Why the Inflation in Legislation on Women's Bodies?

Venessa McLean[*]

Abstract

This article seeks to explore how historical patriarchal theories have crept into the world's legal systems to date and has led to inflation in legislation upon women's bodies. The article highlights how legislation has been used as a tool to deny women autonomy over their bodies by placing unnecessary controls upon women's bodies by legislative, social and political systems and concludes by an examination of the discipline legislative drafting and how an active approach through drafting activism on the part of legislative drafters and policy makers may combat the inflation in legislation upon women's bodies.

Keywords: legislation and control of women's bodies, legislative drafting and the female autonomy, social and political theories and control of women's bodies.

A. Introduction

I. Aims and Objectives

The hypothesis of this dissertation is that historical patriarchal theories have crept into the world's legal systems to date, and as a result, this has led to inflation in legislation on women's bodies. This dissertation seeks to prove that patriarchal theories have become part of our social and legal institutions to date. This state of affairs has resulted in unnecessary controls placed upon women's bodies to the point that women's attempt to assert autonomy over their own bodies have been criminalized or placed under heavy civil penalties. This has been particularly so, because women have been relegated to the private sphere and, as such, are under-represented within the legislature, the political arenas, the process passing legislation and the legal profession in general. This under-representation has led to women's views being suppressed, leading to a continued state of patriarchal hierarchy and paternalistic over legislation upon the natural processes of women's bodies.

* The author currently works at The Office of the Chief Parliamentary Counsel in Jamaica as a Legislative Officer. She is also Visiting Lecturer on the Special Narcotic Investigation Course Carribbean Regional Drug Law Enforcement Centre, Jamaica and Visiting Lecturer University of London External Degree Programme.

II. Methodology and Structure

In order to prove my hypothesis, I will use primary and secondary methods to draw upon arguments put forward by renowned feminist, experts and writers. I will use the following structure in proving my hypothesis; I will first briefly explore the historical theoretical underpinnings that have contributed to the problem of over legislation on women's bodies to date. I will then analyze current legislative infliction upon women's bodily autonomy by looking at the medicalization of women's bodies, which has led to over legislation with regards to legislation and women's attire, indecent exposure and the breast, the treatment of military women with regards to their bodily autonomy and pregnancy. I will further analyse, forced caesareans in general and forced caesareans in the United Kingdom as it relates to the Mental Health Act, I will then analyse female genital mutilation, after which I will move on to surrogacy and abortion. I will also analyse the structure of the various social, legal and political institutions as they relate to the causes of inflation in legislation on women's bodies. I will then conduct an examination on drafting activism as it relates to the combat of inflation in legislation on women does after which I will draw my conclusion.

In understanding the laws relationship with women's bodies, it is first necessary to discuss the historical underpinning ideologies that have shaped societal perception of the female body to date. It must be noted that current legislative infliction on women's bodies has been informed by the following: social theories, cultural theories and religious theories that I will discuss below.

B. Theories that Shape Society's View of Women and Their Bodies

I. Religion

> It is in matters of gender, probably more than anywhere else, that the profound ambiguity and ambivalence of all religions becomes evident. Religions have profound myths and symbols of origin and creation; they offer narratives of redemption, healing and salvation; they encompass 'way-out' eschatological utopias, but also express the deepest human yearnings for wholeness and transcendence. In and through all of these, religions have created and legitimated gender, enforced, oppressed, and warped it (King and Beattie: 8).[1]

Religion is one of the world's oldest political theories that have been used by the physically stronger class to control the physically weaker class of human being, through the use of religious books adopted as formal codes of practice. The Bible may be argued to be one of the oldest legislative texts that have conferred control on women's bodies. In the bible, the original sin in the Garden of Eden was committed by a woman, she tasted the forbidden fruit, tempted Adam and has been

1 S. Calef & R.A. Simkins, 'Religion and "the Gender-Critical Turn"', *Journal of Religion & Society*, Supplement Series 5, 2009.

paying for it through the processes of her body ever since. In the book of Genesis, this was justified by the following:

> In the book of Genesis the Lord said I will greatly multiply thy sorrow and thy conception, in sorrow thou shall bring forth children, and thy desire shall be to thy husband, and he shall rule over thee Genesis 3:16.[2]

The above quotations are theoretical justifications as to the reasons why women's bodies should be controlled, and may be interpreted as meaning that, by virtue of the fact that women sinned and lured men into sinning, their status within society is lower in rank than their male counter parts. The fact that women paid for the sins with their bodies may be argued to support symbolic theories that the sin committed in the garden was bodily and the apple used is a symbolic gesture for the female body that is in need of control as it has natural capabilities to sin than the male body.

In fact Jean Holm argues that there is inequality in all major religions. This is despite the fact that many religions stress equality between men and women. She emphasizes that what happens in practice is that women do play a part in many religions, but the role is subordinate in nature as religions relegate women to the private as opposed to the public sphere. For example, within the Chinese religion, women are yin men are yang. However, yang spirits are more important than ying. Also in both Buddhism and Catholism, there are nuns and monks. However, monks are seen as senior to nuns. Holm further contends that the second-class status is often related to menstruation and child birth, and as a result, participation in religious rituals is often forbidden during menstruation.[3] Further the French feminist Simone de Beau Voir in 'Religion and The Second Sex' contends that men's control of religious beliefs means that men enjoy the advantage of having a God to endorse the codes that men write with regard to their quest to control women's bodies.[4] To date, this is the ideology that has led to the over legislation on women's bodies legitimized in legal codes.

II. Other Theories

Aristotle in his book *Generation of Animals* argued that 'The term woman' is by referred to as a diseased state of the male norm. He believed that women's bodies are diseased and dysfunctional and, as such, the female processes are not normal occurrences in the female body. They are deviant processes, needing male consultation and male solutions.[5] Aristotle's theory resulted in men being viewed as the brain of the two species and women as the body and, as such, it has become the norm in society for the mind to control the body.

The 'minds' or male view of 'body' is that, the body of the two species being woman in all aspects should be governed by her biology. This is based on the fact

2 M. Haralambos & M. Holborn, *Sociology Themes and Perspectives*, Collins, London, 2004, p. 92.
3 *Ibid.*, p. 413.
4 *Ibid.*
5 *Aristotle Generation of Animals*, (1st edn), Loeb Classical Library, London, 1942.

that the defective form of male is in need of tight controls and supervision, by virtue of the fact that women are biologically condemned with a womb as they menstruate, bear children and go through menopause, and these processes confine women to the status of mental instability. In support of this theory is the fact that, the term 'hysteria' derives from the Greek word 'womb', this has been used by the Victorians to highlight assumptions about the links between mental instability and female physiology.

Another myth concerning women is that women are innately irrational creatures, whilst men are naturally rational beings. This high level of irrationality has been argued to make it less able for women to make difficult and moral decisions concerning their biological capabilities.[6]

III. Private Sphere

Through the above-mentioned line of reasoning, Aristotle and other theorist justified the subordination of women both in the private and public domain. Thus on the above-mentioned reasoning, Aristotle argued that the process of reproduction through the female vessel deemed 'body' should be used to deny women political participation, confining women to the private sphere being a lower social role linked to child rearing and home duties. Throughout the Middle Ages, upper class men were frequently involved in politics, and women were generally prevented from participating within the public sphere being politics, business and religious leadership.[7]

IV. Patriarchy

The above-mentioned deep-seated assumptions have led to a system of patriarchy with in today's society as such women have been accorded their inherited lower status within the class structure. Patriarchy is the most powerful force in the world today, trumping other ideologies or political systems or religious beliefs. By its very nature, it is rooted in the subjugation of women. Patriarchal cultures uphold the world's legal codes to date. The patriarchal code is embedded to a greater or lesser degree in virtually all cultures all languages, religions, laws, mores, and forms of government; and it has been used to deny women their bodily autonomy and rights. Historically, patriarchy was used to deny women participation within the legal and political system. There has been some improvement with regard to women and their rights, but to date, the legal system still denies women autonomy over their bodies on the basis of the deep-rooted structural and ideological mythologies that still haunt today's legal systems. This has resulted in the societal conception that women's bodies ought to be controlled.

V. Women and Autonomy

Autonomy is defined by the Oxford English Dictionary as 'personal freedom'. It is considered as a fundamental of being a fully functioning member of society; this is what early feminist strove for in the case of *Chorlton v. Lings [1868] LR 4 CP347*,

6 J. Bourne & C. Derry, *Women and Law* (1st edn), Old Bailey Press, 2005.
7 *Ibid.*, p. 4.

where it was stated that it should be recognized that women are persons with the right to make their own political decisions. Feminist and women's rights activist have argued for years that the legal system should respect and give individual autonomy to every woman as this is closely related to a woman's legal and social position within society. However, despite the various gripes of feminist and women in general, women are still viewed as a defective form of men and are perceived as being sick both biologically and socially. What this status of sickness has conferred on women is the concept put forward by Talcott Parsons. Parson argues that sickness is a social role, with people acting in particular ways according to the culture of society, and in modern societies, the sick role has elements that include rights and obligations elements. Within the obligation element, the sick person must accept that she is sick, seek or be confined to professional help and must cooperate with the medical profession. He further argues that as sickness is socially abnormal, illness is deviant and dangerous to society and must be controlled. As such, as women are the sick form of the two species, they are subject to control as their sickness provides a way in which society can swiftly deal with their deviance of social illness, in order to bring women back to their normal pattern of functioning, which benefits society.[8]

Francis Power Cobbe developed the theory that women were no different from criminals and idiots, and women must, in justice, receive from the law additional strength of control.[9]

As women are seen unequal to men, Marxist Feminist have argued that men to date dominate the ruling class, and as women are the subject class, men continue to have a disproportionate control of the various institutions of society, such as the legal and political institutions through constant manipulation. This has, in their opinion, led to a conflict of interest by virtue of which men are the main beneficiaries of the lower status accorded to women and their bodies. According to Lesley Doyal (1995), women bodies have become increasingly symbolic. In fact, theorists have articulated that despite the fact that women are culturally invisible, they are physically visible. This theory justifies the use of the female body as a machine of production, due to the fact that profit is now made from normal female bodily activity and turning it into the concern of medicine by the over medicalization of women's bodies. As new technology and drugs are developed and sold for pregnancy and child birth and hormonal cycles to profit the patriarchal ruling class.[10] The underlying benefits have been used to deny women their bodily autonomy. This has resulted in inflation in legislation on women's bodies. I will now look at the various pieces of legislation that has been inflicted on women's bodies before addressing how the legislature as an institution has contributed to this, and how policy initiatives can intervene through gender-driven policy initiatives.

8 M. Haralambos, *Themes and Perspectives* (1st edn), Collins, 2000.
9 *Ibid.*
10 *Ibid.*

C. Legislative Infliction on Women's Bodies

I. Legislation and Women's Attire

Due to the concept that the female body belongs to the private sphere, the way women dress has also been brought into the scope of discussion for actions that should attract legislation. Recently women in Kenya, in Africa's Rift Valley, have been attacked for wearing trousers, stripped by men who regarded their dress as 'immoral'. Also in Nigeria, legislation that seeks to punish 'indecent dressing' is being proposed by Ene Ufot Ekaette Akwa, a Nigerian Senator. Also the Chairperson of the Senate Committee on Women and Youth Affairs stated that "women's dress requires legislation due to rising incidences of rape in Africa" and that rape, in her opinion, is linked to the provocation caused by those who dress indecently.[11] Here it can be seen that no excuse has been spared when it comes to the control of women's bodies as men's perverted attitude towards women's bodies in disregard of a woman's autonomy by raping a woman has given the legislature an excuse to pass another piece of law over women's bodies, in an attempt to control and dictate what clothing a woman should wear. To date when a woman is raped, prosecution and defense lawyers are allowed to question a woman as to what attire she was wearing at the time of her rape. Instead of being the victim, what the law has done is to turn the victim into the perpetrator of provocation instead of dealing with the immorality and criminality of rape.[12] The above reasoning has contributed to society's reaction using male norms, which is to inflict further legislation upon women's bodies to the point of women's clothing being attacked.

II. Indecent Exposure and the Breast

The female breast is considered a sex organ as opposed to the breast of a man. Therefore, exposure of the women's breast is considered indecent exposure. Legislation has been inflicted by virtue of the Sexual Offences Act 2003 in England and Wales. In the case of *R v. Abbi-Louise Maple and Rachel Marchan* (2007),[13] both female defendants were tried for flashing their bare chests at a CCTV camera before collapsing in giggles on the beach at Worthing, West Sussex. The CCTV operator called the police and minutes later the two girls were arrested interrogated charged and tried. The offence of indecent exposure carries a maximum sentence of six months prison or a fine of £5,000. This may seem trivial; however, as a result of educational message sent by legislation upon women's breast, the natural process of breast feeding has been controlled by legislation. In instances, mothers have been ordered off buses and have been driven out of public building whilst nursing their babies.[14] As a result, parliament has inflicted another piece of legislation whereby breast feeding is protected under the Sex Discrimination Act

11 <http://media.switchpod.com/users/pathways08/Part01.mp3> (Accessed 1 June 2011).

12 S. Lees, *Ruling Passions: Sexual Violence, Reputation and the Law*, Hamish Hamilton, 1996.

13 Unreported <www.cps.gov.uk/news/press_releases/154_07/> (Accessed 1 March 2011).

14 M. Keegan, 'Breastfeeding Mum Ordered Off Bus by Driver', *Manchester Evening News*, 11 August 2010, <http://menmedia.co.uk/manchestereveningnews/news/s/1313573_breastfeeding_mum_claims_she_was_ordered_off_bus_by_driver> (Accessed 1 May 2011).

1975 under the provision of goods, facilities and services section. If the child is under 6 months old, the mother has additional protection under a 2008 amendment to the act, which protects maternity rights. The above-mentioned reasoning reveals how society's use of the male norm has inflicted legislation to the extent that the natural process of breast feeding has to be controlled in relation to how and when to feed a child. This flies straight in the face of a woman's right to autonomy. The male breast is not considered as a sexual organ; as such the male breast has not been inflicted upon by legislation and this is another example of the disproportionate way women's in contrast to men's bodies are treated.

III. Military Women

Military women have not escaped the inflation in legislation on women bodies. Serving military women are required to submit to urine tests. At the end of 2009, on November 4, Major General Anthony Cucolo, commander of Multi-National Division-North in Iraq for the United States of America, added a pregnancy provision to general order number. The order threatens court-martial, jail time, and dishonourable discharge for female soldiers who become pregnant, whilst deployed in the war zone under his command. This punishment provides no exceptions for sexually assaulted soldiers who become pregnant, or for married soldiers who are deployed.[15] The above mentioned is a stark reminder of the public private sphere divider. This to me is sending a clear message that women should be confined to the societal role given which is to be kept within the private domain due to her reproductive capacities.

IV. Forced Caesareans and the Mental Health Act 1983

Forced caesareans occur in the United Kingdom when a pregnant woman is literally forced into having a caesarean section against her will. Here the law on medical practice clashes against the pregnant woman's assertion of her autonomy. The doctors do not view the pregnant woman as one patient, but rather two, the pregnant woman and her child. This is despite the fact that the 'foetus' is said to have no rights in law.[16] Due to this, laws have been inflicted upon women's bodies through the use of 'forced caesarean orders', which can be applied for by doctors. This is done by the legislators giving with one hand and taking back with the other, as seen in the following cases: For example, in the case of *Re T [1992] 4 All ER* 649, the law seemed to have clearly given rights to women over the foetus it was stated:

> Prima facie every adult has the right and capacity to decide whether or not he will accept medical treatment, even if a refusal may risk permanent injury to his health or even lead to a premature death. Furthermore, it matters not whether the reasons for refusal were rational or irrational, unknown or even

15 M. Gisick, L. Shane III & T. Weaver, 'Senators Lead Calls for Revoking Pregnancy Policy', *Stars and Stripes*, <www.stripes.com/news/senators-lead-calls-for-revoking-pregnancy-policy-1.8025> (Accessed 1 June 2011).

16 Bourne & Derry, 2005.

non-existent. This is not withstanding the very strong public interest in preserving the life and health of all citizens. However this presumption is rebuttable.

In the case of *Re C (Adult: Refusal of medical treatment) [1994] 1 All ER 819* the court set out exactly when the capacity of competence could be rebutted, it stated that only when the patient was unable to

1. take in and retain the treatment information;
2. believe it; and
3. weigh that information, balancing the risks and needs.

The case concerned a male psychiatric patient who had schizophrenia and believed that he had an international career in medicine. He believed that God would help him though. Justice Thorpe held in the High Court that although C's general capacity was impaired by schizophrenia he satisfied the competence criteria and arrived at a clear choice.

The above-mentioned case should be contrasted with the case of *St Georges Healthcare NHS Trust v. S; R v. Collins and Others, exparte S [1998] 3 All ER 673*. S was a 30-year-old pregnant woman. She was, by profession, a veterinary nurse. She sought to register herself as a new patient at the GP when it was discovered that she was 36 weeks pregnant and suffering from pre-eclampsia. The doctors called in a social worker without the consent of S. Both the social worker and the doctor advised her that if she remained untreated both she and the foetus would die. S insisted that she wanted a natural birth and did not wish to have any treatment. The social worker inflicted legislation on S by applying under the Mental Health Act 1983, to have S admitted to a safe place to be treated for depression. This was despite the fact that S did not complain of depression and was not diagnosed as such. The hospital again inflicted legal wounds on S by applying for an exparte order from the High Court to sanction a caesarean section.

The court omitted the application of the criteria used in *Re T [1992] 4 All ER* 649. Justice Hog did not ask and was not told whether

1. S was competent,
2. She had instructed solicitors,
3. And that she was not yet in labour.

Also in US case of *Re Ac [1991] 573 a 2d 1292*, the case concerned a woman who had leukaemia, she refused caesarean because she knew it would hasten her death. The hospital applied to the court and was granted an order to force caesarean at 26 weeks within the pregnancy as a result both she and the foetus died.

It should be noted that not only have women been physically forced to have caesarean sections, they have also lost custody of their child based initially on refusal to have a caesarean section; as in the quest to force caesarean, doctors

have used the legal system to confer a state of madness upon a refusing woman, which makes them unfit to be a mother.[17]

The above-mentioned cases show how the medical profession views women within Talcott Parsons sick role, and as such, the obligation criterion was used to confine pregnant women to professional help, and legislation was used to ensure forced medical compliance. It must also be noted that the initial criterion used to develop the test of competence in *Re S* came from a case where the subject was a 'mentally ill male'. Here, the hysterical preconceptions of the womb were used to subject a woman against her will.

To date, the sick role of women has been used by capitalist for their economic benefit; for example, in Iraq, caesarean sections accounts for 79% of births at private hospitals. This rise in caesarean sections is not with a pure motive. The mainly male-dominated medical profession charges twice as much for caesarean sections as opposed to normal births. In addition, once a woman gives birth by caesarean section, it is more likely that she will have to use the procedure again partly due to the worries of a rupture of the uterus during childbirth.[18,19]

In the above-mentioned analysis, I analysed caesareans in three different countries, two of which are classed as developed and industrialized countries. America would, in the opinion of most persons, be classed as a country with a highly developed legal and medical system; however, the laws of some of the world's most developed countries reeks with historical underpinnings of patriarchy that has crept into their legal codes. The result of this is that there has been an increase in legislation, which aims to control women's bodies. The sombre state of affairs is that despite being one of the wealthiest and 'sophisticated' countries in the world, the United States is one of the most dangerous places to give birth in the industrialized world.[20] The United States spends more than any other country on health care, and more on maternal health than any other type of hospital care. Despite this unprecedented investment in maternity care, Amnesty International recently released a report revealing that women in 40 other countries around the world have a better chance of surviving pregnancy-related complications than American women do. Put another way, the probability of an American women dying in childbirth is five times greater than in Greece, four times greater than in Germany and three times greater than in Spain. Partly to

17 Burkstr & Reid, *supra* note 1, at 141 (citing N.J.Div.of Youth and Family Servs.V.V.M., 974A. 2d448, 449 (N.J. Super.Ct.App.Div.2009).

18 B. Juhi, 'Rise in Iraqi C-Sections Worries Doctors', Associated Press, Iraq 2011, <http://hosted.ap.org/dynamic/stories/M/ML_IRAQ_C_SECTIONS?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2011-08-16-07-39-27> (Accessed 1 June 2011).

19 Associated Press (Iraq 2011) C-sections take a longer recovery time than vaginal births. Like any major surgery, they also pose some major health problems including risk of blood clots and inflammation and infection of the uterus lining. Babies delivered via C-section can also have breathing problems. Juhi, *supra* note 18.

20 I. Loudon, 'Maternal Mortality in the Past and Its Relevance to Developing Countries Today', 72 *American Journal of Clinical Nutrition* 2000, pp. 241, 242.

blame for these numbers is legislation that has been permitting 'overuse' of risky interventions like inducing labour and delivery via caesarean section.[21]

The fundamental issue concerning forced caesareans is that legislation should not be forced upon women denying them bodily autonomy in the name of legal protection. Such is the extent of the legal fraternity to give protection that In *Re MB* a case decided in England, Butler Sloss LJ condoned physical violence being used to make a woman submit to treatment. Sloss continued to leave the discretion of the ratio of force to be used up to the health professionals. On this point, Barbara Hewson wrote in the Independent (5 March 1997) that the decision in *Re MB* meant that:

> Women who rejected their doctors advice could be 'convicted' of incompetency and subject to house arrest, torture or inhumane and degrading treatment enduring forced cesareans, forced medication, forced general anesthetic and forced detention amongst 'other things'

In other words, the patriarchal ghost from the past has presented themselves in all shapes and forms including legislation to force women against their wishes.

V. Female Genital Mutilation

Societal conception that women bodies are unruly and are in need of control has given some members of society within some culture the right to inflict female genital mutilation (FGM) on women. FGM has been designed to prevent women from experiencing sexual pleasure. The World Health Organisation has defined FGM as all procedures involving partial or total removal of the female genitalia or other injury to the female organs, whether for cultural or therapeutic reasons. This is normally common to the African and Arabian Peninsula although it has, to date, been carried out in countries such as Great Britain as a result of migration. The procedure is normally carried out in the effort to control married women, in order to ensure that she does not have affairs in an effort to make her pure for her husband. Due to this cultural phenomena, legislation has again been inflicted on women's bodies as it is now an offence in English law in some circumstances but not all, under Section 1 Probation of Female Circumcision Act 1985 FGM attracts imprisonment.

However, despite the protection given under Section 1, Section 2 makes it 'lawful' to inflict FGM upon mentally ill women and for women suffering from mental health.

FGM, when carried out, is an attempt to deny women of the ability to function as fully sexual beings. Historically, it was legal in all sense in Great Britain and the United States to use FGM as a medical treatment for socially unacceptable female sexual conduct such as masturbation and adultery.[22]

21 J. Block, '*Too Many Women Dying in U.S. While Having Babies*', *Time Health*, 12 March 2010, <www.time.com/time/health/article/0,8599,1971633,00.html#ixzz0hz6oVBwD> (Accessed 5 July 2012).

22 Bourne & Derry, 2005.

One set of legislation may been seen as protective to women when it comes to FGM; however, this does not cast away the fact that societal hunger for control of women's bodies has caused more legislation on women's bodies particularly as mentally ill women are still been subjected to FGM. According to Professor Helen Xanthaki, 'every time you legislate you take away some ones rights' and inflict injury using the legal system, is this fair in the name of protection?[23] On the other hand, one may argue that the role of the law and the legislatures is to protect. The question to ask here is whether women need protection from the legal system itself, as it has afforded great pain on women's bodies in the name of so-called protective legislation, as in the words of Karl Marx "the more things change the more that remain the same" control of women's bodies existed then and still exist now as cultural norms are yet to change.

VI. Surrogacy

Surrogacy refers to practice whereby a woman goes through pregnancy in order to provide childbirth for someone else. Surrogacy is legal in England and Wales. However, in an attempt to control how women can use their body's legislation has been passed more laws restricting surrogate mothers from charging for their services under Section 2 of the Surrogacy Arrangements Acts 1985. The idea of restricting monetary compensation was suggested by the Warnock Report, which restricted payments to verifiable expenses. Why inflicting another piece of legislation on women as to how they use their wombs, with the excuse that it is undignified for women to charge for such services? Bourne and Derry argues that the real reason for legislating a restriction on financial compensation for surrogacy is that, if child birth is commercialized, it upsets the male ideology, which reduces women's childbearing worth as this threatens the male status quo being that, childbearing and traditional roles that women perform are worthless.[24] The issue here is that women's bodies belong to them, and it is an insult to deny them autonomy as to how they use it. Also Andrea Dwarkin states that charging for surrogacy moves towards brothel model previously related only to prostitution, whereby women only sell their bodies for men's pleasure. Charging for surrogacy turns this model into a more liberating model of selling a woman's bodily services, which is against male norms, which supports the argument that women's bodies are worthless.

VII. Abortion

1. A Bill

To ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child. There is substantial evidence that the abortion methods most commonly used 20 weeks after fertilization cause substantial pain to an unborn child, whether by dismemberment, poisoning,

23 Professor H. Xanthaki, Lecture, 2010, School of Advanced Legal Studies, University of London.
24 Bourne & Derry, 2005.

> penetrating or crushing the skull, or other methods. Examples of abortion methods used 20 weeks after fertilization include, but are not limited to the following.

The above-mentioned quote was taken from a piece of legislation propounded within the United States of America, with the intention that women should be informed of the pain that an unborn child feels before terminating pregnancies of twenty weeks old. The bill goes on to propose that anaesthetic should be given to the 'unborn foetus' in such situations, and later states that there is a valid Federal Government interest in reducing the number of events in which great pain is inflicted on sentient creatures. Examples of this are laws governing the use of laboratory animals and requiring pain-free methods of slaughtering livestock, which include, but are not limited to calves, horses, mules, sheep, swine and other livestock. The bill later states that this is in accordance with religious methods of slaughtering other animals, which includes the Jewish faith.[25]

Another American bill proposed that "the state of Georgia has the duty to protect all 'innocent life' from the moment of conception until natural death. We know that 'life' begins at conception". The preamble is the justification for making what is called 'pre-natal murder' illegal.[26]

The pattern emerging from both bills seems to imply that the foetus has a life independent to that of its mother, and as such the foetus should be protected; this battle may be as old as the earth itself. Within the American legal system, the court in *Roe v. Wade*, 410 U.S. 113 (1973) stated that the rights to the people, is broad enough to encompass a woman's decision whether to terminate her pregnancy. The Laws of England and Wales provides that the foetus could have no rights of its own until it had a separate existence from its mother *Paton v. British Pregnancy Advisory Services [1978] 2 All ER 987*. However, in Ireland, despite being a signatory to the Human Rights Act 1998, Irish law still holds that Ireland holds the monopoly to dictate when life begins as abortion was outlawed in Ireland in 1861, and life imprisonment remains a sentencing option for women convicted of 'unlawfully procuring a miscarriage'. Ireland's constitution "acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right". The ban was reinforced by public backing in a 1983 referendum.

To date the age-old battle concerning women, men and the legislature continues. Despite the fact that it has been stipulated in various case law that the foetus has no rights to life of its own, male ideologies have crept into current legislation inflicting another wound on women's bodies by virtue of the Offences Against the

25 United States of America Legislature <www.nrlc.org/abortion/fetal_pain/S512005.html> (Accessed 1 June 2011), at least eight (Alaska, Arkansas, Georgia, Oklahoma, South Dakota, South Louisiana, Texas and Wisconsin) now have legislation requiring that women seeking abortions be informed of the possibility of foetal pain.

26 J. Ingersoll, 'Georgia Legislator Behind Bill Criminalizing Miscarriage Is Christian Reconstructionist', <www.religiondispatches.org/dispatches/julieingersoll/4317/georgia_legislator_behind_bill_criminalizing_miscarriage_is_christian_reconstructionist> (Accessed 1 May 2011).

Persons Act 1967, which governs abortions in the United Kingdom, which makes having or performing an abortion illegal and the Act provides that:

> S 58. Every woman, being with child, who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman whether she be or be not with child, shall unlawfully administer to her or cause to be taken by her any poison or other noxious thing, or unlawfully use any instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable to be kept in penal servitude for life.
>
> S 59 Whosoever shall unlawfully supply or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable to be kept in penal servitude

In addition, the Infant Life Preservation Act 1929 created the offence of Child destruction where a child is capable of being born alive this is regardless of whether labour had begun or not *C V S [1987] 1 All ER 1239*.

As can be seen from the above-mentioned abortion and child destruction are both serious criminal offences in England and Wales. Abortion can be carried out only if two doctors agree that the woman is less than 24 weeks pregnant and the continuing pregnancy would involve some risk to her mental or physical health, greater than if the pregnancy were permitted, or that continuing with pregnancy would involve risk to physical or mental health of existing children in her family.

The above mentioned are clear cases of legislative interference with a woman's right to personal autonomy over her body. The laws have come down on women's body by prescribing legislation that allows the male-dominated medical profession the discretion to choose whether to protect the foetus or the mother. Sally Sheldon argues in her article 'Who Is the Mother to Make the Judgment?'

> That that our patriarchal society has given the medical profession a particular construction under law so much that they are seen in parliamentary debate as male more specifically as professional medical men, such men are portrayed as skilled, dedicated and altruistic and therefore best able to make decisions. This is despite frequently hardly knowing the woman, and not being aware of all the social and emotional issues involved. This is in contrast to the woman seeking abortion who is construed as being immature, irresponsible and irrational

Recently, the Daily Mail UK presented parliament's recent proposal to inflict more legislation on women's bodies in an article titled 'Keep Your Laws Off Our

Body'. The age-old topic of abortion is again the subject, as both Labour and Conservative Members of Parliament have joined forces in the battle for legal infliction on women's bodies by proposing to change the law so that women must be referred to an independent therapist for counselling before they can have a termination and to lower the time limit from 28 to 24 weeks.[27]

My question to the above mentioned is, whether it is necessary to inflict criminal laws on woman's bodies or is it necessary to pass laws with regard to whether a woman wants to conduct abortion? What I believe legislators are failing to understand is that women are sometimes trapped into making a decision due to social circumstances, and the fact that most legal systems inflict criminal laws on women's bodies shows that that a woman's autonomy is viewed by the legal system as a criminal act, and it is a crime for women to make a choice with regard to their own bodies.

It has been argued that the inflation in legislation and criminalization of a woman's autonomy in the form of abortion laws is a result of patriarchy and religious tradition as the main anti-abortion goal is not to 'save babies', it's to keep women in their traditional roles as social construction dictates that motherhood is a woman's highest calling, all women should be and want to be mothers, women should endure the discomfort and pain of pregnancy and childbirth as their natural duty, women should sacrifice themselves to raise kids, women who have abortions are 'bad' or 'victims', women who have abortions suffer psychologically, at least they should, women are irresponsible or too emotional, and need direction and guidance, to 'protect' women, we must restrict abortion. Inflating legislation upon women's bodies in the name of abortion laws are traditionalist in their approach.

In fact anti-abortionists argue that the inflation in legislation on women's bodies in light of abortion laws stems from traditional thinking that no longer works for our modern society with its focus on human rights. They have argued that society should never favour birth over abortion when we live in an overpopulated world, when society will never reach agreement on the moral status of the foetus, when we know that unwilling mothers and unwanted children tend to suffer and when becoming a parent should be the private decision of the woman and her family. Many people may not be ready or able to provide properly for a child. But children have rights, and they deserve respect, love, and the best chance at a good life. Of course, the right to have a child is fundamental and should not be restricted, but abortion is also a fundamental right on an equal basis. Male ideologies and religious doctrines should never dictate how we live our lives in a secular society with secular laws. Besides, most religious books are pro-choice.[28] Several passages say it is better to die in the womb than live an unhappy or wicked life.[29]

27 *Daily Mail*, 'Keep Your Laws Off Our Bodies', <www.womensviewsonnews.org/2011/03/keep-your-laws-off-my-body/> (Accessed 1 May 2011).

28 The Bible Jeremiah 20:14-18.

29 J. Arthur, *Repeal All Abortion Laws*, Abortion Rights Coalition of Canada, Pro +choice forum <www.prochoiceforum.org.uk/ocrabortlaw13.php> (Accessed 1 June 2011).

VIII. Are Abortion Laws Necessary?

It is interesting to note that there are still jurisdictions in the world that do not have any laws controlling abortion. For example, Canada has no abortion laws or restrictions of any kind in relation to abortion. In fact, the Abortion Rights Coalition of Canada has argued that the inflation of legislation on women's bodies for the purposes of abortion is totally unnecessary. It is also their opinion that no country needs to regulate abortion via criminal or civil laws. In addition have also issues a statement that, anti-abortion laws and restrictions, throughout the world, should be repealed as unconstitutional violations of women's rights and equality status.

It is also their contention that anti-abortion laws kill and injure women, violate their human rights and dignity, impede access to abortion and obstruct healthcare professionals. They also feel that abortion restrictions are unjust, harmful and useless because they rest on traditional religious and patriarchal foundations. Only when abortion has the same legal status as any other health procedure can it be fully integrated into women's reproductive healthcare. Also from research they conducted, they have found that laws against abortion do nothing to stop abortion and that, in fact yearly, about 19 million desperate women seek out illegal abortions because the countries they live in have banned safe abortion, also 68,000 women die every year as a result, and at least five million suffer serious injury or permanent disability as a result of over legislation within this area of law.[30]

Abortion Rights Coalition of Canada has found that countries with strict abortion bans (mostly in the developing world) usually allow an exception to save the woman's life. Ironically, such bans result in many times more maternal deaths than in countries with more liberal abortion laws. The hypocrisy of laws that pretend to save women's lives, but which actually slaughter them by the thousands, demands their immediate repeal, anti-abortion laws have nothing to do with good healthcare as abortion laws around the world vary wildly. While some countries ban abortion totally, others have few or no laws, and many enforce statutes regulating various aspects of the abortion decision and procedures.[31] Such laws are generally not required for any other medical treatment. Examples include mandatory waiting periods, parental consent laws, obligatory counselling, early gestational limits, and other restrictions. Differing legal frameworks also lead to 'abortion tourism', forcing women to travel out-of-country to obtain the care they need and discriminating against women who are without the resources to travel.

The sheer diversity of legal situations around the world is a proof that the inflation of abortion laws on women's bodies has nothing to do with quality healthcare, and instead is politically motivated. Abortion laws are unrelated to women's real medical needs and concerns, and divorced from the best practices of medical professionals. They are simply holdovers from the days of criminal abortion, or recent products of religious ideology.

30 J. Arthur, *The Case for Repealing Anti-Abortion Laws*, Abortion Rights Coalition of Canada, January 2009, <http://www.arcc-cdac.ca/action/repeal.pdf> (Accessed 3 March 2011).

31 *Ibid.*

It may also be argued that in practice, many abortion restrictions impede good medical care, such as delaying treatment unnecessarily and providing false information to patients. This increases the medical risks of abortion and causes psychological and physical distress to women. Also, when abortion is illegal or restricted, it blocks or hampers medical research that is needed to improve abortion care and protect women's health.

Abortion laws are frequently hollow because it is assumed they reduce abortion when they do not. For example, abortions in the third trimester are very rare and done only in dire circumstances, so passing a law that prohibits late abortions except for health reasons is pointless, as well as insulting to women and doctors. The natural limiting factors for third trimester abortions are the very low demand for them, and the miniscule number of doctors willing and trained to do them. Anti-abortion laws hurt healthcare professionals as the inflation in legislation punishes healthcare providers and further reduce access to abortion by

- marginalizing abortion care and abortion providers outside the mainstream healthcare system,
- shifting the focus away from basic healthcare to legal issues,
- turning abortion into a political target for legislators and extremists,
- disrespecting professional medical judgments made in the patient's best interests,
- interfering in the confidential doctor–patient relationship and
- threatening healthcare workers with prosecution.[32]

Research has found that the imposition of anti-abortion laws says, in effect, that legislators can make better medical decisions than doctors. No other medical procedure carries with it the threat of criminal punishment, abortion is singled out for special treatment. But physicians should never work under the shadow of prosecution simply for providing medical care.

Anti-abortion laws institutionalize the stigma of abortion. Laws imply that abortion must be restricted because it is wrong and bad, and people who need or perform abortions are also wrong and bad. But no law will change the fact that a woman desperately needs an abortion, and a doctor wants to help her. As a result, abortion restrictions foster hypocrisy and disrespect for the law because they often force providers to interpret laws loosely, skirt them or even disobey them.

Most of all, it is the contention of the advocates against anti-abortion laws that anti-abortion laws violate women's equality as women are different from men because of their capacity to bear children. Childbearing has a much more profound effect on women's lives, than on men's lives. To truly achieve equality with men, women must not be disadvantaged under the law because of pregnancy. There should be no laws regulating pregnancy in any way because that puts a special obligation that is placed on women, not on men. For example, a law that requires women to pay for abortions, but not childbirth costs, is discriminatory.[33]

32 *Ibid.*
33 Juhi, 2011.

Abortion Rights Coalition of Canada rightly concludes that it is the role of courts to uphold peoples' constitutional rights by striking down laws that infringe on those rights. Since any restriction on abortion unacceptably limits women's rights, abortion restrictions can (theoretically) be struck down in a constitutional democracy that protects women's equality. Similarly, abortion rights should never be subject to a vote by the electorate, and anti-choice laws should never be enacted based on public referendums. That's because we cannot trust citizens to fairly protect the constitutional rights of minorities and disadvantaged groups. In the case of abortion, social opinions are often rooted in stereotypical assumptions about women's 'proper' role as childbearers, and in religious beliefs about the value of foetal life, at the expense of pregnant women's lives.[34]

Canada is the only democratic country in the world that has no abortion laws or restrictions of any kind, and it has proven that such laws are completely unnecessary.[35] Current abortion care reflects what most Canadians are comfortable with, and women and doctors act in a timely and responsible manner, without regulations. Women's equality is guaranteed under Canada's constitution, and it is considered unlikely that any anti-abortion law would withstand a constitutional challenge in Canada today. The courts there have consistently protected women's right to abortion since 1988, when the old abortion law was struck down by Canada's Supreme Court as violating women's constitutional rights to 'life, liberty, and security of the person', and 'freedom of conscience'.

It should be noted that even in national constitutions lacking an explicit guarantee of equality for women, there are usually other clauses that will support the repeal of abortion laws. For example, the 14th Amendment in the American Constitution says no state can 'deny to any person within its jurisdiction the equal protection of the laws'. This clause, and similar clauses in other national constitutions, should require the repeal of abortion laws because they unfairly apply only to women.[36]

Before leaving this topic, it should be noted that before the inflation in control on women's bodies via legislation, traditionally women performed the role of delivering babies. Thus, throughout time immemorial, midwives acquired a wealth of knowledge in relation to healing, childbirth, contraception and obstetrics as it affected every aspect of their lives. The skills acquired from midwifery practice were handed down from mother to daughter. As midwifery began to be seen as an important practice, it was formally controlled by laws, which provided for a license, which obviously restricted those without a licence. Laws were passed giving doctors monopoly over medical provision, and this incited a campaign to subordinate midwifery to medicine. General practitioners were very keen to take over the role of midwifery and relegated the role of midwives to nurses, a patriarchal tactic used to deskill.

34 Arthur, *supra* note 30.

35 Section 28 Canadian Charter of Rights and Freedoms, 'Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons'.

36 Arthur, 2009.

As can be seen from above, Canada has set a clear precedent by deflating all the previous legislations that were inflicted on women's bodies by the Canadian legal system, which were based on the outdated theories that women's bodies, being irrational, are considered as potentially unruly and in need of legal regulation. Therefore from this analysis, I am in doubt as to whether abortion laws are necessary.

D. Why the Inflation in Legislation on Women's Bodies?

It may be argued that the inflation in legislation on women's bodies may be caused by a number of different reasons, and I will explain on each in the next section.

I. Legal and Policy Education

The legal system, for years, has exerted stringent controls on women's bodies as laws are perceived to be always correct in its approach in regulating human behaviours. It has become a social norm to accept that women's bodies, as a result of their reproductive capacities, are in need of control through the use of laws. As such, there needs to a formal system to re-socialize society with regard to the way it views women's bodies. This is particularly necessary for persons in government, the police, the legal profession in general and the profession of legislative drafting specifically. Most of the above-mentioned actors are clueless as to the systems that are not visible to the naked eyes, that affect women's issues as such the age-old theories of patriarchy has crept into the legal system and remains there to date. Therefore, it is my contention that formal training is necessary within the above-mentioned fields in arguments for and against feminist theories as it relates to patriarchy, as the lack of such training is partly to be blamed for the unnecessary inflation in legislation on women's bodies. Many of the legal problems that pregnant and birthing women face have developed relatively recently, and there is an overly large body of law available on any of the topics mentioned above with an inadequate amount of literature on topics. As such, the legal community, as a whole, is largely unaware of the legal landscape that birthing women face. As long as the legal community, from law students to judges, remains largely unaware of the diminishing rights birthing women are afforded, women's right to privacy, bodily autonomy, and the right to refuse medical treatment will continue to exist.[37]

Lawyers should be equipped with the knowledge to challenge the large volumes of oppressive policies and laws surrounding women's bodily autonomy issues. For these reasons, gender discrimination, feminist jurisprudence, family law and constitutional law courses should include discussions of childbirth and birthing rights as these are common areas where the inflation in legislation exists

37 C.S. Brooks, *Laboring under the Misconception of Rights: The Need for Legal Education on the Rights Surrounding Childbirth*, Advocates for Pregnant Women, 1 May 2010, <http://advocatesforpregnantwomen.org/Sharples%20Brooks%20-%20Laboring%20Under%20the%20Misconception%20of%20Rights.pdf> (Accessed 5 May 2011).

on women's bodies. My reason for making such a prescription is that the absence of such knowledge will allow the current state of the law to go unchallenged. Law students need to be made aware of the current state of obstetrics, and the way the law is impacting in a negative way up on women and their bodily autonomy. This will aid in making positive changes in the laws concerning women's autonomy women. This should be made a compulsory unit for law students and not an option as often is the case.

II. The Public Sphere

As the numbers of legislation on women's bodies increase in many parts of the world, it has become more obvious than ever that the tactics of getting women bodies into formal political spheres is only a percentage of what it takes to engage democracy. Much of the focus in the debate on 'gendering' democracy has been on how to insert women into existing democratic structures, with a focus on formal political institutions. Yet, it should be understood that, the ideology of 'gendering democracy' might be read in a rather different way. It may be argued that bringing about changes in political systems that make them genuinely inclusive, this is 'gendering' democracy means women's bodies needs to be moved beyond patriarchal prison of the private sphere confined on them by age-old theories into the public sphere. It is not only formal political roles that dictate policy and legislative agendas. It is common for various interest groups to influence change within the legal system. It should be noted that often interest groups present bills to parliament to bring into effect their political and legislative agendas; in addition, interest groups are activist in relation to various issues. They are often consulted as are various professionals within a particular field. As such it is important for women to be in both formal and non-formal political institutions. This being so, I will now analyse how women being brought into the public sphere can aid in the fight against patriarchy within the laws, which has resulted in the inflation in legislation on women's bodies.

III. The Structure of the Legislature

It may be argued that the structure of the legislature has a part to play in the resulting over legislation on women's bodies. As the legislature may be argued shares in the pollutant of historical patriarchal under pinning's that are used to confine women to the private sphere. Legislatures across the world make decisions, create policies and pass legislation, which changes the lives of those living within a country. The state legislature is the site for debate on issues that often have immediate and direct effects on country's inhabitants. Legislators are elected into office to represent the views and advocate the positions of those people who elect them. Legislatures within modern societies are said to be created as a representative democracy, meaning that the legislatures make the effort to fully represent their constituents. To date, there still exist numeral inequalities within the legislative systems. For example, the population of the United Kingdom has 31.0 million women in comparison to 29.9 million men, which means that more than 50% of the population are women, yet with in the House of Lords, which is the United Kingdom's upper house, out of the 589 members only 147 are

women,[38] and in the lower house of Commons, there are 506 men with only 144 women.[39] This has led me to ask the question how will women to gain equal political opportunity when they are proportionally under-represented? Feminists have argued for descriptive representation, which states that if women make up 50% of the population, they should make up 50% of the state legislature as well (Phillips 1995). If women are numerically under-represented in the state legislatures, this poses a potential problem for public policy in today's world.

Research has shown that female state legislators view, change, priorities and create different public policy solutions compared with male legislators (Carroll 2002; Dolan).[40] The UK legislature is not the only instance of under representation, as only 24.3% of state legislators in the United States are women. Specifically, women hold 22.1%, of the state senate seats and 25%, of the state house seats (Center for the American Woman and Politics 2009). This means that even though women account for 50% of the American population, they only account for a quarter of the population of state legislators. This disproportionate representation has in the opinion of feminist is one of the contributory factors to the over legislation on women's bodies.

The composition of the legislator is important for the fact that researchers have found that that women legislators place different priorities than men do on certain types of legislation, and most specifically, they place their priorities with women's issues-based legislation (Dolan & Ford 1995; Kathlene 1994 & 1995; Saint-Germain 1989; Shapiro & Mahajan 1986; Thomas 1991).[41]

Shapiro & Mahajan (1986) started at an important position by asking within the general population as to what their priorities were compared responses of men and women in national surveys about policy-related questions in an effort to find gender differences among policy preferences. They ultimately found that women were much more supportive of what they define as 'compassion issues'. Compassion issues were those that aimed to equalize wealth and provision of healthcare. In contrast, men place importance on issues concerning infrastructure and 'big government'. Differences in men and women's policy preferences in the general public are suggestive that male and female legislators may also display different preferences. Indeed, a study performed by Sue Thomas (1991) highlighted the fact that women bring different priorities to the state legislature than men do. Data was gathered from members of the lower house of 12 different legislatures. The areas of gender differences examined in studies were gender differences in the actual types and categories of bills among legislators' priorities, and gender differences among the levels of success in passing traditionally women's issues-based bills. Women's issues bills were based on rights of women, and Sue Thomas discovered that in areas not traditionally women's issues-based, such as crime, education or the environment, women placed no higher priority on these

38 UK Parliament, <www.politics.co.uk/reference/house-of-lords-reform> (Accessed 1 June 2010).

39 House of Parliament, <www.parliament.uk/about/faqs/house-of-commons-faqs/members-faq-page2/1> (Accessed 1 June 2011).

40 R. Szala, *Gender-Driven Legislative Policymaking: The Case of Truancy*, <https://kb.osu.edu/dspace/bitstream/handle/1811/37293/DONE.pdf?sequence=1> (Accessed 1 June 2011).

41 *Ibid.*

issues than men did. Additionally, Thomas (1991) found that women are more likely than men are to introduce and successfully pass legislation that dealt with traditional women's issues.

From the above mentioned, it may be argued that where the legislature seeks to control women's bodies, women in power seem to make such issues their priorities, and it may be contended that if more women are in the seat of power, being the public sphere, the legal assault on women's bodies may be aborted if it is unnecessary and violates their rights. A game of numbers may be argued as necessary criterion to effect the needed changes in the fight against over legislation.[42] Affirmative action should be taken to increase the numbers of women in the legislature and political institutions; as such I am in support of the stance some countries have taken to introduce quotas in their legislature to ensure gender balance.[43]

IV. Political Parties

To curb over legislation on women's bodies, it is necessary for political parties to also introduce quotas for female representatives within constituencies. It is also imperative for political parties to introduce gender-friendly programs that incorporate women. This should be similar to those used to represent ethnic minorities. In an interview with Class colleague and Legislative Counsel Isabel Fremone, she confirmed that Uganda has successfully adopted such an approach and the approach is yielding positive changes as this has aided in the articulation of gender-based injustices through the introduction of quotas in the legislature.[44]

V. Civil Society

The engagement of civil society is another organ through which women can come into the public sphere in order to pressure legislative changes, as this will aid in holding the state accountable on gender-related issues that have resulted in the inflation in legislation on women's bodies. Some of these groups are represented through non-governmental organization, Interest groups and various charitable organizations. Properly organized interest groups have been known to filter into the legislative process through consultation and media advocacy. In addition, some groups possess specialist knowledge that is required to pressure the legislative assaults on women's bodies, in a manner, that will effect change. Evidence suggests that it is precisely where politicized feminist organisations have built skills for engagement that women have been able to exercise voice most effectively. In the northeastern Brazilian state of Pernambuco, for example, the feminist movement has successfully pursued political projects within these spaces, with other movements. Yet, in the absence of organizations such as these, women face considerable difficulties in overcoming cultural obstacles to substantive

42 R. Mohanty, 'Gendered Subjects, State and Participatory Spaces: The Politics of Domesticating Participation', *in* A. Cornwall & V. Coelho (Eds.), *Spaces for Change? The Politics of Participation in New Democratic Arenas*, Zed Books, London, 2006.

43 It should be noted that countries such as Iraq have now followed this path.

44 Reservations have been used in Uganda since the late 1980s to ensure that at least one Member of Parliament (MP) from every district in the country is a woman.

inclusion that has the potential to filter into our laws resulting in over legislation on women's bodies.[45]

E. Drafting Activism and Over Legislation on Women's Bodies

I. The Role of the Drafter in Combating Over Legislation on Women's Bodies

"Legislation is amongst others a desire to change the social setting of a country";[46] therefore, according to Thornton, the drafter plays a very important role in every aspect of legislation from the type, contents, structure of legislation to even deciding whether there should even be legislation at all.[47] In addition, the drafter is strategically placed, due to the fact that part of his or her duty is to undertake an in-depth, study of the issues through interacting with policy makers, relevant experts, politicians and as well as other stake holders; as such, the drafter is in apposition to exercise vigilance in relation to the reality that we live in a relatively male-dominated, patriarchal society, and due to this fact he or she must be aware that the past ideologies pay a very crucial role in present society. Here he or she should realize that it is necessary to exercise vigilance in scrutinizing a piece of propounded legislation to ensure that the legal system is rid of the ghost of patriarchy which has resulted in our current problem of over legislation on women's bodies.

The drafter must bear in mind that part of his or her duty is to lay down rules of conduct for the guidance of society. Therefore, the drafter in translating policy into law should ensure that vigilance is exercised in ensuring that society is guided to the fact that women are equal to men and as such male domination has no place in modern society and patriarchal systems have no right to suppress female autonomy by seeking to control every fibre of a woman's being with legislation. The drafter must therefore be aware of the reasons for passing the propounded legislation.[48] In this context, it is a fact that some bills are purely motivated by patriarchal underpinnings, and as such care must be taken in deciding as to whether, legislation is the only possible solution to the current social hypothesis, this is to guard against over legislation of women's bodies. It is also necessary for the drafter to guard against adverse social impact in relation to women and their autonomy in drafting legislation; for example, criminalization has not had a reputable track record in solving noncompliance to legal provisions and has been argued to create more problems than solutions.[49] From the above-mentioned reasoning on legal infliction on women's bodies, it can be seen that women's autonomy has been criminalized by the legal system in the name of protection.

45 B. Agarwal, 'Re-sounding the Alert: Gender, Resources and Community Action', *World Development*, Vol. 25, No. 9, 1997, pp. 1373-1380; M. Mukhopadhyay & S. Meer, *Creating Voice and Carving Space: Redefining Governance from a Gender Perspective*, KIT, Amsterdam, 2004.

46 C. Stefanou & H. Xanthaki, *Drafting Legislation* (1st edn), Ashgate, Aldershot, 2008.

47 *Ibid.*

48 *Ibid.*

49 A. Seidman, R.B. Seidman & N. Abeyesekere, *Legislative Drafting for Democratic and Social Change*, Kluwer Law International, London, 2001.

II. Quality in Legislation and Its Link to Inflation in Legislation on Women's Bodies

Stefanou and Xanthaki have argued that a bill lacks quality when it offends the rule of law, as such laws that oppress women's autonomy lack the essence of quality, as women are not treated equal to men by legislation, and as such the male species are placed above the law, this is coupled with the fact that, for years feminist and women's rights activist have griped with regard to the over legislation on women's bodies by some of these bills concerning areas I have mentioned above, as legislatures have continually used patriarchal standards to reject the cries of women over the years, it may be argued that such bills lack justification. Hannah Pitkin, Haber as Rawls have put it the bills proponent must justify the bill across the aisle to rational skeptics being women's rights advocators as well as its proponents.[50] To date women's cries with regard to inflicting control through legislation has been ignored, and instead of a decrease in legislative control on women's bodies, legislatures around the world continue to injure the legal system by inflating legislation on women's bodies. It should be noted that legislation that does not take into account the views of interested parties lacks quality.[51] In addition, Stefanou and Xanthaki have argued the following:

> That the tradition of independence in relation to drafting as a profession rests on the notion that a drafter can and should be able to refuse to draft bills that contravene the rule of law.[52]

Here it may be argued that drafting as patriarchal underpinnings are in breach of the rule of law drafters should refuse to draft legislation that clearly flies in the face of women and their autonomy.

In addition, patriarchy is a system that is invisible to the naked eyes; therefore, drafting activism is necessary to engage inputs into the system of legislation in order to ensure that women voices are heard when propounding a piece of legislation, as such to ensure quality in legislation legal systems should stipulate doctrine of ultra vires, which gives stakeholders a ground to complain to a court or tribunal if they are not consulted on any piece of legislation, which comes in conflict with women's autonomy. In support of quality in legislation and its link to over legislation of women's bodies, a technique that some jurisdictions have used is to seek that the legislative text in question states that the legislative solution is necessary and justified; here this technique may be used to curb over legislation on women's bodies.[53]

50 Stefanou & Xanthaki, 2008.

51 Professor H. Xanthaki, 'The Problem of Quality in EU Legislation: What on Earth Is Really Wrong?', http://sas-space.sas.ac.uk/333/1/CMLR%20quality%20EU%20legislation.pdf (Accessed 26 August 2011).

52 Stefanou & Xanthaki, 2008, p. 167. Stefanou & Xanthaki argues that, for example, a drafter could refuse to draft a bill imposing capital punishment if he disagrees with it, and a similar approach could be taken on over legislation on women's bodies in the quest to control women's autonomy.

53 Belgium, France, Germany and Portugal have used this technique.

In addition to the above mentioned, many bills in relation to women's bodily functions may be deemed to lack quality and, as such, are 'bad legislation' for the fact that the bill's contents include confusing or purely political statements in their quest for control of women's bodies. For example, the bill I mentioned in the forgoing on abortion the wording being "To ensure that women seeking an abortion are fully informed regarding the pain experienced by their unborn child". Here it can be argued that this is a purely politically motivated bill that has the intention to frustrate a woman intending to have an abortion, as the bill seeks to use the issue of the foetus feeling pain. As a reason for the woman to change her mind, the bill further insults women by comparing their bodies to that of other animals. In addition, the bill refers to 'unborn child'. This is an obscure term as a foetus is not an unborn child; as such, the word foetus would have been a better word to use here as it has a single meaning so as not to cause confusion.[54]

Professor Xanthaki has argued in her presentation paper on "The Problem of Quality in EU Legislation" that, "under common drafting rules political statements have no place in legal texts" and that bad legislation which is often the case in legislation that seeks to control women's bodies leads to vague, conflicting, inaccurate provisions, over-regulation, which damages the credibility of the legislator. Here the ignorance or avoidance of quality in legislation may be argued to be a contributory factor to the over legislation on women's bodies.[55] Bad legislation can be responsible for lack of clarity in the role of institutions in an ever changing environment, especially with reference to the increasingly complicated legislative process.[56] This has caused institutions within society to think that it is their role to control women's bodies at all cost.[57] Therefore, drafting activism should seek to draft against political statements as they relate to women's autonomy.

III. The Language Used in a Bill

In accordance with Thornton, the drafter as the architect of social structures and word smith can draft to do and undo as such[58] drafting activism can penetrate patriarchy by using appropriate words within a bill. There has been a long-standing battle between the rights of the mother and that of the embryo or foetus as such, when propounding bills on issues relating to women's bodies skilful choice of words must be used as *language* has always played a key role in the process of framing.

Women's rights activist have argued that in order to not exert forceful legislative pressures on women bodies, scientific descriptions such as foetus or embryo should be used, as the use of words such as 'baby', 'unborn baby', 'unborn child' or even 'pre-born child' makes it easier to claim that life begins at conception and reinforces the concept of the personhood of a foetus denying women autonomy

54 This would uphold the rules of plain language.
55 Xanthaki, 2011.
56 *Ibid.*
57 *Ibid.*
58 G.C. Thornton, *Legislative Drafting* (4th edn), Butterworths, London, 1996, at 125.

over their bodies. This controlling language has the effect of pressuring an undecided pregnant woman to decide against abortion, since often women intending to bring a foetus to term refers to the foetus as a baby and feels conflict about destroying a child.[59]

Here the essence of clarity, unambiguity in language should be the drafters priority as this has the potential of leading to bad legislation that often results in bad application of the law. This is important in the fight against over legislation on women's bodies due to the fact that often the Judiciary is patriarchal in structure and belief, and as such a piece of badly drafted legislation has the potential to allow judges to further pass laws on women's bodies within their judgments, using the doctrines of binding precedent and other legal devices. In fact Professor Xanthaki argues that badly drafted legislation will lead to bad application of laws.[60]

IV. Conflict of Interest

Conflict of interest may also arise where legislation is being passed, and it has the capacity for making a financial gain, as such systems should contain a higher level of scrutiny, when an official propounds a bill that has the capacity to confer a financial benefit to them or organizations they are connected to. Here Codes of practice should be engaged with regard to legislation that has the capacity for individuals and organizations to benefit from the control of women's bodies.[61]

F. Conclusion

Laws create and regulate our social and legal institutions; therefore, if the laws are based on antique social norms, our legal institutions are out of touch and out of date. In order to tackle the inflation in legislation on women's bodies, it is imperative for governments through the legislative process to tackle the dysfunctional social institutions and their formal legal institutions that engage law and politics. To date, institutions steeped in patriarchal traditions continue to torment legal institutions and as such the educational repercussions of laws continue to throw control on women's bodies through over legislation. In winning the fight against over legislation on women's bodies, it is imperative for lawmakers to conceive and bring into being a new set of ideologies through education and reformation of the outdated institutions by implementing active measures that will decontrol and decriminalize autonomy of women's bodies. It is important for legislators to note that as crime is never detached from social problems criminalization for every aspect that concerns women's bodies is not the way forward as it is a misconception to think that law always embodies justice as per the words of Sideman and Sideman.[62] Having said that I have proven my hypotheses as can be seen there is a prevailing inflation in legislation on women's bodies due to the

59 P. Chamberlain & J. Hardisty, 'Reproducing Patriarchy: Reproductive Rights under Siege', *The Public Eye Magazine*, Vol. 14, No. 1.

60 Xanthaki, 2011 .

61 Seidman, Seidman & Abeyesekere, 2001.

62 A. Seidman & R.B. Seidman, 'Drafting Evidence Based Legislation', *ILTAM*.

age-old phenomenon of patriarchy. This is undoubtedly sad because women's reproductive autonomy is not only intrinsically valuable for women, but also instrumentally valuable for the welfare of all humankind. As such drafting activism must take into consideration the fact that amongst the obstacles to modern social reformation is the concept of patriarchy, which has the potential of disempowering, which flies in the face of good governance as such drafters should seek to rid the legal system of the pollution of patriarchy in its various forms by using drafting techniques that will assist in the fight against over legislation on women's bodies. As can be seen from the Canadian constitution, the constitution specifically attacked gender in equality when it stated that "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".

This is in my opinion an example to follow because unless our laws specifically speak to a particular social situation, things will never change for the better and over legislation will continue to plague our legal system at the expense of women's autonomy. Here it should be noted that as the constitution is the highest source of law, it is important for it to send a clear message in terms of equality for women. This is an example of the educational role of legislation speaking against patriarchal systems, resulting in a ripple effect within the Canadian legal system, due to which the over legislation of women's bodies in the area of abortion has been curtailed setting a precedent for other jurisdictions to follow.