of illustration, Hegel's *Philosophy of Right*[51] portrayed the picture of the State as absolutely sovereign, its form and content being determined by history, but its existence and power being unrestricted by any form of natural law.

While natural law, as a dominant philosophical tradition, largely faded from the jurisprudential imagination with the challenge of positivism, natural law remains a constant and recurrent theme in jurisprudence. The Second World War, and in particular Nazi Germany, with all its revelations of the cruelty of the human spirit, and failure to respect individuals who belonged to different, non-Aryan, races, revealed the limitations of many things, not least of all the consequences of the powerful State.[52] The interest in natural law was revived by the German scholar Gustav Radbruch, which sparked the influential debate between Professors Lon Fuller[53] and HLA Hart.[54] Natural law has not lost its power: natural law underpins the law relating to human rights, with its insistence on fundamental rights which inhere in individuals,[55] and resonate through the fundamental principles of international law. Where natural law reveals its limitations, from the perspective of women, is in its failure to articulate clearly the right to freedom from discrimination on the basis of gender, race and class. To proclaim the fundamental 'rights of man', which challenge State power and demand protection under the rule of law, is little more than rhetoric when the specifities of gender, race and class inequalities are brought into the debate. For this reason, natural law has attracted little feminist debate, other than within the field of feminist theology.[56]

The rise of positivism, and its implications in legal theoretical terms, is considered in the next chapter.



51 1821.

52 On the Holocaust, see, further, Chapter 6 and references therein.

53 Professor of Law, University of Harvard. See Fuller, L, 'Positivism and fidelity to law – a reply to Professor Hart' (1958) 71 Harv L Rev 630.

54 Professor of Jurisprudence, University of Oxford. See Hart, HLA, 'Positivism and the separation of law and morals' (1958) 71 Harv L Rev 593.

55 For contemporary analysis of natural law theory, see *op cit*, d'Entreves, fn 36; *op cit*, Finnis, fn 39.

56 *Op cit*, Daly, fn 42; Daly, M, *Gyn/Ecology: the Metaethics of Radical Feminism,* 1979, London: The Woman's Press.

CHAPTER 5

# CONVENTIONAL JURISPRUDENCE AND FEMINIST CRITIQUE: II

# POSITIVE LAW AND SOCIAL CONTRACT THEORY

## THE ORIGINS OF POSITIVISM: THE AGE OF MODERNITY

*Cogito ergo sum.* The age of modernity and modern thought begins with French philosopher René Descartes.[1] Descartes, in his philosophical quest for truth and knowledge, argued that, in the search for truth, everything – including one's own existence – must be doubted. This is the philosophical practice labelled the 'Cartesian doubt'. The doubt as to his own existence ended with *cogito ergo sum:* I think therefore I am. His own existence was verified by his capacity to think: thus to state 'I exist', is proof of that existence. Freed from the Cartesian doubt of his own existence Descartes proceeded to inquire what kind of 'thing', or 'substance' he was – what was his *essence?*

Thus began the age of modernity, which was celebrated in the eighteenth century Enlightenment, and has held the philosophical imagination until the late twentieth century. The concepts central to Enlightenment thought are those of rationality and individual autonomy. Rejecting the theories of natural explanations for physical and human reality, across the sphere of human thought, reason and rationality dominated. From this period stem the 'grand' theories of thought and language, whether in philosophy,[2] politics, science[3] or the arts. The Enlightenment of the eighteenth century represented a reaction against explanations of Being vested in religion, superstition and mythology. The Enlightenment project centred on rationality and objectivity – the intellectual search for truth and knowledge unshackled by the subjectivity and irrationality of faith. Science and scientific knowledge became the successors to former irrationalities as the validating criterion for truth. In 'Berlinische Monatsschrift', philosopher Immanuel Kant[4] was to write that '[I]f it is now asked whether we live at present in an Enlightened age, the answer is: No, but

1 1596–1650.

2 See Kant, I (1724–1804), 'Berlinische Monatsschrift', in Reiss, H (ed), *Kant's Political Writings,* 1977, Cambridge: CUP, p 54.

3 On Sir Isaac Newton (1643–1727), see Cohen, I, *The Newtonian Revolution,* 1980, Cambridge: CUP.

4 1724–1804.

we do live in an age of Enlightenment', and that '*[S]apere aude,* have the courage to know: this is the motto of Enlightenment'.[5] The Enlightenment was neither an event, nor a project capable of completion: rather it represented a process of thought, of knowledge, which continues to exert its influence in current times. Immanuel Kant, John Locke, Jean-Jacques Rousseau, Charles-Louis de Secondat Montesquieu, Sir Isaac Newton, Francois-Marie Arouet Voltaire represent but a few of the prominent Enlightenment thinkers.[6]

In the political arena, the differing conceptions of the social contract – the contract between the rulers and the ruled – expressed by Thomas Hobbes,[7] John Locke[8] and Jean-Jacques Rousseau,[9] emerged in the Enlightenment period and continue to influence contemporary political thought.

## LIBERALISM

Liberal theory represents the underlying political theory behind much contemporary Western legal theory, including modern positivist theory and social contract theory. Liberalism, variously defined, comprises three principal notions: rationality, the maximisation of individual liberty, and the control of governmental power through law. In stressing the primacy of individual liberty, liberal theory assumes that individuals in society are gender-, race-, class- and age-neutral. That is to say, each individual is assumed to share the same characteristics, and to be equally equal for the purposes of theorising, having equal capacities to reason. However, when liberalism is translated into practice, it is immediately apparent that society cannot be viewed in this fashion. The empirical evidence against the existence of true equality condemns liberalism. Society is sexist, racist, and ageist and is divided by social class in a manner which confounds classification even along the lines of sex, race and age. Liberalism nevertheless continues to represent the dominant legal and philosophical influence in Western industrial society.

Liberalism emerged as a product of the changing economic circumstances. The demise of feudalism and the rise of capitalism gave rise to new demands for equality. In England, the conflict between feudalism and capitalism may be traced to the mid seventeenth century with the Civil War and the period of Republican rule under Oliver Cromwell, from 1653 to 1658. The restoration of the monarchy under Charles II in 1660 led to expansions in the fields of

5 *Op cit*, Reiss, fn 2, pp 54–60.

6 1724–1804, 1637–1704, 1712–78, 1689–1755, 1642–1727, 1694–1778 respectively.

7 See Hobbes, T, *The Leviathan* (1651), Tuck, R (ed), 1991, Cambridge: CUP. (See *Sourcebook*, pp 316–17.)

8 See Locke, J, *Two Treatises on Government (*1690), 1924, New York: JM Dent; Rousseau, J-J, *The Social Contract* (1762), 1913, New York: JM Dent.

9 *Ibid*, Rousseau.

commerce, science and the development of the Navy, although the King's Roman Catholic sympathies were to cause civil unrest. The increasing conflict between Parliament and the Crown was finally to be settled in 1688 with the Scottish Petition of Right and the English Bill of Rights. The dawning of the Age of Enlightenment sowed the seeds of liberalism.

Liberal philosophy, arising out of Enlightenment thought, is grounded in the individuality of the rational person. The early liberal theorist John Locke advocated limited government under a contract between government and people which, if breached by government, legitimated the withdrawal of the contract by the people. The autonomy and freedom of the person became a central focus of liberal thought. It was man's capacity to reason which set man aside from the animal kingdom.

The concept of rationality, however, carried with it certain assumptions. One was the distinction drawn between body and mind, and the association of the body with nature and mind with culture – a distinction which has dogged feminist theory to the current day. Manifestations of the alliance between body/nature and mind/culture came early: for Aristotle 'woman has a deliberative faculty but it is without authority',[10] and accordingly 'the male is by nature superior and the female inferior; the one rules and the other is ruled'.[11] David Hume,[12] Jean-Jacques Rousseau,[13] Immanuel Kant[14] and Georg Wilhelm Friedrich Hegel[15] all questioned woman's rationality. For Hegel, for example, woman was more attuned to nature than culture:

> The difference in the physical characteristics of the two sexes has a rational basis and consequently acquires an intellectual and ethical significance. This significance is determined by the difference into which the ethical substantiality, as the concept, internally sunders itself in order that its vitality may become a concrete unity consequent upon this difference.[16]

Furthermore:

> The difference between men and women is like that between animals and plants. Men correspond to animals, while women correspond to plants because their development is more placid and the principle that underlies it is the rather vague unity of feeling. When women hold the helm of government, the

10 Aristotle, *The Politics*, Sinclair, TA (trans), 1962, London: Penguin, 1 13. 1260 a13.

11 *Ibid*, 15. 1254 b 13–14.

12 1711–76. See Hume, D, *A Treatise of Human Nature* (1740), 1938, Cambridge: CUP; *An Enquiry Concerning the Principles of Morals* (1751), Selby Bigge, LA (ed), 3rd edn, rev Nidditch, PH, 1902, Oxford: Clarendon; *History of England* (1778), 1983, Indianapolis: Library Classics.

13 1712–78; see *op cit*, Rousseau, fn 8.

14 1724–1804. See Kant, I, *Critique of Pure Reason* (1781), Kemp-Smith, N (trans), 1965, New York: St Martins; *Critique of Practical Reason* (1788), White Beck, L (trans), 1949, Chicago: Chicago UP.

15 1770–1831. See Hegel, G, *The Phenomenology of Spirit* (1807), Miller, AV (trans), 1977, New York: OUP; *Science of Logic* (1812–16), Miller, AV (trans), 1969, London: Allen & Unwin.

16 Hegel, G, *Philosophy of Right* (1821), Knox, T (trans), 1952, Oxford: OUP, para 165, p 144.

> State is at once in jeopardy, because women regulate their actions not by the demands of universality but by arbitrary inclinations and opinions.[17]

The debate about gender was rife in the Enlightenment period of the late seventeenth and early eighteenth centuries. As reason and rationality replaced superstition and irrational belief, the mind took priority over nature. Enlightenment thought centred on human capacity for universal reason. But if rationality was universal, and all human beings equal, how could the position of women – with their differing physical attributes – be explained? For Jean-Jacques Rousseau, the answer was clear: woman's role was determined by biology:

> The male is male only at certain moments; the female is female her whole life ... everything constantly recalls her sex to her, and to fulfil its functions, an appropriate physical constitution is necessary to her ... she needs a soft sedentary life to suckle her babies. How much care and tenderness does she need to hold her family together! ... The rigid strictness of the duties owed by the sexes is not and cannot be the same.[18]

This emphasis on woman's maternal function reinforced the idea that women occupy the private sphere of life, the home, and that they lack the rationality for participation in the public sphere of the economy and politics. It also perpetuated the dualism between mind and body, between culture – rationality of the mind – and nature – women's reproductive bodies, the emphasis on which was encouraged by emergent medical and scientific knowledge. Related to this were perceptions about the importance of women's role as carers and nurturers, imbued with femininity, and entrusted with the task of ensuring a climate of private morality. Not all Enlightenment thinkers, however, shared Rousseau's view of women and her appropriate role in the domestic sphere pursuing maternal functions. For Enlightenment thinkers such as Voltaire and Montesquieu, women were capable of equality with men, and should not be regarded as being under the authority of the husband and represented as capable only of maternal functions.

It was, however, against writings such as those of Rousseau against which Mary Wollestonecraft argued. In her seminal *Vindication of the Rights of Women,*[19] Mary Wollestonecraft was to equate, as was John Stuart Mill in the nineteenth century, the lack of rights for women to the denial of rights to slaves. Male enlightenment thought which generated a different 'virtue' for women and men, was contradictory:

17 *Op cit*, Hegel, fn 16, para 166, p 264.

18 Rousseau, J-J, *Emile (*1762), Bloom, A (trans), 1991, Harmondsworth: Penguin, p 450.

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

> If women are by nature inferior to men, their virtues must be the same in quality, if not in degree, or virtue is a relative idea ... virtue has only one eternal standard.[20]

But the issue was not put to rest: in the much later work of Austrian psychiatrist and founder of psychoanalysis Sigmund Freud,[21] woman are said to 'have little sense of justice', and 'their social interests are weaker than those of men, and that their capacity for the sublimination of their instincts is less'.[22] Thus, the issue of women's rationality has lain at the heart of masculine political and psychoanalytic theory from time immemorial. It is the claim to equality as equal, rational persons which women demand, and, within the context of liberalism, liberal feminism[23] seeks to achieve.

## The rise of legal positivism

In the United Kingdom, the Scottish philosopher David Hume laid the foundations for positivism.[24] Positivism, in its many forms, concerns the endeavour of isolating the law laid down by human superior (the sovereign power) to human inferior (the subject).[25] In essence, Hume's thesis was that, in logic, it is not possible to derive a statement of fact (an *existential statement)* – from a statement of what ought to be (a *normative statement).* On this reasoning only by keeping separate statements of fact and statements of 'ought' – or moral statements – can there be a true understanding of reality, and law. The implication of such a distinction for law and legal theory is that no moral statement as to what 'ought to be' can be inferred from a purely factual statement. This essential logical separation of the factual from the normative underlies the positivist endeavour: the attempt to provide a coherent logical structure of legal rules, and legal rules alone unaffected by morality. For the positivist, whatever is enacted according to the accepted constitutional procedure employed within the State is valid law and entails an absolute obligation of obedience. As such there can be no claim to 'freedoms' or 'human rights' which are capable of overriding the positive law. According to positivist theories of law, while in a perfect world the positive law may – and ideally should – conform to moral precepts, should it fail so to do, according to positivist theories of law, the individual is powerless to confront the law.

---

20 *Op cit*, Wollestonecraft, fn 19, p 108.

21 1856–1939.

22 See Freud, S, 'Femininity', in *New Introductory Lectures on Psychoanalysis,* 1933, London: WW Norton, p 184.

23 See, further, Chapter 7.

24 See *op cit*, *An Enquiry Concerning the Principles of Morals*, fn 12.

25 See, eg, Austin, J, *The Province of Jurisprudence Determined* (1832), 1954, London: Weidenfeld and Nicholson; and Hart, HLA, *The Concept of Law*, 1961, Oxford: OUP, Chapters I–IV.

The nineteenth century rise in positivism represented both an attack on the claims of natural law over and above that of man-made law and an attempt to analyse scientifically the law as it exists in fact. The doctrine of natural law for which so much had been claimed in relation to human rights and freedoms was placed on the defensive.[26]

## The elements of positivist thought

Positivist jurisprudence is most closely associated with the nineteenth century jurist John Austin,[27] and his twentieth century successors Hans Kelsen[28] and HLA Hart.[29, 30] It is not intended here to introduce in any detail the theories of these analysts, but rather to consider the central elements of a positivist analysis of law, and the manner in which that analysis precludes considerations which are fundamental to women's equality.

In severing legal theory from natural law thought, positivists claim that laws and legal systems must be understood as purely human phenomena: the



26 The protection of rights based on natural law was further damaged by the utilitarians, whose philosophy underpins early positivist thought. Thomas Hobbes, Jeremy Bentham and John Austin all subscribed to the tenets of utilitarianism: the principle that an action (or law) is ethical if it conformed to the principle of creating the greatest happiness for the greatest number of people in society. Having rejected natural law as providing the lodestar for enactment of positive law, the utilitarians adopted the principle of *utility*. By *utility* is meant that the proper guidance in the formation of laws is the overall effect of a legislative proposal on society as a whole. A proposal for legislation will be in conformity with the doctrine of utility if it increases the sum of happiness in society overall. The leading exponent of the utilitarian school was Jeremy Bentham whose *Principles of Morals and Legislation* was to exert enduring influence. Bentham dismissed the idea of natural law and natural rights: natural rights were 'nonsense' – and worse – 'nonsense on stilts'. Essentially, the doctrine of utility requires that the benefits and burdens of legislative proposals should be calculated, using a form of 'felicific calculus', to determine whether the net effect of legislation will increase the 'sum of happiness' in society overall. If the benefit to society *as a whole* will benefit then legislation is justified and desirable. The most blatant and obvious flaw in this notion is that it ignores the position of the individual in society – treating the individual as merely a part of the whole, and not as an individual being with his or her characteristics, needs or desires. The potential for the use of the 'felicific calculus' is to undermine the individual. Accordingly, harsh treatment of an individual or a group of persons may be justified simply because that treatment will benefit society overall. There is nothing here of evaluating legislative proposals according to their moral worth – all is reduced to a calculation of efficiency and the benefit for society at large. See *op cit*, Hobbes, fn 7; Bentham, J, *A Fragment on Government* (1776), 1948, Oxford: Basil Blackwell; *Introduction to the Principles of Morals and Legislation* (1789), Burns, JH and Hart, HLA (eds), 1977, London: Athlone; *op cit,* Austin, fn 25.

27 *Op cit*, Austin, fn 25.

28 See Kelsen, H, *The General Theory of Law and State*, 1961, New York: Russell; *The Pure Theory of Law*, 1967, Berkeley: California UP.

29 See Hart, HLA, 'Positivism and the separation of morals' (1958) 71 Harv L Rev 593, and *op cit*, Hart, fn 25.

30 See, on Austin, Kelsen and Hart, Freeman, M, *Lloyd's Introduction to Jurisprudence* (1994) 6th edn, London: Sweet & Maxwell, Chapters 5 and 6.

'positing' of law by a sovereign body for the guidance of human conduct within society. Law is viewed as an autonomous, discrete, scientific domain of enquiry divorced from both naturalistic perceptions of morality, and from sociological explanations of the origins, nature and effects of law in society. For liberal positivist HLA Hart, positivism has five principal characteristics. First, law emanates from a determinate (human) sovereign power. Secondly, there is no necessary and/or inevitable connection between law and morality. Law may be criticised from perceptions of morality, and morality underlies the law and legal system, but from a scientific theoretical perspective, law must be theorised as an autonomous entity. To argue that immoral laws are invalid, is to confuse law and morality and to deny both the potential of a positivist analysis of law and undermine the role of morality as a means for subjecting law to critique. Thirdly, a positivist analysis of law takes care not to confuse an analysis of law with law's sociological origins or effects: it is with the analysis of law 'as it exists' that positivism is concerned. Fourthly, law being a rational, autonomous order, it is legal rules, and legal rules alone, which determined the outcome of legal cases. A positivist analysis insists that it is legal rules, not policy considerations, nor moral or equitable principles which explain the working of the legal order. Finally, laws alone – unlike moral precepts and principles and social policy – can be identified according to the predetermined criterion of validity.[31] In Hart's theory, legal rules are supplemented by equitable principles which operate in the judge's discretion: being non-legal, these principles remain outside the self-embracing structure of rules.

Positive law theory has little concern with the effect of law upon the individual, but is concerned with the necessary conditions which must exist in order for law to be identifiable with a coherent structure and be generally effective in the regulation of society. Professor Hart – now a classic liberal positivist theorist – does insist that law should contain a 'minimum content of natural law', however this insistence is centred on a supposedly gender-neutral person and nowhere does Hart consider the problems of gender or class. Hart's theory is cast in male language. The traditional justification would no doubt be forthcoming: that for the purposes of interpretation and understanding the word 'man' includes 'woman'. This, however, is not enough. For a wide ranging liberal theory of law totally to ignore the differences and similarities between men and women is to deny a vast and important perspective. In *The Concept of Law*,[32] Hart considers the minimum content of natural law within positivist theory. The requirements, which are

31 Variously expressed: by Austin as the illimitable, indivisible, sovereign; by Kelsen as the 'Basic Norm' and by Hart as the 'ultimate rule of recognition'. A legal rule is valid provided that it conforms to the requirements of the ultimate rule: traditionally identified within the United Kingdom as 'what the Queen in Parliament enacts is law'.

32 *Op cit*, Hart, fn 25, Chapter IX.

not specified in any detail, are dictated by 'man's nature'. 'Man' is perceived to have varying degrees of intelligence, limited altruism, varying physical strength. Moreover, the world is one characterised by limited resources. Accordingly, for law to serve its constituents, it must contain rules which protect the vulnerable against the strong, provide for some approximate equality and provide against exploitation and greed by the strongest in society. This is sound common sense, and indeed Hart acknowledges that his perceptions about human (male?) nature are mere truisms. However, even his 'truisms' are suspect from a feminist perspective, for notwithstanding Hart's perceptiveness concerning human nature, and the need for law to recognise differing human attributes, by focusing on human nature in a non-gendered manner Hart blind's himself to the possibility that there exists within society a *traditional and systematic* practice of discrimination against women which has not been addressed. The traditional discriminations experienced by women – whether in the public field of employment or in the private sphere of the family – demand recognition, especially within Hart's liberal theory which he claims to be a 'sociological' approach. To recognise, for example, as Hart does, 'human vulnerability', without a recognition of the manner in which vulnerabilities differ according to gender (and race and class) is to ignore too much about the reality of gender-structured society.

This last point raises the general objection to positivist theory from a feminist perspective, whether the theory be that of Austin, Kelsen or Hart. Positivist theory has its rationale in the separation of law from other social systems of organisation and control in order to achieve an explanation of law's structural clarity and autonomy. In the course of achieving this goal, however, the reality of society gets 'lost'. From a legal feminist perspective, this blindness to the reality of society which is inherent and essential to the positivist enquiry and theory, ignores that which is central to the feminist quest: the search for explanations as to law's gendered nature and the achievement of equality. From a feminist legal-sociological perspective, to theorise about law's autonomy and neutrality is to reason from false assumptions. Law is not autonomous. Law is not gender neutral. Law is predicated on power – power associated with class and gender. Positivism is thus blinkered theorising: the attempt to theorise law as an enclosed, autonomous, self-validating order in which the legal subject is manifested only in the assumption of disembodied individuality and rationality, with the consequence that the concepts of substantive law are imbued with the same assumptions.

Positivist theory, with its insistence upon autonomy, moral neutrality and rationality masks the reality of law from a feminist perspective, and offers little towards an understanding of the manner in which law supports the economic base, which of itself determines the position of women and class within society, or of law's patriarchy in terms of its exclusion of women from the public sphere, or discriminatory admission to the public sphere, or the

confinement of women within the private sphere of life in conditions of economic dependency, either on a male partner, or the State.

Moreover, the picture painted by positivist theory is based on a false premise: that of the rationality of law. In common law jurisdictions the projection of law's rationality is enhanced and supported by the doctrine of precedent. In Ronald Dworkin's analysis, law unfolds like the chain novel: each chapter being constrained by what has gone before yet the whole novel exhibiting an innate coherence.[33] This comforting portrait of the law disguises law's reality: law is undeniably rational in some of its manifestations, yet in others displays little rationality and certainty. In addition, many patriarchal assumptions are displayed in the operation of law.[34] To return to already introduced aspects of law, from a feminist perspective, the English law relating to provocation which precludes the notion that women and men respond to violence in differing ways, ignores women's experience. The English law relating to financial provision and property on divorce is not predicated on consistency and the doctrine of precedent, but on the achievement of fairness between the parties. The legal system in cases of rape and sexual violence itself is damaging to the victim of the violence: forcing a detailed examination of the victim's behaviour and, in some instances, past sexual history in order to ascertain the credibility of the victim's evidence. Law's regulation of pornography, from a feminist perspective, lacks the rationality law proclaims for itself. Framing pornography law in the language of obscenity, and concentrating on whether or not pornographic representations are likely 'to deprave and corrupt', or other similar formulations, misses a core feature of pornography. As Andrea Dworkin and Catharine MacKinnon have so forcibly argued, the harm of pornography lies in its symbolic and actual denigration of women, reinforcing stereotypical images of women as sexual objects, thereby demeaning women and enhancing discrimination against women.

Positivist theory has not been subjected to great feminist analysis, perhaps on the basis that it is 'too antediluvian to merit explicit attention'.[35] Nevertheless, positivism exemplifies the extent to which modernist thought adopts the assumption that men and women are both subjects of law, that law is rational, coherent and all-embracing, and that law is applied neutrally as between State and citizen and as between citizen to citizen. That this is a fundamental fallacy is revealed in feminist reasoning about law, which is critically concerned not with the traditional positivist claims to law's autonomy and rationality as a closed intellectual domain, but with an analysis

33 See, further, below.

34 See, in particular, Smart, C, *Feminism and the Power of Law*, 1989, London: Routledge and Kegan Paul.

35 The phrase is Professor Nicola Lacey's. See Lacey, N, 'Closure and critique in feminist jurisprudence', in Norrie, A (ed), *Closure or Critique: New Directions in Legal Theory*, 1993, Edinburgh: Edinburgh UP, p 196.

of, variously, law's blindness to gender and the deleterious, discriminatory effects of this blindness; the liberal dichotomy between the public and private spheres of life which underpin modern positivist analysis; the relevance of gender, race and class to legal analysis and the need to make heard the distinctive voices of woman in all her manifestations, and to effect change in the legal order in order to realise women's equality under the law.

Pre-eminent liberal legal philosopher Ronald Dworkin attacks positivist analyses of law which posit rules at the heart of the explanation of law. Dworkin explicates the role of principles in law, and the manner in which principles, rather than rules, may in 'hard cases' determine the outcome of a particular case. Principles do not operate in the same manner as legal rules: they have, as Dworkin explains, a 'different weight and dimension' than legal rules; they apply or do not apply according to their relevance to the particular case – there is nothing automatic or invariable about their application. If, then, principles are to be included within a positivist explanation of law, how can this be achieved? Dworkin argues that they cannot be so included. Not only are they qualitatively different and not automatically applicable, but principles are incapable of being encompassed under the ultimate rule of recognition (in the United Kingdom, that the Queen in Parliament ought to be obeyed), since the rule of recognition is the criterion for the validity of concrete, specific legal rules.

Significantly, Dworkin argues against Hart on the matter of judicial discretion.[36] Hart is emphatic that judges have an area of discretion, in which principles play their role. Dworkin by contrast argues that in every significant (or 'hard') case, there will be only one right answer and that it is the task of the judiciary to tease out this right answer by following the evolutionary nature of legal development and reaching a decision in the instant case which 'fits' with constitutional precedent.[37] In *Taking Rights Seriously*,[38] in which Dworkin takes positivism in general, and HLA Hart's version of positivism in particular, to task, Dworkin argues that it is rights, underpinned by principles, not discretion which determine the outcome of difficult cases. In each difficult case, for which no precedent exists, judges employ not discretion to determine the outcome, but the existing principles within the legal system. These equitable principles – such as 'no man shall profit from his own wrong' – underlie rights. Principles, Dworkin insists, have a 'different dimension and weight' than do legal rules: their application will depend upon the facts of the instant case, and principles will be employed not in a routine 'all-or-nothing' fashion, but according to their appropriateness. Thus, Dworkin argues, positivism is deficient in its inability to accommodate within its formal and

36 Dworkin, R, *Taking Rights Seriously*, 1977, London: Duckworth.

37 See Dworkin, R, *Law's Empire*, 1986, London: Fontana.

38 *Ibid*, Dworkin, 1977.

formalistic structure the concept of principles, and in its reliance on judicial discretion.

Dworkin's primary focus is on rights which are underpinned by the principles within the legal system, rather than with formal rules analysed from a positivistic perspective. Principles represent:

> ... a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.[39]

Principles thus underpin rights, and the judge must be sensitive to and enforce the rights of the parties. From this perspective, the task of the judge is not the mechanical application of legal rules, but rather an interpretative exercise grounded in the rights of the parties. The denial of judicial discretion in Dworkin's analysis, allied to the concept of rights, results in there always being a 'right answer' in hard cases. Judges, adhering to the doctrine of precedent which gives a 'gravitational force' to his decision and which negates the idea of discretion, seek to develop the law in the manner best fitted to the underlying constitutional, moral and political framework of society. Thus, rather than a strict analysis of the components of the legal system, which for positivists are the legal rules, Dworkin develops a theory of adjudication. Dworkin's jurisprudence, in its critique of positivism and Hart's *Concept of Law*, breaks the mould of the positivistic/naturalistic opposition.

It is with *Law's Empire,*[40] however, that Dworkin's own distinctive brand of jurisprudence develops most fully.[41] Dworkin seeks to explain law's role by excavating 'its foundations in a more general politics of integrity, community, and fraternity'.[42] In *Law's Empire,* Dworkin once again summons up his ideal judge, Hercules. Hercules, is the embodiment of the judicial tradition imbued with the maturity and wisdom which enables him to find the 'right answer' to 'hard cases'. The law unfolds, under Hercules' charge, like a novel. With the novel, even if there are several authors, the plot must have cogency and coherence. Each participant author, accordingly, must interpret preceding chapters in such a manner as to advance the requisite coherence in the story overall. Hercules does this in judicial interpretation and evolution of the law, in the same manner as the authors of the joint novel.

The community, which Hercules serves as a judge of the Supreme Court, interpreting the written Constitution, is the 'fraternal' (*sic*) community, committed to commonly held principles and beliefs, and instilling in its members, an obligation to obey:

---

39 *Op cit*, Dworkin, 1977, fn 36, p 22.

40 *Op cit*, Dworkin, 1977, fn 37, p 22.

41 It is in *Taking Rights Seriously*, 1977, that the distinction between principles and policies, the problem of 'hard cases' and Hercules are introduced.

42 *Op cit*, Dworkin, 1986, fn 37, viii.

> ... each accepts political integrity as a distinct political ideal and treats the general acceptance of that ideal, even among people who otherwise disagree about political morality, as constitutive of political community.[43]

Integrity as a political ideal comes about 'when we make some demand of the State or community taken to be a moral agent'.[44] Provided that the individual has the opportunity to 'have his/her say', to argue for or against a particular proposition in political debate and before the courts of law, the obligation to obey exists where the majority in society agree with a particular proposition. Judges articulate the prevailing moral standards in their legal judgments: these judgments 'are themselves acts of the community personified'.[45] There is thus a high degree of consensus in Dworkin's political community, the conditions for which, in Dworkin's view, both the United States of America and the United Kingdom[46] satisfy.[47] Moreover, as Allan C Hutchinson points out, Dworkin's assumption of 'fraternal community', 'a moral agency of principled proportions', is at odds with reality, for '... where others see despair and isolation in American political and social life, Dworkin sees an enviable community of personal contentment and social solidarity'.[48]

There are further contradictions in Dworkin's arguments. The appearance of Hercules as the superhuman adjudicator of competing arguments in hard cases, striving to present law in its 'best light' and consistent with previous decisions, yet departing from them when changed circumstances dictate, is arguably marred by two factors. The first is the extent to which Hercules follows majoritarian opinion. From a feminist perspective, the opinion of the majority is precisely what underpins the sexism and inequality which women have traditionally suffered and continue to experience, despite the many formal legal reforms. The second difficulty lies in Dworkin's assertion that judges do not have discretion, and that there is one inexorably right answer to hard cases. In his analysis of *Brown v Board of Education*[49] and *Regents of the University of California v Bakke*,[50] Dworkin considers the many differing approaches which Hercules might take, and the justification for the preference of one over another: in so doing, Dworkin reveals that, contrary to his claim that judges do not have discretion, Hercules makes choices. If Hercules makes choices, and in part those choices are informed by public opinion in order to

43 *Op cit*, Dworkin, 1977, fn 36, p 211.

44 *Op cit*, Dworkin, 1977, fn 36, p 166.

45 *Op cit*, Dworkin, 1977, fn 36, p 148.

46 And presumably Australia and Canada and other liberal democracies.

47 For a critique of Dworkin's conception of community and his assumption of its 'fit' with Western liberal democracies, see Hunt, A, 'Law's empire or legal imperialism?', in *Reading Dworkin Critically*, 1992, Oxford: Berg.

48 Hutchinson, A, 'The law emperor?', in *Reading Dworkin Critically*, *ibid*, p 60.

49 349 US 294 (1955).

50 438 US 265 (1978).

reach a decision favourable to the community, what prospect is there for feminist claims, claims which seek to remedy and overturn deeply embedded socio-cultural and legal discriminations? Paradoxically, while conceding that judges 'make choices', in order to fulfil their interpretative quest and to 'portray law in its best light', Dworkin continues to deny judicial discretion: the judge is not exercising discretion but judgment, constrained by the gravitational force of precedent and communitarian integrity. The distinction between discretion, judgment and choice is exceedingly fine.

There are a number of further problems with Dworkin's jurisprudence from a feminist perspective. One issue which causes difficulties for feminist scholars is whether Hercules is overtly male, as his name suggests, or whether he is capable of gender-neutrality in his interpretation of the law. The answer to this would appear to be negative. Notwithstanding Dworkin's insistence that Hercules is fictional – 'a lawyer of superhuman skill, learning, patience and acumen'[51] – the highest courts of law have not proven in practice, as feminist scholarship has revealed, to be the champions of women's rights. Women's traditional exclusion from law, legal system and *polis*, the failure of law to reflect women's identities or subjectivities in its construction of, for example, the law of provocation, or more generally law's insistence on the male Enlightenment values of reasonableness, rationality and objectivity, reflect women's exclusions. Nor has Hercules improved the position of women under the law. Such equality as has been won has been won by women through exposing the maleness of law, and pressing for women's recognition not just by law, but in law. A cursory reflection on the law relating to abortion[52] and pornography,[53] particularly as interpreted under the US Constitution, support this view. In relation to abortion, the seminal case of *Roe v Wade*[54] established women's constitutional right, under the doctrine of privacy, to abortion within the first trimester of pregnancy. As will be seen later, subsequent jurisprudence of the Supreme Court has rendered that 'right' flimsy and contingent. In relation to the protection of women from pornography, conceptualising pornography as 'speech' or 'expression', rather than harm to women and women's equality, has ensured that the Constitution of the United States protects male pornographers and consumers, not pornography's victims – primarily women. On the other side of the coin, law's acceptance that sexual harassment is a form of unlawful sexual discrimination; the elimination of a husband's immunity from the law of rape in marriage; rules providing for gender equality in employment and so on all suggest that in many areas the judges are sensitive to gender issues. The

51 *Op cit*, Dworkin, 1977, fn 36, p 105.
52 On which see Chapter 10.
53 See, further, Chapter 12.
54 410 US 113 (1973).

problem is that judges are not consistent and do not construe gender-equality uniformly. There is thus sufficient evidence to conclude that, from women's perspective, the law is at least ambivalent and inconsistent in its protection of women's status and rights.[55] Thus Dworkin's theory of adjudication, which while intuitively plausible – in the absence of empirical sociological evidence – fails to convince. Dworkin himself has criticised the Critical Legal Studies movement,[56] the essence of which is the unravelling of law's inconsistencies, while accepting in part the challenge which Critical Legal Studies poses for liberal theory. At root, however, Dworkin is deeply sceptical about the aims of some Critical Legal scholars, who in his view, want to 'show law in its worst rather than its best light', and to mystify law 'in service of undisclosed political goals'.[57]

Furthermore, Dworkin's political 'fraternity', and his theory of adjudication, assumes too much about human nature to provide reassurance as to the role of law in society. Dworkin fails to address issues of power, race, gender and class. The same assumptions which are made by positivists are made by Dworkin. Thus, while Dworkin tries to break the stranglehold of positivism without falling into the arms of natural law theory, his own theory of adjudication reflects the same shortcomings: that of idealism and utopianism.

Moreover, the 'chain novel' imagery of law propounded by Ronald Dworkin[58] ignores the differing modes of moral reasoning and approaches to decision making which Carol Gilligan's controversial research has revealed.[59] As feminist lawyer Nicola Lacey has pointed out, positivism and the associated ideal of the liberal rule of law, with its insistence on formality and rationality, effectively denies the differing modes of moral reasoning; ignores the fact that an ethic of care, and human inter-connectedness plays a role in women's reasoning and, it must follow, women's legal reasoning, as much as hierarchy and rationality.[60] The reality of differing modes of reasoning requires recognition in legal theory. The success of the American Realist school in the 1920s and 1930s, and its contemporary successor, Critical Legal Studies, discussed in Chapter 6, is in part due to the unmasking of law's lack of rationality and coherence.

---

55 On law's ambivalence in family law, see Smart, C, *The Ties That Bind; Law, Marriage and the Reproduction of Patriarchal Relations*, 1984, London: Routledge and Kegan Paul; see, also, Smart, C, *Law, Crime and Sexuality: Essays in Feminism,* 1995, London: Sage.

56 On which see, further, Chapter 9.

57 *Op cit*, Dworkin, 1986, fn 37, p 275.

58 *Op cit*, Dworkin, 1986, fn 37.

59 See Gilligan, C, *In A Different Voice: Psychological Theory and Women's Development*, 1982, Cambridge, Mass: Harvard UP; and see, further, Chapter 7.

60 See Lacey, N, *Feminism and the Tenets of Conventional Legal Theory*, 1996 (see *Sourcebook*, p 309); see, also, Lacey, N, 'Feminist legal theory: beyond neutrality' [1995] CLP 1.

One further aspect of Dworkin's theory which has fallen to feminist analysis is Dworkin's concept of obligation to the community. In Chapter 6, Dworkin analyses the foundational concept of integrity as political virtue. Integrity insists, Dworkin asserts, 'that each citizen must accept demands on him' and may 'make demands of others'.[61] Integrity is intimately bound up with the moral authority of law. Each person in the community has 'associative responsibilities', to be determined by critical interpretation, in light of the requirements of justice. The analysis is developed through the concept of the 'dutiful daughter'. Dworkin asks: '[D]oes a daughter have an obligation to defer to her father's wishes in cultures that give parents power to choose spouses for daughters but not sons?'[62] Dworkin accepts that if the community holds the view that daughters are less equal than sons, then this is not a true community (a community of integrity). If, however, gender equality is accepted, but a culture believes that women need paternalistic protection, there exists a 'genuine conflict' in terms of moral, and associative, obligation. The daughter has a responsibility to defer to parental choice, but this responsibility may be overridden by claims to individual freedom and autonomy. How is the conflict to be resolved? Dworkin's solution reveals his lack of concern with the daughter's dilemma, and her lack of rights:

> ... a daughter who marries against her father's wishes, in this version of the story, has something to regret. She owes him at least an accounting, and perhaps an apology, and should in other ways strive to continue her standing as a member of the community she otherwise has a duty to honour.[63]

In Allan C Hutchinson's analysis, this response represents a 'powerful and destructive dynamic at work', and represents the 'oppression of women masquerading as honour'.[64] The critique is elaborated by Valerie Kerruish and Alan Hunt who detect conservatism in Dworkin's analysis of the obligation imposed on the 'dutiful daughter'. This conservatism is manifested at two levels. In the first place, the authors argue that Dworkin is imposing the duty to resolve the conflict between individual autonomy and community duty upon the person who has been wronged. In the second place, and at a deeper level, conservatism is apparent in Dworkin's insistence that the daughter – whose rights are being sacrificed in the name of community – accept the 'normative power embedded in the discriminatory rule', notwithstanding the presumption that Dworkin himself 'does not approve of

61 *Op cit*, Dworkin, 1986, fn 37, p 189.
62 *Op cit*, Dworkin, 1986, fn 37, p 204.
63 *Op cit*, *Reading Dworkin Critically*, fn 47, p 205.
64 *Op cit*, *Reading Dworkin Critically*, fn 47, p 63.

the practice',[65] and notwithstanding Dworkin's otherwise deep commitment to the liberal conception of equality.[66]

Finally, Dworkin's evolving, subtle, and sometimes contradictory, jurisprudence falls into the trap of reifying law. While positing law in the political community, Dworkin demands that it is law, rather than politics, which regulates society. Law's 'empire' is just that: the single most powerful edifice in society. Standing Marxist theory on its head, law is the infrastructure, all else, economics, politics, ideology, religion, are superstructural. As Alan Hunt has written:

> His failure [to change the landscape of legal theory] is precisely the refusal to confront the inescapably political dimension of law or to acknowledge that law is politics in a special and distinctive form.[67]

## SOCIAL CONTRACT THEORY

Thomas Hobbes, John-Jacques Rousseau, John Locke and John Rawls all present variants of social contract theory. For Thomas Hobbes, men come together in civil society and contract with the sovereign for the greater security of society as a whole.[68] The individual's rights are limited by that contract, although the sovereign holds individual rights on trust and cannot force the individual to harm himself. The central depressive thrust of Hobbes' writing is encapsulated in the idea that in a state of nature man would be at constant war with other men; that life would be 'nasty, brutish and short'. By contrast, John Locke's social contract theory[69] places heavy emphasis on the individual rights of man, rights which cannot be contracted away to the State.

The most comprehensive contemporary liberal social contract theory is offered by John Rawls. In *A Theory of Justice*,[70] Rawls considers the fundamental principles which individuals, stripped of self-knowledge (behind a 'veil of ignorance') would choose for the just ordering of society. Knowing nothing of one's own abilities and position in society, but having a general knowledge of economic systems and human psychology, individuals behind the veil of ignorance would proceed cautiously and would base their reasoning on the possibility that once the veil of ignorance is lifted, they might

65 Kerruish and Hunt, in Hunt, *op cit*, fn 47, pp 209, 211.

66 The liberal conception of equality is described by Dworkin as 'the nerve of liberalism': see Dworkin, R, 'Liberalism', in *A Matter of Principle*, 1986, Oxford: OUP, pp 181, 183.

67 *Op cit*, Hunt, fn 47, p 41.

68 *Op cit*, Hobbes, fn 7.

69 *Op cit*, Locke, fn 8.

70 Rawls, J, *A Theory of Justice*, 1972, Oxford: OUP.

end up in the 'worst off' position in society. Accordingly, the principles chosen would be directed to ensuring that the 'worst off' in society were in the best possible position given alternative outcomes of decision making.

The resultant principles which would emerge would be, first, that priority is to be given to liberty without which no individual can achieve his life plan. Secondly, inequalities in the distribution of wealth in society are justifiable only in so far as the achievement of greater wealth on the part of the most talented would compensate the 'worst off' in society. Finally, there is to be equality of opportunity in terms of access to political and economic life.

John Rawls' *A Theory of Justice* was published to much critical acclaim. Hailed as the most comprehensive contemporary exposition of the social contract, Rawls elaborates on the ideas of earlier writers such as Locke, Paine and Rousseau. The result is a painstakingly worked and reworked calculation of the criteria for a 'nearly just society'. The formula to which Rawls works is to hypothesise about placing representative people from differing walks of life in a society behind a 'veil of ignorance'. This veil prevents individuals from knowing their personal characteristics, including *inter alia* their intelligence, wealth, class or position in society. Only by stripping people of their individuality does Rawls consider that the principles on which society should be based – and hence laws – can be reached. Rawls does not envisage that everyone in a society at any point in time will go behind this 'veil of ignorance'. Rather, the original position (under the veil of ignorance) is a mental construct to be used for the determination of rational principles for the ordering of society. The original position is not 'a general assembly' of all persons living at one point in time, nor is it 'a gathering of all actual or possible persons'.[71]

Rather than an assembly of all persons, those in the original position are viewed as being 'representatives' of a class of persons: the representative being the 'head of the family'.

## Knowledge and ignorance behind the 'veil of ignorance'

In order to maximise the rationality and disinterestedness in decision making about society and laws, Rawls denies the representatives behind the veil of ignorance certain knowledge. Such persons do not know their 'class position', nor 'their intelligence, strength or the like', nor whether he or she is an optimist or pessimist; have no idea of their own 'rational life plan' and have no knowledge of their own 'conception of the good'. Neither does the representative know the particular facts about his or her own society; its stage of development or politics, and his or her place within that society. The

71 *Op cit*, Rawls, fn 70, p 139.

disembodied, ungendered representative person does, however, know the general facts of human society, including knowledge of politics, economics and psychology.[72]

By denying parties any particular knowledge of their personal situation, Rawls considers that the parties will be unable to bargain to reach decisions about justice from a self-interested position. Rather, parties – who will have a general desire to achieve their 'life plan' and to participate as fully as possible in the good of society – will adopt an attitude to decision making which, should they end up as less advantaged than others, will protect their position as far as possible. The parties behind the veil of ignorance are vaguely pessimistic about their own end position, and as a result will always gear their decisions towards the 'worst off' position in society.

## The principles of justice

The principles which would be chosen by this representative congress of people will prioritise liberty over equality: each will have an equal right to the 'most extensive basic liberty compatible with a similar liberty for others'. Liberty may only be restricted in the interests of achieving greater liberty for all, and restrictions on liberty must be both acceptable to those whose liberty is being restricted, and consistent with the overall maximisation of liberty in society. The second principle of justice is that social and economic differences are to be distributed so that they are to everyone's advantage on the principle of equal access for all. Where there is an inequality in the distribution of primary social goods (liberty, opportunity, income and wealth), those inequalities may be justified on the basis that for every gain of those who find themselves the best advantages, the 'worst off' in society will also benefit from that person's advantage. The principles are ordered lexically – that is to say the first principle is 'prior to the second'[73] – and accordingly no departure from the first principle is justified by any greater social or economic advantages which might flow from such a departure.

From a feminist perspective a number of large questions loom out of Rawls' conception of the criteria for selecting principles of justice in society, and *A Theory of Justice* has been submitted to feminist scrutiny.[74] Amongst other matters, the question of the gender of Rawls' 'representative persons'

72 *Op cit*, fn 70, p 137.

73 *Op cit*, fn 70, p 61.

74 Matsuda, M, 'Liberal jurisprudence and abstracted visions of human nature: a feminist critique of Rawls' *A Theory of Justice*' (1986) 16 New Mexico L Rev 613 (see *Sourcebook*, pp 325–27); Moller Okin, S, *Women in Western Political Thought*, 1979, Ewing, New Jersey: Princeton UP; 'Justice and gender' (1987) 16 Philosophy and Public Affairs 42; Kearns, D, 'A theory of justice – and love: Rawls on the family', in Simms, M (ed), *Australian Women and the Political System*, 1984, Melbourne: Longman.

arises. The 'representative person', the 'head of the household' at least implies that the representative person is gendered male. However, even if he is not, there is the suspicion that the representative is none other than the philosopher himself, and that the principles of justice adopted are those to which the philosopher himself adheres. Also central to the analysis is Rawls' attitude to the reality of equality in a just society. Rawls' methodology is subject to scrutiny by Mari J Matsuda[75] who argues, *inter alia,* that Rawls' abstractions are unhelpful:[76]

> To argue at the level of abstraction proves nothing and clouds our vision. What we really need to do is to move forward through Rawls' veil of ignorance, losing knowledge of existing abstractions. We need to return to concrete realities, to look at our world, rethink possibilities, and fight it out on this side of the veil, however indelicate that may be. By ignoring alternative visions of human nature, and by limiting the sphere of the possible, Rawls creates a gridlock in which escape from liberalism is impossible, and dreams of the seashore futile ...[77]

Susan Moller Okin in *Justice, Gender and the Family*[78] argues that Rawls has paid little or no attention to justice within the family, thus perpetuating the public/private distinction in terms of the justice constituency. Notwithstanding this failing, Moller Okin finds that Rawls' *A Theory of Justice* has potential from a feminist perspective. By applying Rawls' original position behind the veil of ignorance, the author argues that it is possible to reach decisions about a just society. A key point of justice within the family would be, for Moller Okin, the jointly shared responsibility for childcare. This would have an impact on the workplace, requiring employers to grant equal rights to time off for parenting, and flexible working hours in order to facilitate the demands made by children. Schools, too, would be implicated, and should ensure that children 'become fully aware of the politics of gender', in order that the traditional stereotyping of men's and women's attributes be overcome. The 'disappearance' of gender from the family and workplace, the socialisation of children within genderless families and schools, would result in a society which would exhibit true justice.[79]

For Carole Pateman, Rawls' thesis, resting on the primary construct of the original position, represents such an 'logical abstraction of such rigour that nothing happens there'.[80] As noted above, it is this abstraction that has also

75 At the time of writing, Assistant Professor of Law, University of Hawaii.

76 *Op cit*, Matsuda, fn 74.

77 *Op cit*, Matsuda, fn 74, p 624.

78 Moller Okin, S, *Justice, Gender and the Family*, 1989, New York: Basic Books.

79 For a critique of Susan Moller Okin's work on Rawlsian theory, see Lacey, N, 'Theories of justice and the welfare state' (1992) 1 Social and Legal Studies 323.

80 See Pateman, C, *The Sexual Contract,* 1988, London: Polity, p 43.

been criticised by Mari Matsuda.[81] In her view, Rawls' notion that self-interested individuals come together for the advantages which flow to the individual from collaboration and co-operation over-emphasises acquisitiveness, greed and self-interest. Rawls' individuals are excessively individualistic, and in their desire for the pursuit of their rational life plans and the maximum possible share in life's primary goods, ignore the possibilities of alternative modes of social life in which 'humour, modesty, conversation, spontaneity, laziness and enjoying the talents and differences of others also feels good'. What is called for is an abandonment of the abstracted original position, and decision making in the real world.

More fundamentally, for Carole Pateman, all social contract theory, in its insistence on spheres of individual liberty and individual rights, obscures the issue of gender, 'the original contract is a sexual-social pact, but the story of the sexual contract has been repressed'.[82] It is the sexual contract which explains the creation of a patriarchal social order which manifests itself in both the public and the private spheres of life. Through the distinction drawn by liberalism of life into two spheres, and theoretical emphasis being placed on the public, political, sphere, social contract theory leaves out, ignores, the patriarchal order. Those aspects of life – marriage, the home and family – are implicitly deemed by classic social contract theory to be unimportant to civic freedoms and rights enjoyed in the public sphere. Thus:

> Sexual difference is political difference; sexual difference is the difference between freedom and subjection. Women are not party to the original contract through which men transform their natural freedom into the security of civil freedom. Women are the subjects of the contract. The (sexual) contract is the vehicle through which men transform their natural right over women into the security of civil patriarchal right.[83]

The sexual contract is the original contract and lays the foundation, and the fundamental terms, for the social contract. It is the sexual contract which determines women's role as the nurturer and domestic worker. With the terms of the social – fraternal – contract in place, and the world divided into those areas of freedom and rights, the public sphere, and the areas free from legal regulation, the private sphere, the woman's role becomes affirmed as subordinate. Throughout her wide ranging scholarly study, Carole Pateman reveals, in relation to domestic labour, labour in the marketplace, classical social contract, Marxist and capitalist theory, the significance of this the original form of contractual relations: the sexual contract which underpins society. The social contract then is one between male citizens, between fathers

81 *Op cit*, Matsuda, fn 74.

82 *Op cit*, Pateman, fn 80, p 1.

83 *Op cit*, Pateman, fn 80, p 6.

and brothers, to the exclusion of women. Women can enter into the contract only 'as men', on male terms, not as women.

## The communitarian critique of liberalism

Liberal theory in general, and Rawls' *A Theory of Justice* in particular, also attracts critique from the point of view of those who reject the primacy of the individual as atomistic being and stress the individual as in relation with others: the communitarian critique. In part, the communitarian approach insists that the individual can have no identity or rights other than within the connections and relations created within the political community. Rawls' portrayal of the genderless individual imbued with the rationality to determine the principles of justice behind the 'veil of ignorance', and to develop his or her own rational life plan, is, from a communitarian perspective, a false conception for the individual cannot exist without society and community: justice, rights and rationality are only meaningful within the community.[84] Moreover, the individual subject is constituted by the community: the web of social relations into which the individual is born, and through which the subject individual moves throughout her life. The critique is also advanced by Drucilla Cornell who argues that the construction of the atomised individual effectively represents a denial of women through its implicit denial of the relational bonds between mother and child.[85, 86]

Communitarian philosophy stands opposed to liberalism's insistence on the primacy of the individual and stresses human interconnectedness. Rather than viewing individuals are imbued with individuality and autonomy, communitarianism in its many guises, insists that the individual is constructed through her interrelatedness within the community and



84 See Sandel, M, *Liberalism and the Limits of Justice*, 1982, Cambridge: CUP; Taylor, C, *Philosophical Papers*, Vol 2, 1985, Cambridge: CUP; MacIntyre, A, *After Virtue: A Study in Moral Theory*, 2nd edn, 1984, London: Duckworth; *Whose Justice, Which Rationality?*, 1988, London: Duckworth; Gewirth, A, 'Rights and virtues' (1988) 38 Review of Metaphysics. See also John Rawls' response to the communitarian critique: 'Justice as fairness: political not metaphysical' (1985) 14 Philosophy and Public Affairs 3; 'Kantian constructivism in moral theory' (1985) Journal of Philosophy 77; 'The idea of an overlapping consensus' (1987) 7 OJLS 1; 'The priority of the right and ideas of the good' (1988) 17 Philosophy and Public Affairs 251; *Politician Liberalism*, 1993, New York: Columbia UP.

85 Cornell, D, 'Beyond tragedy and complacency' (1987) 81 Northwestern University L Rev 693; 'The doubly prized world: myth, allegory and the feminine' (1990) 75 Cornell L Rev 644.

86 For a detailed feminist critique of communitarianism, see Frazer, E and Lacey, N, *The Politics of Community: A Feminist Critique of the Liberal-Communitarian Debate*, 1993, Hemel Hempstead: Harvester.

emphasises societal values rather than individuality.[87] The values of communitarianism, connectedness and interdependency, are both relevant to feminist theory and practice. As seen in Chapter 1, feminism's consciousness raising techniques are situated within the concrete experiences of women, often within localities. Moreover the shared identities of women within their own location, be that cultural, racial, or through social stratification, has been an enabling, facilitating, characteristic for the development of theory.

However, while communitarian political philosophy shifts the libertarian focus on individuality, rationality and autonomy towards an understanding of the interconnectedness of society and the manner in which that interconnectedness constructs the individual subject, and emphasises societal interdependence, communitarian philosophy ignores both gender and power relations. Moreover, communitarian philosophy in denying individuality and autonomy of legal and social subjects, ignores the differences between people: subjectivities become 'shared', 'mutually sympathetic, understanding one another as they understand themselves'.[88] This 'shared subjectivity', in Iris Young's analysis, is not only impossible[89] but politically undesirable in so far as the striving for community – through the identification with similar others – makes co-existence with groups having different characteristics more, not less, difficult. In Young's view, the ideal of community 'is similar to the desire for identification that underlies racial and ethnic chauvinism'.[90] Accordingly, in denying difference and emphasising shared identities, communitarianism ignores the problems entailed in forging theoretical and practical objectives within feminism which, under the conditions of postmodernity,[91] demand the recognition of women's differing subjectivities, socially constructed through identification on racial and gender-orientated lines. Feminist scholarship in recent years has been keenly attuned to the differences between women, and the need for 'the implementation of a principled call for heterogeneity'.[92]



87 See, for analysis, references cited at fn 85, and Taylor, C, *Sources of the Self,* 1990, Cambridge: CUP; Mulhall, S and Smith, A, *Liberals and Communitarian*, 2nd edn, 1995, Oxford: Basil Blackwell; Kymlicka, W, *Liberalism, Community and Culture,* 1989, Oxford: OUP; Cotterrell, RBM, *Law's Community*, 1995, Oxford: Clarendon.

88 Young, I, 'The ideal of community and the politics of difference' (1986) 12 Social Theory and Practice 1, p 10.

89 Given that, according to psychoanalytic theory, the subject cannot 'know' itself, let alone others, and that subjectivity, as Julia Kristeva analyses the concept, is always a 'process in being', 'heterogeneous, decentred', never fixed in meaning, but always fluid.

90 *Ibid,* Young, p 12.

91 On which see Chapter 9.

92 *Ibid*, Young, p 13.

## THE FAILURES OF TRADITIONAL JURISPRUDENCE

It may be seen from the above, necessarily brief and introductory outlines, that, in differing ways, traditional, male jurisprudence has been concerned with identifying the *characteristics* of valid law, not with the *effect of law* on the individuals it serves. It may be countered that natural law thought with its concern for the morality of law and the central notion of equality of all before the law – the concept of the rule of law – does entail an appreciation of the effects of law. This, however, from a feminist – and indeed a socialist, Marxist or more general classist or minority approach – is lamentably inadequate. Aristotelian equality – the principle of treating like alike and treating different cases differently – tells us little of the relevant criteria by which 'sameness' or 'difference' should be evaluated. Formal equality fails in other respects. To treat all equally gives no guarantee that all shall benefit: indeed all may suffer as a result of equal treatment.

It would not be too sweeping a conclusion to argue that women have been denied recognition in male jurisprudence. The only manner in which it is tenable to argue the converse, is to argue that women are 'men'. Laws, legal systems and conventional jurisprudence, in its many guises, have failed women – have either excluded women from law's domain, or required that woman enters the domain on male, patriarchal terms. The extent to which feminist analysis and scholarship has provided alternative, inclusionary, visions is considered in Part III.

# PART III

# SCHOOLS OF FEMINIST JURISPRUDENTIAL THOUGHT

CHAPTER 6

# SCHOOLS OF FEMINIST JURISPRUDENTIAL THOUGHT: I

# LIBERALISM AND MARXISM

## INTRODUCTION

### The liberal tradition in Western democracy[1]

As seen in Chapter 5, liberalism has long been the dominant political ethos in Western democratic society and hence in law. The key concepts of liberal thought are rationality, individuality, equality, liberty from interference from others or the State unless justified, the availability of legal rights, and the protection of the private sphere of life which is conventionally deemed to be 'not the State's interest'. The powers of the State must thus be constrained under the rule of law.

First and foremost, liberalism emphasises the priority of the freedom of the individual and his or her freedom from undue political, legal and economic restraint. Liberty is thus at the heart of the liberal tradition. Liberalism insists on the demarcation of the 'public' and 'private' spheres of life: whereas State regulation of the public sphere – the world of employment, commerce, politics and participation in the democratic process – is justified in the public interest, the private sphere is that realm of privacy within which individuals should be able to retreat from the pressures of the public world, and to live according to their own dictates, unrestrained by law and the State, other than for the protection of others. Correlated with the priority of liberty are perceptions about the individual's autonomy and rationality which enables individuals to pursue their own 'rational life plan'[2] without undue interference or restriction. Rationality requires that equal respect be given to each citizen in the pursuit of their personal legitimate goals in life. Equality between persons is also critical to the realisation of a liberal democratic State: no individual or group of individuals should be privileged in a manner which delimits the equality and freedom of others. Central also to liberalism is the concept of enforceable

1 See, *inter alia,* Arblaster, A, *The Rise and Decline of Western Liberalism*, 1994, Oxford: Basil Blackwell; Laski, H, *The Rise of European Liberalism*, 1936, London: Allen & Unwin. For a feminist appraisal of liberalism, see Jaggar, A, *Feminist Politics and Human Nature*, 1983, New Jersey: Rowman and Littlefield.

2 The phrase is that of John Rawls. See Rawls, J, *A Theory of Justice,* 1972, Oxford: OUP.

individual rights which may be called upon to enforce restrictions on State intrusion into a person's legitimate sphere of liberty.

Subsumed within these introductory remarks lie several difficult issues. First, if each individual as citizen is to enjoy maximum freedom, it is necessary that some restraints be placed on conduct in order to protect the freedoms and rights of others. Accordingly, it is false to speak of total freedom; rather what must be sought is maximum individual freedom consistent with the freedom of others. Secondly, it must be asked whether the State is justified – on the basis of protection of others – in interfering in all aspects of life, or whether the justification only relates to the public sphere of life. Entailed in this last point is the question of whether in fact there can be boundaries drawn around 'spheres of life' – the public and the private – in order to determine the legitimacy of State regulation.

One of the clearest expositions of liberal legal philosophy comes from the nineteenth century political philosopher, John Stuart Mill.[3] In 1859, John Stuart Mill's *On Liberty* was published. The essence of Mill's thought is encapsulated within the following paragraph:

> The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[4]

Mill thus emphasises the liberty of the citizen in which the State has no right to interfere unless justified in so doing for the protection of other members of society. The individual is free – subject to necessary restraints predicated upon the principle of the protection of others – to pursue his or her own goals in life, to live his or her own lifestyle however morally worthy or unworthy that may appear in the eyes of others. On this basis, each individual's preferences and predilections should be accorded equal respect by the law, and the individual should be accorded the maximum sphere of freedom to pursue his or her own chosen destiny and satisfy his or her own personal wants. If 'society' abhors an individual's lifestyle, it may attempt to educate the individual into reforming, but it may not – subject to the harm to others principle – seek through the means of law to control that person's conduct. Liberal philosophy places the individual centrestage. No individual may be sacrificed for the

3 1806–73.

4 Mill, JS, *On Liberty* (1859), 1989, Cambridge: CUP, p 13.

community at large. Society – howsoever defined – is not, from this perspective, an entity whose interests, however legitimate, may override the supremacy of the autonomous individual.[5] Law's role, therefore, is one of providing the societal framework which accords to the citizen the maximum area of freedom which is consonant with the freedom of others. The structure demarcates an area of privacy – a private sphere – into which the State has to justify any intrusion.

## The public and private spheres in liberal philosophy

> 'Public' may be used to denote State activity, the values of the marketplace, work, the male domain or that sphere of activity which is regulated by law. 'Private' may denote civil society, the values of family, intimacy, the personal life, home, women's domain or behaviour unregulated by law.[6]

The public/private distinction derives from ancient Greek thought which drew a distinction between the *polis,* the public sphere and the *oikis,* the private; the public world is that of male governance, the private is that of the home occupied by women and children.[7] By the seventeenth century the concept of the public and private spheres had been formulated as determinative of the appropriate sphere for both legal regulation (the public sphere) and the freedom from legal regulation (the private sphere). Thus, the family became largely invisible to law: a haven of legal liberty.

As will be seen, there remain difficulties in any attempt to rigorously distinguish between the two spheres, and there is much evidence for the conclusion that law, far from leaving the private sphere unregulated, plays a significant role in regulating the private and that the notion of a private sphere of freedom from law is largely mythical.

A central tenet of Western liberalism endorses this divide by insisting that there exists an area of personal individual privacy which is 'not the law's business'.[8] A similar idea is expressed in the time-worn expression that 'an English*man's* home is his castle' into which no one, without lawful authority, may intrude into an individual's personal space.[9] As seen above, the nineteenth century liberal philosopher and feminist activist John Stuart Mill was also to insist on a sphere of personal privacy into which the State must

5 See, for a contrasting view, Devlin, P, *The Enforcement of Morals*, 1965, Oxford: OUP.

6 O'Donovan, K, *Sexual Divisions in Law*, 1985, London: Weidenfeld and Nicolson, p 3. (See *Sourcebook*, pp 146–59.)

7 See Arendt, H, *The Human Condition,* 1958, Chicago: Chicago UP; cf Swanson, J, *The Public and the Private in Aristotle's Political Philosophy,* 1992, New York: Cornell UP.

8 See, eg, *op cit*, Mill, fn 4; *The Report of the Committee on Homosexual Offences and Prostitution*, Cmnd 247, 1957, London: HMSO, but cf *ibid*, Devlin, fn 5.

9 See, eg, *Semayne's* Case (1605) 5 Co Pres 91a; 77 ER 194.

not intrude if individual freedom and rationality are to be respected. Accordingly, while law may intervene to prevent one individual's conduct from causing harm to another, law may not, without that justification, otherwise intrude on individual liberty. To reiterate, at the heart of liberal theory lie concepts of limited State power, individualism, rationality and privacy.

Women, traditionally, have been denied full and effective participation in society. Much of the discrimination so effectively perpetuated until this century (although not all discriminatory laws and practices have yet been removed) is explained through the conceptual separation of the public and private spheres of life. When the demarcation of the 'private' sphere is allied to patriarchal attitudes which insist on male superiority over women there exists a potent and potentially dangerous scenario from the perspective of women.

Liberal feminists accept the merits and strengths of liberal ideology but seek to unmask and rectify the inequalities which liberalism – through its implicit insistence that all individuals are equally equal – disguises. The task, from this perspective, is to act within the dominant ideology and seek to eliminate gender-based discrimination – to achieve true equality for women in all walks of life – without challenging the ideology itself and while remaining faithful to the liberal ideal of equality and autonomy. What liberal feminists, from Mary Wollstonecraft onwards, have sought to achieve is the elimination of practices and laws which effectively deny women access to the 'public sphere' of life and relegate women to the 'private sphere' of the home and family. By historically and traditionally excluding women from civic life, men not only seized for themselves the highground of policy and law making, but also subordinated and silenced women, denying women a voice in public affairs. Liberalism's biggest fraud lies in its assumptions that men and women are equal, when in fact it is all too apparent that traditionally the only voices being heard and given effect were male voices. Nowhere is this phenomenon more apparent, even nowadays, than in the legal system.[10] The feminist liberal movement has not been confined merely to achieving legal reforms such as the right to the franchise, the right to equal education, the right to own property, the right to admission to the professions and all other forms of employment, the right to equal pay and conditions of work, but has extended across all aspects of life.

In relation to the liberal respect for the private sphere of life, liberal feminists have analysed the position of women within the family, the rights of women to protection from sexual and other domestic violence, the rights of women in relation to that most private sphere of life: the control over reproduction, which demands that women be given access to and control over

10 See, further, Chapter 11.

issues such as contraception, abortion and childbirth. Liberal feminism also, in seeking true equality and choice for women to exercise their own rationality and pursue their own life plan, examines the economic effects of domesticity on women's economic capacity in the public sphere of remunerated employment. Undeniably, women are free to choose to devote their lives to their children and family, but all too often – as social surveys and statistics continue to reveal – the responsibilities of the private sphere result in women being employed in part time, low paid jobs with little job security.[11] For those women who choose to pursue their own career, the stark choice must often be made as to whether to attempt to combine this career with domestic responsibilities, or to postpone the question of personal fulfilment through family life until their careers are well established – with the attendant risks of finding fulfilment in the public sphere at the expense of the private sphere.

Equality of opportunity is thus also inextricably linked to the meaning of substantive, rather than purely formal, equality. Discrimination in employment and other aspects of life, and the removal of such discrimination, has been a central focus of liberal feminism. Gender, the social construction of biological sex, should be irrelevant to issues such as the right to participate in spheres of employment, other than where physical attributes render women unable to fulfil the responsibilities entailed in that employment. Thus, whereas it may be justifiable for an employer who requires a worker to be able to lift 200 pound weights to employ a man rather than a woman, should a particular woman be able to satisfy the requirements of weight lifting, there is no legitimate cause for her exclusion from employment. Where the activity in question does not relate to physical strength, however, there should be no barrier placed in women's path to entry to that employment. Thus, for liberal feminism, gender is an issue which should be viewed, as it was in Plato's *The Republic*[12] as a concept which has little, if any, relevance to women's status in the public sphere, save where legitimate justifications can be adduced to support discriminatory practices. For the most part, women have the capacity, physical and intellectual, to operate in the public sphere under the same terms of reference as men. The conventional, Victorian, imagery of women as 'too feminine' for particular professions also continues to resonate in contemporary society and has resulted in women's long exclusion from such professions in which gender should make no difference. The early struggles for the right to vote, the right to full education and entry into universities and the professions bear witness to the representation of women, by men, as 'feminine', 'weak' and 'in need of protection' from the brute (male) realities of the public sphere. Conceptions of women as more rightly confined within the private sphere supported the resistance to women's demands for equality. In contemporary society, echoes of Victorian values continue to be 'heard' in the

11 See, further, Chapter 2.

12 On which see Chapter 4, but note the ambivalence in Plato's theory.

conceptualisation and reality of women as most appropriately employed within subordinate positions. Accordingly, as seen in Chapter 2, women are disproportionately represented within the fields of nursing, in childcare, in clerical work and in support positions within the professions. Further, women remain either excluded from or relegated to roles defined by male leaders in areas of employment.

The dilemma which liberal legal feminists face, it may be argued, is the too ready acceptance of the intrinsic and superficially attractive tenets of the liberal tradition. Liberalism's very tenacity as a philosophical and political foundation for Western society and law confirms its attraction, and it is tempting to accept that if only the formal, substantive inequalities from which women have suffered, and continue to suffer are eradicated through law, liberalism's empire will continue, a little tarnished but fundamentally unimpaired.[13]

By working within the framework, rather than challenging the underlying political philosophy, liberal legal feminism has achieved much by unearthing the inequalities and pressing successfully for legal change. The project will continue as scholars continue to research into and press for reform of discriminatory laws. The illustrations noted above underline the magnitude of the task which has both been undertaken and remains to be undertaken.

Liberal feminism argues that women, despite their physical differences, are equally capable of functioning in the public sphere, provided that the structured inequality in law and society can be removed. Thus, women are or could be 'just like men' and therefore accorded equality on that basis. This reflects the approach of liberal feminists who do not attack the law or legal system as inherently and unfailingly sexist, but rather view the law as having evolved in a manner which reflects the reality of social life and has been constructed according to male norms. If these norms could be deconstructed and a reconstruction effected which would include rather than exclude women, the law would be essentially fair.

As noted above, much significant reform has been achieved through use of this softly-softly approach: reforms in family law and employment law in the United Kingdom provide a wealth of examples of the strides made towards formal equality within the family and the workplace. For example, on equal parental responsibility for children, see the evolution from the father's automatic right to 'custody' of his children[14] through to the Children Act 1989 which makes explicit the equal rights and responsibilities of parents of legitimate (but not illegitimate) children. In relation to employment, see the Equal Pay Act 1970, Sex Discrimination Act 1975, and the significant gains

13 Communitarian philosophy stands opposed to liberalism's insistence on the primacy of the individual and stresses human interconnectedness: see, further, Chapter 5.

14 *Re Agar-Ellis* (1883) 24 Ch D 317.

made by women under Article 119 of the Treaty of Rome 1957 (founding the European Economic Community, now the European Community and Union). The social reality of women's position remains, however, rather different from that portrayed by formal legal equality.

There exists a fundamental difficulty with the 'liberal State'. With its emphasis on individual freedom, rights and equality, liberalism masks the gendered nature of society, the State and law. Achieving formal equality for women through the dismantling of existing inequalities before the law cannot, without more, achieve substantive equality. A number of issues are entailed here. First, for the most part the law is cast in gender-neutral terms, thus creating the liberal illusion that the law is blind to gender.[15] That this is not an accurate reflection of law's reality is demonstrated through analyses of the manner in which the law is applied in particular circumstances which have an adverse consequence for women, but not men, simply because 'man', not woman, is the referent – the Subject – of law.

## The feminist critique of liberalism

A sceptical reaction to legal liberalism may lead to a different conclusion from that which suggests that the achievement of formal legal equality is an adequate good. In Chapter 2, the movement from culture to law was considered, and it was seen there, the many and various ways in which women have traditionally been treated as nurturers and carers of children, as subordinate to, and as possessions of, their husbands and other male kinfolk. It is not necessary, as was seen, to look to once physically and culturally remote societies to find such attitudes. It may be recalled, for example, that under English law, women were denied the right to own and manage personal property until 1882;[16] were accorded equal rights and duties in relation to their children under statute only in 1973;[17] were denied equality in access to divorce until after the Second World War; that until 1970 English husbands could recover damages from a man proven to have committed adultery with his wife, although no equivalent remedy was available to an aggrieved wife;[18] that English women were denied a remedy for rape within marriage, on the basis of implied consent through marriage to sexual access by their husbands irrespective of their own feelings, until 1991;[19] that in England women may be prosecuted for the murder of their violent husbands

15 There are, of course, obvious exceptions to this, particularly in relation to abortion rights and other gender-specific medical issues.

16 Married Women's Property Act 1882.

17 Guardianship Act 1973.

18 Law Reform (Miscellaneous Provisions) Act 1970.

19 *R v R* [1992] 1 AC 599.

and until recently denied the right to a special defence of delayed provocation because the criminal law recognises only a defence of immediate provocation which is appropriate only to men.[20] Such examples illustrate the intractable nature of sexism and patriarchy in society and law.

### *The public and private spheres of life*

As the quotation from Katherine O'Donovan's *Sexual Divisions in Law*[21] cited above makes clear, the public sphere of life is that of politics, law and employment in the marketplace, whereas the private sphere is that domain into which the individual retreats from the pressures of the world and in which the individual is sovereign and unregulated by the law. Neither concept is, however, as simple and straightforward as this brief introduction suggests.

As O'Donovan's analysis makes clear, the private sphere is rather more regulated than liberal theory would imply. Liberalism's insistence on the division is thus more ideological than real. As will be seen below, the law does for example regulate the private sphere particularly in relation to domestic violence, the protection of children from abuse and through controlling the terms on which a marital relationship may be entered into and terminated.[22] The law also controls that most private sphere of life: sexuality. Thus laws regulate the age of consent to both heterosexual and homosexual activity; laws regulate the availability of contraception and abortion advice and treatment. Law and medical practice control the management of pregnancy and childbirth.[23] Law also regulates permissible sexual activity between adults.[24] The 'private sphere' is also affected by fiscal controls imposed by the State through taxation and social welfare benefits, and more broadly through management of the economy which determines employment opportunities and conditions of employment. Thus it is arguable that the private-public distinction, which is so central to liberal theory, is itself fundamentally flawed. Further, the conceptual divide between the public and private masks and ignores the economic role of women within the family and home. As Katherine O'Donovan perceptively notes, even where law does not regulate



20 *R v Ahluwalia* [1992] 4 All ER 889; *R v Thornton* [1992] 1 All ER 306. For discussion of the law's reaction to battered woman syndrome and its role, see, further, Chapter 11.

21 *Op cit*, O'Donovan, fn 6.

22 Although as O'Donovan states, Anglo-American law does not seek to regulate the marital relationship during its subsistence to the extent which civil law systems of continental Europe do through the provision of detailed family codes stipulating respective mutual rights, duties and responsibilities in marriage.

23 See, further, Chapter 10.

24 See *R v Brown* [1994] 1 AC 212, in which the House of Lords ruled that adults may not consent to assault in sexual activity.

an aspect of private life, that very non-regulation has meaning. As O'Donovan states:

> Not legislating contains a value judgment just as legislating does. Law cannot be neutral; non-intervention is as potent an ideology as regulation.[25]

As will be seen later, the ascription to women of a subordinate status to that of her husband, and her traditional familial (private) role, lends itself to a non-recognition of conditions of inequality and violence within the home. Law's blindness to the 'private' – conscious or unconscious – for too long left women in a position whereby they were unprotected from rape by their husbands; unprotected also from violence within the home,[26] and having unequal economic bargaining power, at the mercy of their economically active husband's financial generosity or otherwise, thus perpetuating notions of inequality and lack of worth. It is for reasons such as these that the statement that 'the personal is political' has become a central feminist perception.

Women's unpaid domestic labour in relation to child-bearing, caring and nurturing, represents the private unrecognised economy of most women's lives, and often determines the extent to which women can enter the marketplace of paid employment, and the terms on which they do so.[27] That this contribution is largely ignored by the State[28] ensures women's continuing dual role and unequal participation in the private sphere, while at the same time facilitating male participation through freeing the man from domestic responsibility. Women's child-bearing, caring and domestic role plays a central analysis in feminist theory, whether approached from a liberal, cultural or Marxist-socialist perspective.

Liberal feminism's quest for women's entry into the public sphere on the basis of equality with men is also not as unproblematic as it might at first sight appear, as O'Donovan's analysis reveals. First, there remains the problem of legal paternalism: the attitude of the State towards women's 'nature' and women's appropriate 'role'. Secondly, there remains the difficulty of securing substantive as opposed to formal equality in the marketplace. While these problems are recurrent themes throughout this book, brief illustrations at this point are necessary to elucidate the difficulties in the 'public/private' dichotomy.

In relation to 'women's nature and role', the traditional image of woman as mother and woman as carer comes to the fore. Historically, as discussed below, this reveals itself in the many legal disabilities from which women suffered. Conceptually and linguistically, the binary oppositions of

25 *Op cit*, O'Donovan, fn 6, p 184.

26 See, further, Chapter 11.

27 On disparities in employment, see, further, Chapter 2.

28 Contributions to the family are recognised under English law relating to financial provision on divorce: see the Matrimonial Causes Act 1973, s 25(2).

male/female, culture/nature, public/private and so on, are applied to the perceptions of woman as inferior, irrational, subordinate. From ancient Greece through to current times, these images are renewed and reaffirmed by the law and legal system. In earlier times, the concept of 'one flesh' on marriage, with the woman 'under the protection' of her husband and accordingly unable to own and manage her own property represented a clear expression of law's paternalism. Katherine O'Donovan discusses, in this regard, the English protective employment legislation which regulated the hours of female factory workers[29] and prohibited the employment of women in mining.[30] Ostensibly 'protective', the legislation had the effect of removing from women free choice and full autonomy of decision making in relation to employment. The seminal United States case of *Sears v Equal Employment Opportunities Commission*[31] reveals most starkly the dangers of law considering women's 'special nature'. In *Sears v EEOC,* the Equal Employment Opportunities Commission (EEOC) argued that Sears Roebuck & Co were discriminating against women. Two women employment experts submitted evidence. One of these supported the EEOC, while the other supported the company. At the heart of the matter lay women's suitability to succeed in the competitive world of insurance sales. The outcome of the case, which turned on an analysis of women's 'nature and role', was that the company had not discriminated against women: as Catharine MacKinnon expresses it, 'the argument on women's differences won, and women lost'. It is precisely because 'women's nature' can be manipulated in this manner, to argue both for and against equality, that cultural feminism which valorises women's special characteristics[32] is regarded with so much suspicion by other feminist scholars.

With regard to formal as opposed to substantive equality in the public sphere, O'Donovan analyses the shortcomings of law's attempts to provide equal opportunities for women, and questions the efficacy of sex discrimination legislation as currently formulated and applied. While the concept of equality has formally been ascribed to by the State,[33] the manner in which that ascription has been incorporated into law is fraught with

29 Factories Act 1961.

30 Mines Regulation Act 1842; Ten Hours Act 1844. The struggle for women to be admitted to the armed forces on the basis of full equality with men, and free from sexual harassment in that employment, remains a contemporary illustration of this discriminatory phenomenon.

31 628 F Supp 1264 (ND Ill, 1986), affirmed 839 F 2d 302 (7th Cir 1988). On this case see MacKinnon, C, *Toward a Feminist Theory of State,* 1989, Cambridge, Mass: Harvard UP, p 223, and references cited therein.

32 See Chapter 8.

33 See the English Equal Pay Act 1970 and Sex Discrimination Act 1975 and Equal Pay Directives of the European Communities issued under the Treaty of Rome, Art 119, which stipulates the requirements of equal pay.

difficulties.[34] Discrimination on the basis of sex is prohibited in the public sphere, and that discrimination may be either direct or indirect. For a complaint to be adjudicated it is necessary for the victim of discrimination to begin and pursue an action in law. This individualisation of the pursuit of formal equality thus leaves untouched the structured nature of gender-based discrimination within the public sphere as a whole. The creation of individualistic remedies while of some utility, does not create wide-scale structural and attitudinal change. Furthermore, as O'Donovan argues, liberalism is 'committed to creating similarities between women and men where possible and to minimising the differences between them'. The effect of this strategy is to 'lead[s] to assimilation of women to men in the public world and to a denial of needs and responsibilities arising from the private'.[35] Thus, women – in order to achieve formal equality – must enter the marketplace *as if* they are men: man is the standard for woman to achieve; man is the referent against which her inequality is to be judged. This position ignores both women's differing physique and physiology, and women's dual role as worker in the public and private spheres. To demand that women demonstrate that their abilities and capabilities are identical to men's is to privilege men over women; to make man the superior standard which must be reached before entry into the public sphere can be justified, without any consideration of the reality of most women's lives.

However, while feminists have successfully unravelled the paradoxes and illusions about the liberal State's insistence on a sphere of privacy into which law will not and should not intrude, and highlighted the dangers of this supposed neutrality of the State from a woman's perspective, it does not necessarily follow that there should be a total abandonment of the notion of some sphere of privacy in private life. What is required is not a police State in which every vulnerable person is protected, but rather appropriate remedies for those who suffer in the private sphere, together with the aspiration to and achievement of conditions of real gender equality in which the manifestations of patriarchal power would be absent. Changes to the status quo of women's equality therefore need to be undertaken not purely by law, which has limited efficacy, but primarily through cultural and political change. Feminist analysis and action has achieved much in relation to women's equality, and remains the foremost vehicle through which future changes may be achieved.

Such a conclusion, however, does not end the debate about the appropriate role of law within the private sphere. In Katherine O'Donovan's analysis, the absence of rights during the subsistence of marriage in English law,[36] represents a lost opportunity. Civil family codes, in specifying rights

34 See *op cit*, O'Donovan, fn 6, Chapters 3 and 7.

35 *Op cit*, O'Donovan, fn 6, p 174.

36 Under English law, rights are established on the granting of a decree of nullity or divorce under the Matrimonial Causes Act 1973 (from 1999, the Family Law Act 1996) and not during marriage.

and duties within marriage, as opposed to on divorce, can, in laying down general principles, 'influence attitudes and behaviour. By expressing in its content general community beliefs concerning interpersonal justice it exhorts spouses to behave with justice towards one another'.[37] Katherine O'Donovan recognises, however, that there are difficulties with such an approach. Not only is there the liberal objection to regulating the 'private' sphere of life, and the problems inherent in effective enforcement of such law, but such extended regulation would also require an acceptance of the liberal State and its law as just. As O'Donovan asks, '... what is the nature of the State in feminist theory? Is it protector or oppressor?'.[38] At source, the issue of increased regulation or deregulation of private family life, lies in the liberal distinction between the private and the public. Unsettle the certainties of this false dichotomy, and the rational basis for law's intervention or non-intervention is undermined.

The question of the nature of the State is directly addressed by radical feminist Catharine MacKinnon. From a radical feminist perspective,[39] there exist further difficulties with the liberal State. Liberalism continues to suggest that equality for women is attainable, if only the obstacles to full participation in public life are removed. Equality for women, from a liberal perspective, is 'just around the corner'. However, what liberalism consciously or unconsciously conceals is the concept of *power* in society. If Catharine MacKinnon's analysis is considered in relation to the supposed public/private dichotomy, the idea of power and power relations can be more readily understood. In brief, it is MacKinnon's thesis that the liberal State is profoundly male and exclusionary of women. In MacKinnon's analysis, liberalism masks the reality of gender relations, which are political relations demarcated by power and powerlessness. An analysis of the State is a prerequisite for understanding the relative powerlessness of women. As MacKinnon asks, '[W]hat, in gender terms, are the State's norms of accountability, sources of power, real constituency?'. Further, '[I]s the State to some degree autonomous of the interests of men or an integral expression of them?'.[40] In the absence of a feminist understanding of the gendered nature and character of State power, MacKinnon argues that women can only accept and use State power (in the form of law) in order to improve women's formal position while at the same time leaving 'unchecked power in society to men'. Rationality, that central tenet of liberal philosophy, legitimates the State by implying that the State is objective; that the State merely reflects the 'way things are'. Thus law, for MacKinnon, with its objectivity and rationality, is a means whereby the status quo of male power and female powerlessness is

37 *Op cit*, O'Donovan, fn 6, p 182.
38 *Op cit*, O'Donovan, fn 6, p 184.
39 On which see Chapter 8.
40 *Op cit*, MacKinnon, fn 31, p 161.

reinforced, whilst at the same time maintaining the myth of its own neutrality and gender-blindness. Only when gender is understood to be a 'means of social stratification', rather than an ostensibly neutral, rational arbiter between equal conflicting interests, will the position of women be understood and improved. The law of sex discrimination, in MacKinnon's analysis, masks the reality of power. Whether the 'sameness' approach is adopted in law: that is to say that a woman qualifies for a particular position because she can demonstrate the same capabilities as a man, or whether the 'difference' approach: that which treats women as different from and deserving of different treatment from men, is adopted, the standard referent remains that of man. As MacKinnon writes:

> The philosophy underlying the sameness/difference approach applies liberalism to women. Sex is a natural difference, a division, a distinction, beneath which lies a stratum of human commonality, sameness. The moral thrust of the sameness branch of the doctrine conforms normative rules to empirical reality by granting women access to what men have: to the extent women are no different from men, women deserve what men have. The difference branch, which is generally regarded as patronising and unprincipled but necessary to avoid absurdity, exists to value or compensate women for what they are or have become distinctively as women – by which is meant, unlike men; or to leave women as 'different' as equality law finds them.[41]

For MacKinnon, only by understanding women's 'sameness' or 'difference' from men in terms of power and powerlessness, dominance and subordination, can the sterile debate about gender relevance be escaped from, and a cogent explanation provided as to power disparity. From this perspective sex discrimination law, in its reliance on the male referent elevates the male to a superior position. But, MacKinnon argues:

> [W]hat sex equality law fails to notice is that men's differences from women are equal to women's differences from men. Yet the sexes are not equally situated in society with respect to their relative differences. Hierarchy of power produces real as well as fantasised differences, differences that are also inequalities. The differences are equal. The inequalities, rather obviously, are not.[42]

Paradoxically, therefore, sex discrimination law, in refusing to recognise the cultural and social inequalities between men and women, fails to recognise that it is always *women* who are unequal to *men:* and never the reverse. Liberalism's claim to rationality and neutrality is thus unmasked as reflecting not gender-equality, but gender inequality.

Superficially, liberalism appears benevolent, egalitarian and protective of the rights and freedoms of citizens. Scratch beneath the veneer of liberalism's

41 *Op cit*, MacKinnon, fn 31, p 220.

42 *Op cit*, MacKinnon, fn 31, pp 224–25.

political ideology, from a feminist perspective, however, and unmasked are a number of fundamental difficulties and deficiencies. In short, liberalism ignores the realities of individual characteristics and ignores gender differences. Thus the subject of law, under classical liberal thought, while ostensibly gender-neutral, is male, and if women are to be subjects under the law, women must 'become male' – adopt the male standard. In social and legal relations, individuals are also affected by race, class, gender-orientation and age. Individuals are not raceless, classless, genderless or ageless. To portray as the subject of law a stereotypical anonymous, genderless, etc individual is to mislead. Beneath liberalisms' high sounding tenets and aspirations there have lurked a range of discriminatory practices and laws which it has been the task of feminists to redress.

In Robin West's[43] analysis, liberal feminism fails to attend adequately to the gendered nature of the legal system.[44] Too often the injuries women suffer are simply ignored, unrecognised or trivialised by the legal system which, focusing on autonomy and rationality, fails to take account of the reality of women's lives, and especially their reproductive role. Further, the stress on individuality and autonomy, in West's analysis, ignores the extent to which women value intimacy and connection with others, rather than individualism and isolation. Working within the sphere of cultural feminism, West calls for the recognition of woman's difference rooted in women's biological role, and the difference that difference makes. Robin West's theory, however, suffers from the criticism that the author is identifying woman's nature with her biology, and thereby perpetuating the very stereotypes which feminism seeks to deconstruct. In Robin West's analysis, feminist jurisprudence must 'bring about' the recognition by the legal system of the variety of harms suffered by 'all forms of being'.[45]

On the other hand, for radical feminist, Catharine MacKinnon, the issue in question is not woman's difference from man, or woman's sameness as man, but rather unravelling the question of power over and domination of women by men. Society, and law, is male: '[T]he State is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society.'[46] Marxist-socialist feminism, alternatively, focuses less on gender *per se* than on the manner in which the class structure configures the social situation of both men and women.

---

43 Professor of Law, University of Maryland.

44 See West, R, 'The difference in women's hedonic lives: a phenomenological critique of feminist legal theory' (1987) 3 Wisconsin Women's LJ; 'Jurisprudence and gender' (1988) 55 Chicago UL Rev 1; *Narrative, Authority and Law,* 1993, Michigan: Michigan UP.

45 Robin West also calls for masculine jurisprudence to become 'humanist jurisprudence'. See *ibid*, West, p 72. (See *Sourcebook*, pp 227–43.)

46 *Op cit*, MacKinnon, fn 31, p 163.

## MARXIST-SOCIALIST FEMINISM

Notwithstanding the failure and demise of Marxist politics, Marxism – in its many guises – remains as a powerful intellectual challenge to liberal philosophy. Marxism[47] has long been a site of special research interest for feminist scholars. The thought of Karl Marx[48] and Friedrich Engels[49] concerning the structure and evolution of society and the fundamental importance of the economic base – historical materialism – as the determinant of social relations and class structures in society, and the ideological function of law in supporting the economic base, represented a startling philosophical challenge to all political and legal thinkers. For jurists trained in classical Western political thought, Marx offered a powerful critique, for an essential feature of all Marxist thought is that law – far from being the central feature of society – is but a reflection of, and supporter of, the economic base, the infrastructure. Law is thus part of the 'superstructure': a part of those features of society – religion, politics and philosophy, which are secondary – in terms of the unfolding of society – to the economic base. As a result Marxists are not primarily interested in law, but rather in demonstrating the unfolding of society in a manner analogous to Hegel's dialectical, and natural, process. For Marx, the dialectical process is that of the material – or economic – base. Society evolves through differing stages, essentially from feudalism, to capitalism, to socialism and finally to communism. Only in the final stage of communism will the individual attain both equality and freedom.

The citizen's place in society is determined by the relations of production. In the capitalist phase, the owners of the means of production compel men by necessity to enter unequal contracts of employment where terms and conditions of work are set by the owner, and wherein the worker receives less than the full market value of his labour. It is thus private property and its ownership which subordinates the workers.

Marxism challenges the neutrality of law, and its self-proclaimed rational objectivity. From a Marxist perspective, the role of law is not to provide a minimal framework of law within which individual subjects of law are free to pursue their own goals. Nor is law primarily a source of protection for the individual against the power of the State. Rather law plays an ideological and political role which is far removed from neutrality and objectivity. From the Marxist perspective, liberalism's preoccupation with law, and with the rule of law, represents a fetishism which requires deconstruction, and a reconceptualisation of the role of law as an instrument of power for the

47 See Collins, H, *Marxism and Law*, 1982, Oxford: Clarendon (see *Sourcebook*, pp 329–31); Hunt, A, *The Sociological Movement in Law*, 1978, London: Macmillan.

48 1818–83.

49 1820–95.