A PATRIARCHAL PORTRAYAL OF WOMEN'S LATE ENTRANCE TO THE BAR AND THE IMPLICATIONS OF THEIR TREASON AGAINST THE ORDER OF NATURE: A JUDICIAL ANALYSES

ABSTRACT

During the Roman Empire, two women Carfinia and Calphurnia, offended the sensibilities of the Courts. Carfinia vexed a praetor with her pleading and Calphurnia, pleading before the Senate, lost her case and in an act of extreme contempt of Court, turned her back to the judges, lifted her robes and displayed her derriere. As a result of the actions of Carfinia and Calphurnia, women were excluded entirely from rendering any Court or public service on account of their temperament. Being decommissioned for centuries from the legal profession, women encountered a heavy backlog and their entry, after much fighting, was not received as a welcome invitation by their male counterparts. Law, therefore, was seen to be a male prerogative and the common rationale had been that women should never been admitted to the bar. And, over and above this contention of the legal fraternity, patriarchal sentiments portray that the constitution of the family organisation and divine ordinance dictates that the domestic sphere is that which properly belongs to the domain and functions of womanhood. The destiny of women is to fulfil the noble and benign offices of wife and mother. This is the law of the Creator and the argument that women who want to practice as lawyers, by so doing, committed treason against the order of nature.

INTRODUCTION

Law is one of the oldest and most conservative of the professions and its members were exclusively male. The profession has given little consideration to the difficulties encountered by the first woman seeking entry or to the prejudice and discrimination other women lawyers have had to face. Males have always appeared to regard themselves as superior to woman.[1]

This superiority of males is stressed under common law whereby a woman's status merged, on marriage, with that of her husband which became the dominant one. As a result, a woman had little control over her own property and she was not considered to be the legal guardian of her own children. In this study it is evident that the American, English, and South African Courts had interpreted the common law to mean that a woman was not entitled to hold any public office. Women's activities were confined to those associated with the home and a married woman was at law incapable of exercising any public function.[2]

This research will show that for women to depart from these common law expectations took courage and determination. The barriers women have to face and their struggle are encapsulated in this paper.

[1] O'Brien, J. 1986. A History of Women in the Legal Profession in New South Wales. Department of History. University of Sydney, p. 1.
[2] O'Brien (1986) 7.

1. BIBLICAL REFERENCES AS TO THE CONFINEMENT OF WOMEN TO THE HOUSEHOLD IN REFERENCE TO THE ORDER OF NATURE

It is a truism that men or husbands are to be responsible for house maintenance, while women or wives are responsible for the care of children. This ought to be the order of nature in a Biblical sense. The idea of the order of nature is divulged in Proverbs 31 in which it is stressed that the household pertains to the woman and the same source of reference even calls the household "hers" four times. In this Biblical reference the household tasks of a woman is laid out: she does everything in her power to care for her family; she works hard to keep her house and her family in order. A woman's motivation, however, is important in that her business activities must be a means to an end and not an end in themselves. She is to provide for her family, not to furthering her career. The study alluded that employment is to be secondary to a woman's true calling – the stewardship of her husband, children and home. Therefore a woman's responsibility as a wife and mother should come before any desire or need to have a job.[3]

According to Genesis 2: 18 a woman was created to be a helper to man. She should, therefore, consider her responsibility, with respect to their children, as that of helper. In other words, while the husband is at work, she should be dealing with the children in such a way that she is helping him with his job or teaching and training the children.[4]

But, in contradistinction to the above mentioned Biblical verses, there are also references to women who held jobs outside their homes. It seems that we dealt here with a dichotomy. And that the perception that women militate against the order of nature will not hold water. In adumbration of the job description of women in antiquity (Biblical times) it is revealed that Deborah worked as a Judge in Israel.[5] Anna worked at the Temple.[6] Tabitha worked in her community sewing clothes for the needy.[7] Phoebe worked as a deaconess.[8] And an unnamed woman in Abel was an effective negotiator speaking with Joab about exposing a traitor who was hiding out in her city.[9] Based on these latter passages it would be hard to argue that it is wrong for a woman to work outside the home.

The paper, however, hinges upon a Christian ethos by stressing the notion that it is important that a mother understand her Biblical responsibility before she makes a decision to go to work. She needs to consider her children first.

[3] May, Rebecca S. A Biblical Perspective on Women and Work. Relational Concepts Inc. Distributed by www.relationalconcepts.org
[4] May, Rebecca S. A Biblical Perspective on Women and Work. Relational Concepts Inc. Distributed by www.relationalconcepts.org
[5] Holy Bible, The New International Version. The Bible Societies. Great Britain. Judges 4-5.
[6] Holy Bible, Luke 2: 36-38.
[7] Holy Bible, Acts 9: 36, 39.
[8] Holy Bible, Roman 16: 1-2.
[9] Holy Bible, 2 Samuel 20: 16-22.

2. HISTORICAL EVOLUTION OF THE RIGHTS OF WOMEN IN:

GREECE

In Greece and under Athenian law women were regarded as inferior and were confined to the domestic sphere. Women had no legal personhood, and were under the guardianship of a male *kyrios* (Greek master): the father being the first *kyri* from birth, then under their husbands, as well as their brothers and sons. Legal proceedings would be conducted by her *kyrios* on her behalf.[10]

It is believed that anyone could become a poet, scholar, politician and even an artist, except if you were a woman. According to Aristotle women would bring disorder and as a result they must be kept separate from the rest of the society. This separation would be best achieved if women were to be relegated to the household domain so that they would have little exposure to the masculine world. If women were to be educated it must be done in a limited fashion such as the attainment for basic skills such as spinning, weaving and cooking and an elementary knowledge of money.[11]

Greek women were excluded from military and political life, and as a result, rather busied themselves with the responsibility of running estates of their husbands or male relatives who were away with the army. Women had not much bearing on economic activities, their role is somewhat confined to mediocrity wherein their task was mainly about the safeguarding of the household property created by men.[12]

ROME

Women received the same treatment in Rome as was the position in Greece. Law was regarded as a male construct, created by men for men. This sentiment had even spilled over to other social and political realms of society which dictated that women could not vote, hold public office or served in the military.

The *paterfamilias* (in Greece it was termed the *kyrios*) was crucial to the Roman society, and the former held sway over his wife, children and servants. Tantamount to the position of Greek women (the matter of *kyrios*), Roman women's activities were limited by guardians, called tutors. Over time tutelage became more relaxed and as a result women were accepted to participate in some public roles such as owning or managing property and acting as municipal patrons for gladiator games and other entertainment activities.[13] By 27-14 BCE women were granted freedom from tutelage if she gave birth to 3 or more children.[14]

[10] Blundell, Sue. 1995. Women in Ancient Greece. Volume 1995, Part 2. Harvard University Press, p. 114. ISBN 978-0-674-95473-1. In Wikipedia. The Free Encyclopedia. Women's Rights. https:/en.wikipedia.org/wiki/Women%27s_rights, Accessed 23/05/2016 (3/37).

[11] Pry, Kay O. 2012. "Social and Political Roles of Women in Athens and Sparta." Sabre and Scroll, vol. 1, Issue 2.

[12] Gerhard, Ute. 2001. Debating Women's Equality: Toward a Feminist Theory of Law from a European Perspective. Rutgers University Press, pp. 32-35. ISBN 978-0-8135-2905-9.

[13] Smith, Bonnie G. 2008. The Oxford Encyclopedia of Women in World History: 4 Volume Se. London, UK: Oxford University Press, Oxford, pp. 422-245. ISBN 978-0-19-514890-9. In Wikipedia: The Free Encyclopedia.

In respect of other realms of the law, like inheritance, women did not enjoy legal capacity to make wills.[15]

Both daughters and sons were subject to *patria potestas*, the power wielded by their father as head of the household (*paterfamilias*).[16]

During the early Roman Republic, a bride passed from her father's control into that of her husband (*manus*), where she was subjected to her husband's *potestas.*[17]

Roman women have no *locus standi* to plead cases in court. They must, therefore, be represented by a male person.[18]

It had been alleged that the moral legislation of the Emperor, Augustus, which set out to regulate the conduct of women, that the crime of adultery (in that period) had a double standard ring to it seeing from the terminology. Adultery was an illicit sex act (*stuprum*) that occurred between a male citizen and a married woman, or between a married woman and any man other than her husband. It implies that a married woman could have sex only with her husband, but a married man did not commit adultery when he had sex with a prostitute.[19]

Roman law became synonym for civil law because of its originating feature in Europe. The core principles of civil law were that it derived from the Code of Justinian. In certain cases civil law seemed to be complemented by common law. In fact, no any legal jurisdiction follows a pure legal tradition. The civil legal tradition is sometimes interfused by a common law one. Although there are more than these two legal traditions, especially in the East and Far East (where other legal traditions also exist), this paper confines itself to two major legal traditions, namely the civil and the common law jurisdictions.

Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.

[14] Smith (2008) 422-425.

[15] Smith (2008) 423.

[16] Frier, Bruce W. & McGinn, Thomas A.J. 2004. A Casebook on Roman Family Law. Oxford University Press, Oxford, p. 31-32. In Wikipedia: The Free Encyclopedia. Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.

[17] Frier & McGinn (2004) 20.

[18] Bauman, Richard A. 1992, 1994. Women and Politics in Ancient Rome. Routledge, p. 50. In Wikipedia: The Free Encyclopedia. Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.

[19] McGinn, Thomas. 1991. "Concubinage and the Lex Iulia on Adultery," Transactions of the American Philological Association 121 (1991), p. 342. In Wikipedia: The Free Encyclopedia. Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.
Edwards, Catherine. 2002. The Politics of Immorality in Ancient Rome. Cambridge University Press, Cambridge, pp. 34-35. In Wikipedia: The Free Encyclopedia. Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.

3. THE LEGAL IMPLICATIONS OF CIVIL LAW AND COMMON LAW TRADITIONS ON WOMEN'S RIGHTS

Under English common law of the 12th century, property which a wife held at the time of marriage became the possession of her husband. The husband retained the right to manage the property and to receive the money which is yielded by the property. This notion connotes that females were subjected to the common law tradition of coverture. It is alleged by English common law that under coverture, the husband and wife were regarded as one person and that that one person was the husband in the eyes of the (common) law. As a result, and with regards to the wife's personal and property rights, her legal existence was suspended during marriage and has automatically merged into that of her husband. In other words, the husband was entitled to all of the wife's personal property and in turn became liable for all torts committed by the wife.[20] This common law legal construction emphasised for female obedience towards their husband and alluded to the perception that women were untrustworthy and weak.[21]

The subsequent abolition of coverture was started in 1707 in the Electoral Palatinate. It was however briefly re-instated by Karl III Philipp. After the protestation of Dorothea von Velen coverture was again abolished.[22]

At common law, the erstwhile coverture principle or law is today couched under a new marriage relationship termed as "consortium." Consortium connotes to the rights of marital companionship such as material services, felicity, comfort, aid, company, sexual intercourse and co-operation. Consortium is still recognises under common law (and even civil law), and consortium is a common ground upon which damages are recovered in a civil action by a non-injured spouse when the other spouse is a victim of personal injury. Thus, the husband could recover damages for loss of consortium from the rapist in a civil damage action.[23] The wife or woman under this common law enactment is still regarded as legal incapacitated.

The negative effect incurred under common law against women was, however, perpetuated under the civil tradition. In civil law jurisdictions of Europe, especially France, husbands controlled most of their wives' personal property until the *Married Women's Property Act* 1870 and the *Married Women's Property Act* 1882. During this period, children were regarded as the husband's property and rape was legally impossible within marriage. The civil law tradition dictated that wives were also perceived to lack legal personhood, since the husband was taken as the representative of the family.

[20] Women and the Law. In http://www.umich.edu/-ece/student_projects/bonifield/rape2.html. Accessed 23/5/2016.
[21] Ward, Jennifer. 2006. Women in England in the Middle Ages. New York: A & C Black, pp. 3-4. ISBN 1852853468. In Wikipedia: The Free Encyclopedia. Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.
[22] Langdon-Davies, John. 1962. Carlos: The Bewitched. Jonathan Cape, pp. 167-170. In Wikipedia: The Free Encyclopedia. Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.
[23] Women and the Law. In http://www.umich.edu/-ece/student_projects/bonifield/rape2.html. Accessed 23/5/2016.

This unfair treatment of women by the laws actuated Thomas Paine who asserted that women were robbed of freedom of will by both the civil and the common law.[24]

The remonstrance by Thomas Paine and other concerned legal scholars against the oppressive nature of these laws evoked a language of rights in relation to women in the 1890's. Inspired by the ideas and thoughts of Paine, John Stuart Mill argued that women deserve the right to vote and he, therefore, proposed that the term "man" be replaced with a more neutral terminology like "person." His proposal, at that stage, won little support amongst contemporaries and was met with ridicule. It was subsequently divulged that Mill's bold stand reaps the fruits when the issue of suffrage to women attracted attention. Suffrage became the primary cause of women's movement at the beginning of the 20th century.[25] And today, women's suffrage is considered a right under the international legal instrument, the Convention on the Elimination of All Forms of Discrimination Against Women.[26]

The arguments and championing for the cause of women by Paine and Mill were the impetus women were waiting for. With these sentiments – women rampart against the walls of the common and civil law traditions, which aimed at their exclusion from the profession and their subsequent legal incapacity. Women hope, like in the case of Paine and Mill, that their efforts might reap fruit. But the law which is a male construct bolstered by patriarchal undertones would not lost its grip over its power structure so easily. Law saw women's attempt as a revolt against the order of nature that needs to be stop at all cost.

The legal fraternity therefore constructed barriers to keep women out of the legal realm.

4. DISCCUSSION

5.1 THE BARRIERS AGAINST WOMEN AND THEIR STRUGGLE TO POSITION THEMSELVES IN THE LEGAL FRATERNITY

5.1.1 Social rationale for barring women

Ever since antiquity, law was seen to be a male prerogative. Although Rousseau's Social Contract theory of the late eighteenth century and the French Revolution had introduced the idea of a modern civic society, its blessings, however, were restricted to the male sex. Women were denied civic rights (see paragraphs 3 and 4 of the text) before and during the late eighteenth century and were legally subordinate to their fathers and husbands. They were only allowed to choose legal careers in the late nineteenth century. In Western countries, just before or just after World War I, women were granted suffrage and full civic rights (as for the efforts of Paine and Mill). World War II and its aftermath brought and contrived a drive towards the full integration for women into society

[24] Jehlen, Myra & Warner, Michael. 2013. The English Literatures of America: 1500-1800. Routledge. ISBN 9781317795407. In Wikipedia: The Free Encyclopedia. Legal Rights of Women in History. https://en.wikipedia.org/wiki/Legal_rights_of-women_in_history. Accessed 23/05/2016.
[25] Philips, Melanie. 2004. The Ascent of Woman: A History of the Suffragette Movement. Abacus.
[26] "Women's Suffrage." Scholastic. Retrieved 8 October 2015.

and certain professions.[27] Backed up by egalitarian views and sentiments, women challenged now the contention that maleness was equated with "persons" in the legal sense, and wanted isonomy. Special legislation was needed in many countries to open the doors for women to the legal profession.

But, granting women access to the legal professions was delayed in all countries. For example, in Venezuela the first woman was awarded a law degree in 1936 and in South Korea it took until 1952 for the first women to be admitted to the advocacy. While gaining initial access to the legal professions was one thing, achieving equal participation for women within them proved to be quite another. Women academics, for example, suffered isolation, marginalisation and underrating of their achievements.

The social rationale of the legal fraternity to bar women from the legal profession had been that women had never been admitted to the bar. Women's participation in the public sphere during the 12th century was confined to suffrage. The rationale of the legal fraternity was sufficient reason for Courts, as adumbrated in this study, to refuse to admit women to the bar. The other factor that could be added to the barring of women was that they were also not able to hold office during this period under common law.[28] It was proposed by the legal profession that the inability for women to hold office was that their mental and physical nature rendered them unfit for legal practice. It was further contended by a stereotypical thought that women did not possess a "legal mind." Women were thought to be emotional rather than rational and logical. It was also noted that women did not have the natural proclivities to perform the duties required by the legal profession. Weisberg interpreted the assertions of a woman lawyer by saying that women have been told that a successful lawyer must have a logical mind, and since the mind of woman is sadly lacking in this respect, her unfitness for the legal profession is obvious. According to Weisberg women possessed a delicate constitution which could not withstand the conflicts of the courtroom. She made reference to women's mental and physical nature in a story portrayed by Charles C. Moore. The anecdote by Moore featured Miss Padelford who has loses her first case in court. It is alleged that Miss Padelford bursts into tears in the courtroom. In another courtroom incident she fainted and fell from her chair.[29]

In the light of these anecdotes it would seem that women's physical disabilities rendered them unfit for the practice of law. By adding insult to injury, it must be noted that women's peculiar physiological condition (menstruation) would also inhibit women's practice of law. On the issue of menstruation, an unknown woman noted how a female lawyer would not be able to consult with her clients, when she was attacked by the nausea of the first few months of pregnancy. The unknown woman also stated further that what a figure a female lawyer would make in court, when, the months of her interesting situation being advanced, her curved lines become crushed with an anterior round line. If the pains should come upon her in the heat of argument! Would she invite her

[27] Schultz, Ulrike and Shaw, Gisela. 2003. Women in the World's Legal Professions. Onati International Series in Law and Society. A Series published for the Onati Institute for the Sociology of Law. Hart Publishing, Oxford, Portland Oregon p, xxxiii.
[28] Weisberg, D. Kelly. Barred from the Bar: Women and Legal Education in the United States 1870-1890. 28 J. Legal Educ. 485 (1977), p. 488. Available at: http://repository.uchastings.edu/faculty_scholarship/782.
[29] Weisberg, 28 J. Legal Educ. 490.
http://repository.uchastings.edu/faculty_scholarship/782.

colleagues to serve her as midwives? Weisberg linked up with the sentiments of the unknown woman and concluded this childbirth courtroom drama, by saying, "I assure you that I laugh to myself thinking of the ridiculous figure that a woman lawyer would make".[30]

Another argument furnished against women entering the legal profession concerned the fear that the interests of justice would suffer. It has been averred that the female sex is garrulous and wanting in discretion. Because of this assertion, the interests of clients are less likely to be entrusted into women's hands.[31] It was thought that judgment would no longer be impartial if women lawyers were present in the courtroom. This notion can be demonstrated in the following rendition whereby a woman lawyer asked her client why he came to her for legal assistance. This client, who had been tried and convicted of a crime and awarded a new trial by an Appellate Court, replied: "Well, ma'am, I reckon I've had justice. What I need now is mercy, and I figure them jurors will feel mighty sorry for me if all I have is a woman to defend me."[32]

The social rationale for barring women can also be forged beyond the legal profession to the family realm. The constitution of the family organisation, which is found in divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The destiny of woman is to fulfil the noble and benign offices of wife and mother. This is the law of the Creator and the argument that women who want to practice as lawyers and other public officers, by so doing committed treason against the order of nature. Justice Ryan maintained in the *Goodell* case that the law of nature tailored the female sex for the bearing and nurture of children and for the custody of the homes.[33] An engagement of the legal profession by women would conflict with such rationale echoed by *Goodell* case law and divine ordinance. It is ruled by *Goodell* case law that the socially approved role for woman as wife and mother had duties associated with it which were expected to be woman's first and primary obligation, and such duties supersede any other claim. For the (male) lawyer, obviously, his occupation was intended to be his first priority. For woman, only her husband and children were supposed to exact the devotion of her life. The requisite personality attributes of a lawyer, moreover, were seen as incompatible with those necessary for the role of wife and mother. A lawyer is supposed to be aggressive. Woman is seen as nurturant, gentle and tender. These personality attributes required are apt for the fulfilment of the role of wife and mother by women.[34] The Court in the *Goodell* case decided that there are many employments in life not unfit for the female character, but the profession of law is not one of these.[35]

[30] Weisberg, 28 J. Legal Educ. 491.
http://repository.uchastings.edu/faculty_scholarship/782.
[31] Weisberg, 28 J. Legal Educ. 491-2.
http://repository.uchastings.edu/faculty_scholarship/782.
[32] Weisberg, 28 J. Legal Educ. 492.
http://repository.uchastings.edu/faculty_scholarship/782.
[33] *In re Goodell*, 39 Wis. 245 (1875).
[34] Weisberg, 28 J. Legal Educ. 492-3.
http://repository.uchastings.edu/faculty_scholarship/782.
[35] Weisberg, 28 J. Legal Educ. 493.
In re Goodell, 244-245.
http://repository.uchastings.edu/faculty_scholarship/782.

5.1.2 Patriarchal tools to frustrate women legal practitioners

Now that female lawyers won the battle against their exclusion from the legal profession they encountered another one to stay and exert themselves in the profession. Such a ride or move, however, is not without speed bumps as women face many challenges, especially discrimination. Discrimination against female lawyers were and are still rife even to this day, and occurred in the conviction that it can be rationally justified by the male dominated legal fraternity.[36]

Female lawyers found that in order for them to be successful, academic capital needs to be complemented by social capital. In order to achieve this academic/social capital phenomenon, women try to set up their own mentoring systems and networks, but their slight representation at the higher echelons makes this a less effective process. Male lawyers enjoy greater network support and male cultural capital. Male applicants, for example, on entering the profession, are often preferred and firms even advertise exclusively for male applicants.[37]

Because of their barred status (of exclusion) from the legal profession, female lawyers tend to be less specialised than their male counterparts. It has been established that female lawyers are more likely to work in particular female-dominated segments of the legal profession such as family law. While male lawyers dominate commercial and property work, women are more likely to be found in areas of little prestige and financial gain, but greater emotional labour. As a result of their penchant towards certain areas of the legal profession, female lawyers were pushed into certain areas of work which are associated with supposed feminine features such as sympathy, intuitiveness and altruism. As a result women do usually prefer certain areas of law work which requires less technology, literature and regular updating through training. Divorce cases, for example, can be dealt with in small firms, and unlike commercial cases, rarely require working overtime or giving up one's week-ends.[38]

Patriarchal sentiments have portrayed that female lawyers are more likely to be encouraged to concentrate on matters of lower visibility, profile and financial rewards. Male lawyers, on the contrary, are more inclined to focus on work which offers greater prestige as well as better opportunities to develop legal skills and client contact and correspondence, which is important to develop a client base. Because of these masculine ambition partnerships are less likely to go to female lawyers than to men, particularly in the face if a continuing increase in the overall number of lawyers, which encourages the introduction of more hierarchical structures. Male lawyers are therefore more likely to make it to partner status, irrespective of any specific achievements (experience, specialisation, billable hours, client structure) thus lending support to the view that partnerships are based on fraternal trust and male bonding. Promotion is also rendered more probable for male lawyers than for women. With regard to their career ambitions, both sexes mentioned family responsibilities, but for male lawyers this represented a further reason to aim for promotion, while female lawyers saw it as a reason for cutting back on their career in order to accommodate their domestic duties.[39]

[36] Schultz & Shaw (2003) xxxviii.
[37] Schultz & Shaw (2003) xli.
[38] Schultz & Shaw (2003) xlii.
[39] Schults & Shaw (2003) xliii.

Patriarchal notions further stress that low incomes are typical of female lawyers working on their own, although this cannot altogether be blamed on a self-chosen limitation of work but is also due to lack of clientele or the type of cases dealt with. Significant income and salary differentials in law firms are only due to differences in specialisation, age, professional experience and the size of the firm, but have to be attributed also to female commitment and productivity being held in lower esteem, for example, discrimination. As a result, starting salaries for female lawyers tend to be lower than those for men. The old argument that women's incomes do not need to support a family still to this day is alluded to by patriarchal proclivities.[40]

From a general perspective, it is axiomatic that in law firms usually dominated by male culture, female lawyers who have risen to full partnerships and higher incomes do not have the same degree of power, independence, decision-making and other authority as their male colleagues. It is surmised that female lawyers lack the appropriate social and cultural capital. This emerges particularly about large firms and their corporate identity and about these firms' chambers, which tend to be organised on the model of fraternities. Female lawyer's social capital is seen to be less valuable, because they have fewer contacts in male networks and participate less readily in male socializing processes such as talking sports, dining and drinking. Demeaning ways of talking about their female colleagues and insulting remarks about errors of these female colleagues are a regular occurrence. Patriarchal tools criticised female lawyers for lacking authority and self-confidence and for putting moral and consensual values above profit.[41]

L

egal professions established by a patriarchal culture have always been characterised by a philosophy of total commitment and a long-hours culture. This means that the domestic scene needs to be left to somebody else. Female lawyers with children tend to lack both time as well as domestic support, as they still take on the bulk of family duties. Women's involvement in domestic chores is three times higher than that of men and their total workload burden is accordingly higher. Men regard their professional commitment as fixed and unchangeable, while considering that of women as perfectly negotiable. Women are expected to prioritise the family and therefore have to make a choice which men are spared. Women with children are suspected of lacking full commitment. And a woman's place is seen to be in the home.[42]

If men leave their jobs, they do so for professional reasons, in particular for purposes of career advancement, while women are often left with no choice because they find it impossible to cope with their dual burden of job and family.

[40] Schultz & Shaw (2003) xliv.
[41] Schultz & Shaw (2003) xliv.
[42] Schultz & Shaw (2003) xlv.

5.2 PRACTICAL JUDICATURE EXPLICATIONS OF WOMEN'S TREASON AGAINST

5.2.1 Women and public office and the semantics around the word "person"

In *Incorporated Law Society v Wookey*, the applicant, Miss Wookey, wanted to do her articles of clerkship with an attorney. The secretary of the Cape Incorporated Law Society, refused to register the articles under Act 27 of 1883, section 4, and accordingly the Registrar of the Supreme Court was unable to accept and register Miss Wookey. Miss Wookey therefore applied to the Provincial Division for an order to compel the Law Society to accept and register her articles of clerkship. The Court finally ruled that Miss Wookey is entitled to enter into articles of clerkship as an attorneys's clerk contingent thereupon that she is duly qualified. A judge of the Provincial Division thereupon made an order compelling the society to register the articles. The order was granted and the matter came before the Court of Appeal from the decision of the judge (of the Provincial Division).

In harking back into history under the Roman Empire, *Digest* 3, 1, 1, which was a postulation of the Praetor's edict, it was divulged by the Court of Appeal that women were prohibited from taking charge of law suits for others. In other words, according to the Court, women should not have taken charge of duties appropriated only to men ("*ne virilibus officiis fungantur*"). To similar effect, *Digest* 50, 17, 2, read as follows: "Women are entirely excluded from rendering civil or public services." ("*feminae ab omnibus officiis civilibus vel publicis remotae sunt*"). This paraphrase hinges upon the notion that women can therefore neither be judges "*judices*," nor exercise a magisterial office, nor bind themselves for another, nor hold the position of "*procurators*." The Court of Appeal alleged that the reason why women were prevented from becoming "*procuratores*" was not because the office was at that time considered a "public" one, but because the duties of procurators were reserved exclusively for men and could not be discharged by females.[43]

In *Code* 2, 13, 18, which dealt with guardianship, it was derived in the *Wookey* case that the undertaking of the defence of another is the exclusive duty of a male ("*virile est officium*") and is outside the function of the female sex. Even with regard to other professions (if I may digress), the *Digest* 2, 13, 12, declares that women ought not to be bankers, because that is work allowed only to men ("*cum ea opera virilise sit*").[44]

The *Digest* (50, 17, 12) of Justinian excluded women from civil and public offices. This civil disability of women under the Roman Empire perpetuated into the Roman-Dutch common law. Rules 149 to 152 of the Rule of Court (of the Roman-Dutch law), which dealt with attorney, used the word "person" and "he" and "she" and "his." These words imply or allude to masculinity. The Court of Appeal adopted these erstwhile legal authorities by barring women from entering the legal fraternity.

5.2.2 Is a woman a "person" under the law?

It is evident from the Roman legal texts, the *Code* and the *Digest*, that the legal incapacity that is associated with women connote to them not being regard as "persons" in the eye of the law. The Roman-Dutch law adopted and perpetuated the implications of these erstwhile or antique legal constructs of Roman law. The Courts of Holland, therefore, like those under Roman law, admitted

[43] Incorporated Law Society v Wookey, p. 563.
[44] Incorporated Law Society v Wookey, p. 564.

only men as legal practitioners.[45] Although the language portrayal of the *Charter of Justice* seems to be gender neutral by employing the term "persons" as those applicants, who on proof of due qualification, were entitled to be enrolled as attorneys, the reality proved different. An attempt was made as to whether to interpret the term "person" to mean male person or any person. The principle of statute interpretation dictates that if a word is capable of one meaning then we should have to give effect to the language used by the Legislature, even if we felt serious doubts as to whether it really intended what it had said. Also, when a word is capable of bearing equally well more than one meaning, we are then bound to enter as far as we can into the mind of the Legislature, and so determine in which sense the word was really used. If I may adumbrated or anticipate the tenor of this discussion: when the Legislature used the word "person" it meant male person, for it was thinking only of men. This impression was buttressed by section 15 of the *Charter of Justice,* which provided for the appointment of a Registrar and a Master of the Court. Sections 18 and 19 of the same statute law empowered the Court to admit any person to practice as barristers, who had previously been admitted to practice as advocates in the Supreme Court. It can be deduced that the terms "person" or ""any person" meant men, as no women had ever been admitted to practice as barrister. Another example can be postulated with regard to the issue of succession of an incumbent of an officer of the Court. In order to fathom or derived the exact meaning of the Legislature, a solution to the problem regarding incumbency of the position of Chief Justice, would have served as determining factor. Section 4 of the *Charter of Justice,* for example, empowers the Governor, in case of the death, resignation, or incapacity of the Chief Justice or any of the puisne Judges to appoint some fit and proper "person or persons" to act in their stead. If we read this statute law within the context, time frame and meaning of the concerned Charter, it would be obvious that the appointment of a woman to be Chief Justice would have been illegal. It is clear that the Legislature under section 4 of the *Charter of Justice* must have meant that only male persons could occupy such office.[46]

From time immemorial, only men had been admitted and enrolled as attorneys of the Court. It matters not whether it is the Courts of England, Holland or of South Africa and Botswana. In neither country was there a single case on record where a woman has been admitted as an attorney during antiquity. If the Legislature had intended to introduce so great a change and to throw open the doors of the profession to women, it would not have done so in clear and unambiguous language, instead of leaving it as an inference to be drawn from the use of the word person, which might or might not include women as well as men.[47]

On the ground of the immemorial practice of centuries, the word "person" must be construed in accordance with that practice, and must, therefore, be taken to mean men only and to exclude women.

The judge decided in the *Wookey* case that if the Legislature had meant women as well as men, in future to be admitted as attorneys and notaries, it would have said so in plain language.

Over and above their disentitlement as a person under the law, women were barred for reason of their sex from practising the profession of attorneys of the Court. The status of the *procureur* in

[45] Incorporated Law Society v Wookey, p. 561.
[46] Incorporated Law Society v Wookey, p. 562.
[47] Incorporated Law Society v Wookey, p. 571.

Holland during the 16th century and onward was considered honourable and filled only by qualified men. The enrolled *procureurs* of Holland were officers of the Court. Their duties being of a public nature could, therefore, not be executed by women. Voet asserted that because of Court practice and tradition, no woman could be entered as procurators. Huber said women are excluded from the office of attorney as they are from all public offices. *Van Leeuwen's Roman-Dutch Law* (1, 6, 1) stated that the whole of womankind by reason of an inborn weakness is less suited for matters requiring knowledge and judgment than men. Women are therefore excluded from holding any office or dignity relating to the government of a people and its affairs.[48]

Although one of the judges interpreted that there were no positive laws disqualifying women from following the profession of attorneys, the Courts of Holland had laid down a rule of practice that men only should be admitted in the roll of attorneys who were entitled to practice in the Courts. The opinion of this dissident judge is that women were disentitled by reason of their sex from practising the profession of attorneys of the Court. The presiding judge in the present case came to the conclusion that on the construction of the statutes that the word person meant men only and did not include women.[49]

5. IMPLICATIONS OF WOMEN'S LATE ENTRY TO THE BAR

6.1 A modern-day judicatory analysis

6.1.1 United States of America jurisdiction

In re Goodell [50] (*supra*) dealt with a state statute governing the admission of a woman to the bar. In February 1876, the Court denied Miss Goodell's petition of admission to the bar. Justice Ryan ruled that the Legislature's use of the masculine pronoun in the statute indicated an intent that it should apply only to men. He averred that by interpreting the statute to include women, would lead to judicial revolution. The judge alleged that women were not suited to practice law, because their peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its delicacy, and its emotional impulses unfit her for the practice of law. Justice Ryan sentiment must have been influenced by reference of Judge O'Regan citation of *Incorporated Law Society v Wookey* at page 641. In this citation it was divulged that two women, Carfinia and Calphurnia offended the sensibilities of the Courts. Carfinia vexed a praetor with her pleading and Calphurnia, pleading before the Senate, lost her case and in an act of extreme contempt of court, turned her back to the judges, lifted her robes and displayed her derriere. Women were therefore excluded entirely from rendering any Court or public service on account of their temperament. It seems as if, by their actions, these two women tainted all other women.[51]

The judge mentioned that the Wisconsin statute refers to a "person" being admitted to the bar in the masculine pronoun throughout. It is thus obvious that the statute strived to exclude women as

[48] Incorporated Law Society v Wookey, p. 565.
[49] Incorporated Law Society v Wookey, p. 569.
[50] 39 Wis. 232 (1875).
[51] Catherine B. Cleary, "Lavinia Goodell, First Woman Lawyer in Wisconsin." Wisconsin Magazine of History (Summer 1991), p. 16.

late-commers from admittance to the bar. As a result Miss Goodell's application for admission to the Supreme Court bar, was unsuccessful. Disgruntled by the decision of the Wisconsin Supreme Court, Miss Goodell demonstrated on appeal that, despite of Judge Ryan contention for the historical non-admittance of women to the bar, it was never the intention of the state law of Wisconsin to exclude women. She maintained further that, although, the statute referred to admission of a "person" and used the male pronoun, the statute (bolstered by another statute) actually provided that male pronouns in state laws should be construed as extending to females as well. Miss Goodell argued that for the purpose of the proper administration of justice it would be feasible to allowed women admission to the practice of law. The reciprocal argument for this contention was, that by their exclusion, a class of people like women, cannot obtain justice in courts where its members are not represented. According to Miss Goodell, the firmness and vigor of men in the profession will be complemented by the peculiar delicacy, refinement and conscientiousness attributed to women. And she held that it is unjust to shut out anyone (or a class of persons) with the ability and interest of a lucrative and honorary profession.[52]

As echoed earlier in this study, Justice Ryan declared that the law of nature destines and qualifies women for the bearing and nurture of children and for the custody of the homes. If a woman engaged in professional callings such as law she would infringed the sacred duties of her sex. This would be a departure from the order of nature and treason against nature.[53]

In case law of *Bradwell v The State*[54], the Supreme Court of Illinois refused to grant (to) a woman a license to practice law on the ground that females are not eligible under the laws of that state to practice law. Mrs Mary Bradwell made an application to the Supreme Court for a licence to practice law. On due examination she had been found to possess the requisite qualifications. But when her application came before the Court, her application for licence to practice law was refused, on the basis that she was a married woman who would neither be bound by her express contracts nor by those implied contracts which is a creation of the attorney/client relationship.[55] Such capacity pertains to males only. It is averred in the *Bradwell* case that under common law a woman had no legal existence separated from that of her husband. A married woman is incapable, without her husband's consent, of making contracts, which shall be binding on her or him. This incapacity was one of the reasons which the Supreme Court deemed important in rendering Mrs Bradwell, a married woman, incompetent to fully perform the duties that belong to the office of an attorney and counsellor.[56] The judge opined that the divine ordinance as well as the nature of things alludes thereto that women belong to the domestic sphere. And he also noted that the idea or philosophy of a family institution is repugnant to the perception of a woman adopting a distinct and independent career from that of her husband.[57]

The admission or not of Mrs Bradwell was left to the discretion of the Court. In rendering its decision, the Court, as a result adhered to two limitations. One was that it should establish such

[52] Catherine B. Cleary, "Lavinia Goodell, First Woman Lawyer in Wisconsin," pp. 16-7.
[53] In re Goodell, 39 Wis 232, 245 (1875).
Maithili Pradhan. "Exclusion of women from the legal profession in the United States of America, the United Kingdom, and South Africa." Women & Justice Fellow, Avon Global Center for Women and Justice, p. 4.
[54] 83 U.S. 130 (1872). https://supreme.justitia.com/cases/federal/us/83/130/case.html. Accessed 2/26/2016.
[55] Bradwell v The State, p. 131. (83 U.S. 1872).
[56] Bradwell v The State, p. 141 (83 U.S. 1872).
[57] Bradwell v The State, p. 141 (83 U.S. 1872).

terms of admission as would promote the proper administration of justice, and the other that it should not admit any persons, or class of persons, not intended by the legislature to be admitted. In view of this latter limitation, and in support of the *Wookey* case, the Court felt compelled to deny the application of females to be admitted as members of the bar. This is a rule of the common law from time immemorial and it could therefore not be supposed that the legislature had intended to adopt any different rule. The Court, therefore, ruled that the paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. It said this is the law of the Creator and the rules of civil society must be adapted to the general constitution of things and cannot be based upon exceptional cases. This notion finds resonance with Justice Bradley who echoed that in the nature of things, it is not every citizen of every age, sex and condition that is qualified for every calling and position.[58]

In *Re Maddox* case law is a petition of Miss Etta H. Maddox for an order directing her to be admitted to practice law if certified to be qualified by the State Board of Law Examiners. Miss Etta H. Maddox has made an application for admission to the bar. In her application she noted that she is a female over twenty-one years of age and a graduate of the law school of Baltimore. She alleged she is entitled to be admitted to the bar upon the ground that the right to practice law is a natural right possessed by everyone alike without regard to sex.[59]

Chief Justice Bartol denied the claim of Miss Maddox and asserted that the privilege of admission to the office of an attorney cannot be said to be a right or immunity belonging to the citizen, but is governed and regulated by the Legislature, who may prescribe the qualifications required and designate the class of persons who may be admitted. The Act of 1892, Chapter 37 provided that any male citizen of Maryland possessing the qualifications mentioned therein, might be admitted to practice law. Section 3 stated that all applicants for admission to the bar shall be referred by the Court of Appeals to the State Board of Law Examiners, who shall examine the applicant. If the Court of Appeal shall find the applicant to be qualified to discharge the duties of an attorney, they shall pass an order admitting him. A perusal of the Act of 1892 showed that there was no design to enlarge the class of persons entitled to admission. The Act connotes to the understanding that not being a male citizen would have ineligibled Miss Maddox. It is evident that the phraseology of the Act of 1898 dealt with the masculine gender only, and it is unlikely that it would have included Miss Maddox. In light of these versions of the Act, it seemed that there is no legislative provision under which Miss Maddox can claim that she is entitled to practice law. If there is no such legislative provision, the Court of Maryland is powerless to admit her. The Court ruled that it cannot enact legislation that it is restricted to an interpretation of that which has been adopted by the General Assembly.[60]

The Court therefore ruled that it has no power to admit Miss Maddox and her request been denied.

[58] Bradwell v The State, p. 142 (83 U.S. 1872).
[59] In Re Maddox, 93 Md. 727. https://casetext.com/case/in-re-maddox-12.
[60] In Re Maddox, 93 Md. 727.

6.1.2 English law jurisdiction

In case law of *Hall v The Incorporated Society of Law-Agents,*[61] Hall wrote to the Board of Examiners of Law-Agents wherein she intimated her wish to enter the bar examination. The secretary of the Examiners declined to enrol Hall for examination, whereupon she petitioned to the Court to authorised and direct that she be enrolled and examined in respect of all subsequent examinations relating to law-agents practising in Scotland.

The *Law-Agents Act* of 1873 neither expressly nor by implication excluded women. The appellant inferred that the use of the word "person" can, therefore, be construed to apply to both genders. In support of her arguments, the appellant contended that an Act of 1850 dictates that in all Acts, words importing the masculine gender shall be deemed and taken to include females, unless the contrary as to gender is expressly provided. And, it is clear that the Act of 1873 did not expressly exclude women from being examined as law-agents.[62]

The respondent, the Incorporated Society of Law-Agents, hit back and traverse the applicant's plea by stating that before the Act of 1873 women were not eligible to be appointed law-agents, and that they are not made eligible by the 1873 Act. The respondent maintains that the Court let itself by inveterate usage and custom in Scotland. According to usage and custom, law practising had been confined exclusively to men. It might, therefore, be doubtful whether women had legal right to be admitted.[63] The presiding judge in the Hall case asserted that no woman had been admitted to practice law in England and Ireland before. And no woman sought to be admitted before the commencement of the Hall case.[64]

The presiding judge in the Hall case revert back to the Law-Agents Act of 1873, and in the same breath ruled that the word "man" did not include "woman".[65] On the basis of the practice of usage and custom, the Court, therefore, denied Hall's petition for admittance to write bar exams.

In *Bebb v Law Society* [66], the plaintiff, Bebb, sent to the Law Society a notice of her intention to present herself at their preliminary examination with a view to be admitted as solicitor when she passed the examinations. She enclosed thereupon the requisite fee. The Society returned the fee and informed her that if she presented herself for examination she would not be admitted, giving the reason that she was a woman, and therefore could not be admitted as a solicitor of the Supreme Court.

The plaintiff declared that she was a person within the meaning of the *Solicitor's Act*, 1843, and that she ought not to be refused admission. She asked for a mandamus from the Court in, which she, directed the Society to admit her to the examination, and at the same time or alternatively, she requested an injunction from the Court restraining the Society to admit her.[67]

[61] July 12, 1901.
[62] Hall v Incorporated Society of Law-Agents, p. 1061.
[63] Hall v Incorporated Society of Law-Agents, p. 1063.
[64] Hall v Incorporated Society of Law-Agents, p. 1064.
[65] Hall v Incorporated Society of Law-Agents, p. 1064.
[66] [1913 B 305.]
[67] Bebb v Law Society, p. 286.

The Law Society refused to admit the plaintiff to the examination process and stated that its decision was in accordance with law. Counsel for the Law Society suggested, that according to the *Solicitor's Act* of 1843, women had never acted as solicitors even before the commencement of the Act. They have never been barristers or solicitors. These counsellors also averred that there is nothing in the *Solicitor's Act* which confers on women the right to become solicitors. Although it is alluded that words importing the masculine gender are to include females, counsel for the Law Society stressed that there was something in the subject repugnant to the application inasmuch as women never had been solicitors.[68]

In order to rationalise the Courts verdict, the Court stated that, in early days, from the time that attorneys (statute of the 4th Henry IV) and solicitors (statute of 3rd James I) became a profession, there was no instance of a woman ever being an attorney or solicitor. The only professional representative or agent of a litigant in the Court of Chancery were always men. There is, therefore, a consensus of usage that the law agents of clients in all the Courts have always been men. All these renditions or evidences taught us that there is an inveterate usage to the effect that the law profession had not been open to women before the 1900's.[69]

Conclusion

Women's attempt to practice law in Rome and Greece was viewed with opprobrium. Patriarchal sentiments have used law as a male construct to bar women from entering the legal profession. Such patriarchal notions employed language as a conduit to obtain its object, namely the semantics around the word "person" to thwarted women's efforts to enter the legal profession. It has been portrayed by semantics that women lack personhood or was not regard as a persons under the law. For that reason, women had never been admitted to practice law. Beyond their incapacity or failure as "persons" under the law, patriarchy portrayed that the mental and physical nature of women rendered them unfit for legal practice. Women were thought to be emotional rather than rational and logical. It is the perception of patriarchal notions that women did not have the natural proclivities to perform the duties required by the profession. The anecdotes about the ignoble conduct of Carfinia and Calphurnia before the Courts also attested to women's exclusion for the legal profession. Patriarchy also contents that the constitution of the family and divine ordinance dictates that women belong to the domestic sphere, where they executed the nurturing duties of wife and mother. This is the law of the Creator and women infringed this law when they militate against it by entering the legal profession. Patriarchal notions regard women's intention to enter the legal profession as treason against the order of nature.

But, nevertheless, sentiments as to the exclusion of women from the legal profession, have been regarded in modern-day legal perspective as anachronistic. The demands of socio-economic realities today require (of) both sexes to engage in the public and legal arena in order to sustain the family organisation. And women are forced to eked out a livelihood for themselves in the dynamics of single female parenthood and with regard to an incapacitated male partner.

[68] Bebb v Law Society, p. 290.
[69] Bebb v Law Society, p. 298.

REFERENCES

Bauman, Richard A. 1992. Women and Politics in Ancient Rome. Routledge.

Bradwell v The State 83 U.S. 130 (1872).

Blundell, S. 1995. Women in Ancient Greece. Volume 1995, Part 2. Harvard University Press.

Bebb v Law Society [1913 B 305].

Cleary, Catherine B. 1991. "Lavinia Goodell, First Women Lawyer in Wisonsin." Wisconsin Magazine of History (Summer).

Edwars, C. 2002. The Politics of Immorality in Ancient Rome. Cambridge University Press. Cambridge.

Frier, Bruce W. & McGinn, Thomas A.J. 2004. A Casebook on Roman Family Law. Oxford University Press, Oxford.

Hall v The Incorporated Society of Law-Agents. July 12, 1901.

Incorporated Law Society v Wookey, 1912 Bloemfontein-Cape Town.

In re Goodell, 39 Wis. 245 (1875).

In re Maddox, 93 Md. 727.

Jehlen, M. & Warner, M. 2013. The English Literatures of America: 1500-1800. Routledge.

May, Rebecca S. A Biblical Perspective on Women and Work. Relational Concepts Inc. Distributed by www.relationalconcepts.org

McGinn, T. 1991. "Concubinage and the Lex Iulia on Adultery." Transactions of the American Philological Association 121 (1991).

O'Brien, J. 1986. A History of Women in the Legal Profession in New South Wales. Department of History. University of Sydney.

Philips, M. 2004. The Ascent of Women: A History of the Suffragette Movement. Abacus.

Pradhan, M. "Exclusion of Women from the Legal Profession in the United States of America, the United Kingdom, and South Africa." Women & Justice Fellow, Avon Global Center for Women and Justice.

Pry, Kay O. 2012. "Social and Political Roles of Women in Athens and Sparta." Sabre and Scroll, vol. 1, issue 2.

Schultz, U. & Shaw, G. 2003. Women in the World's Legal Professions. Onati International Series in Law and Society. A Series published for the Onati Institute for the Sociology of Law. Hart Publishing, Oxford. Portland Oregon.

Smith, Bonnie G. 2008. The Oxford Encyclopedia of Women in World History. 4 Volumes Se. London, UK, Oxford University Press, Oxford.

613 The Holy Bible. 1973. The New International Version. The Bible Societies. Great Britain.

614 Ute, G. 2001. Debating Women's Equality: Toward a Feminist Theory of Law from a European
615 Perspective. Rutgers University Press.

616 Ward, J. 2006. Women in England in the Middle Ages. New York: A & C Black.

617 Weisberg, D. Kelly. Barred from the Bar: Women and Legal Education in the United States 1870-
618 1890. 28 J. Legal Educ. 485 (1977).

619 "Women's Suffrage." Scholastic. Retrieved 8 October 2015.

620 Women and the Law. In: http://www.umich.edu/ece/student_projects/bonifield/rape2.html.
621 Accessed 23/05/2016.