

CHAPTER ONE

INTRODUCTION

*And the Lord GOD said, it is not good that
man should be alone; I will make him
a mate for him.*

Genesis 2:18¹

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1.1 INTRODUCTION

The status of women has, through the ages, been a cause for grave concern in every culture and in every society. In some areas of the globe, it has passed the stage of sympathetic concern and has entered an era of aggressive feminism. The subjugation of women and children is built into the myths and folklore, in the culture, tradition and in the way of life of many human communities. This subjugation stretches back, all the way, to the dawn of pre-historic culture.² The slave trade and the subjugation of blacks in America began only in the sixteenth century, much, much later than the subjugation of women.³ This early and

¹ *Holy Bible* King James version (1611).

² Oputa (1990) 2.

³ *Ibid.*

elementary dislocation of the sexes struck at the very meaning of human being, and has poisoned and distorted all subsequent relationships.⁴ By thus distorting “the female”, “the male” is also distorted and thereby humanness itself, since “male” and “female” are the essential correlatives of humankind. It is not possible to distort one half of a correlative without necessarily distorting the other. What the shape, history and development of world civilisation would have been had this split not occurred, can only be imagined.⁵ The exploration of this distortion and split at the core of humanness is very necessary to human self-understanding. According to Rosemary Reutter: “The women’s movement is engaged in an effort to reach behind the history of civilisation to a lost alternative”.⁶

To prove the origin of sexism is to prove the foundations of all the human institutions, which have been afflicted and affected by this pre-medieval blight. The result of such a probe may open up new frontiers, but one may soon discover that those new frontiers are too near the rear, so much so that ultimate and total success may be as distant as the pre-historic origins of sexism. Some proof is necessary. Sexist power patterns have to be noted before any dismantling can be attempted. In dealing with structural injustice (and sexist power patterns are examples of such injustice) one should note that ensconced privileges have never yielded their places voluntarily in any society. It will therefore amount to shallow utopianism to think that we can do away, overnight, with popular mentality and prevailing social, mental, moral and even religious prejudices against the female in a male dominated society.

The war between the sexes has been raging on since the beginning of humanity, but it has become more pronounced in recent times. The Biblical account of creation has helped to maintain male domination. In this account, God created man first. Woman was created when God perceived that man needed a helper. This account of creation has helped to perpetuate male domination over women.

Fifty-two years after the Universal Declaration of Human Rights (UDHR) had been adopted, governments all over the world are yet to acknowledge the pervasive violations of women’s rights and their duty to stop them. There are at present visible women’s right movements and

⁴ Oputa *op. cit.* 2.

⁵ Reutter (1975) 25.

⁶ *Ibid.*

governments' articulation of policies supporting women's rights, yet many governments fail to reform laws that discriminate against women and practices that deny women's rights.

Some progress has been made in the struggle to bring human rights protections to bear on women's lives. For example in 1998 the International Criminal Tribunal for Rwanda's 1994 genocide convicted Jean-Paul Akayesu of sexual violence, thereby showing that there can be justice for women raped in conflict.⁷ Many changes have occurred as a direct consequence of women's activism, and women's rights are now recognised as human rights.

Despite sporadic advances, women continued to see their ability to enjoy basic human rights challenged at every turn. Governments proclaim their commitment to women's rights and yet pursue policies that undermine them. Many of the countries that have sworn to combat sex discrimination by ratifying the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) continue to deny women's rights. Countries such as Algeria, Egypt, Morocco and Tunisia continue to deny women full citizenship. These countries reserved the right to continue discrimination against women despite ratifying CEDAW.

It is true that CEDAW is the second highest ratified human rights convention, after the Convention on the Rights of the Child (CRC). However, it is also true that CEDAW contains the most reservations of all international human rights instruments. Countries like Afghanistan continue to challenge openly the notion that universal human rights extend to women. The Taliban authorities in Afghanistan continue to confine women to their homes, cut off their access to education and health care, and beat them up in the street.

Women's right movements all over the world embrace the universality of human rights as a guarantee of respect for their dignity and equal treatment as human beings. Women's rights activists captured the attention of the international community at the 1993 United Nations (UN) Vienna World Conference on Human Rights and won recognition that women's rights are human rights. At the 1995 UN Conference on Women in Beijing, governments agreed that respect for women's rights must be the cornerstone of efforts to improve women's political, economic, and social status. Despite this change in the rhetorical climate, women

⁷ See generally Morris & Scharf (1998).

continued to be frustrated in their efforts to make the structures of government live up to the UDHR. Implementations of women's rights remain slow and inconsistent, reflecting the unwillingness of international actors to change the structures that accommodate and encourage daily abuses of women's rights.

Governments, especially in Africa, continue to do very little to remedy violence and discrimination against women, two significant indicators of women's secondary status in societies around the world. The single conviction for sexual violence in Rwanda set a precedent, but changed little for thousands of women awaiting justice from the ad hoc UN tribunals.

In spite of the bleak future of women's human rights painted above, the status of women has seen some positive changes. Constitutions in both Nigeria and South Africa recognise equality between the sexes and both countries have done a lot to improve the status of women in the work place. For example, equal pay is now being paid for equal jobs. Efforts have been made to bring conditions of service of women in conformity with their male counterparts. In both countries, conditions of service for men and women are now harmonised. Women have come a long way from the traditional view of them as collateral to men, to the modern human rights dispensation whereby women are recognised as bearers of rights.

1.2 IMPORTANCE OF THE WORK

In these days of greater awareness of human rights, the topic of this research "A Comparative Study of Aspects of Gender Equality Under Nigerian and South African Law" is very important. It is becoming obvious that women have been neglected for far too long. Article 55(c) of the UN Charter provides for "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

Most human rights instruments prohibit discrimination on the basis of sex, among other grounds. In spite of this, women are still being discriminated against both de jure and de facto. This study has as its objectives the comparison of some aspects of gender equality in Nigeria and South Africa. The topic is important especially now that attention is being

focused on women's rights the world over. In South Africa, the focus has shifted from racial inequality to that of equality on the basis of sex and gender. Women, especially rural black women, have borne the burden of discrimination in South Africa. The equality provision of the South African Constitution, including the provision on affirmative action, is aimed at addressing some of the injustices of the past.

In Nigeria, there have always been problems with the realisation of human rights under a military administration. It is however ironic that successive military governments have done more to improve the status of women than any other government in Nigeria. In 1985 the military government of General Ibrahim Babangida created the Office of the First Lady, the Better Life for Rural Women programme, and the National Commission for Women. In 1994, the government of General Sanni Abacha started the Family Support Programme and the Family Economic Advancement Programme. Ministries of Women Affairs are created at both federal and state levels. All these agencies have assisted in creating awareness about women's rights and the Family Economic Advancement Programme is aimed at the alleviation of poverty amongst women in particular. For the first time in the history of Nigeria, women's issues appeared on the national agenda.

The study hopes to contribute to the development of human rights of women in both Nigeria and South Africa and the establishment of an African jurisprudence on women's human rights. The work sets out to be a legal source on the rights of women in Nigeria and South Africa, and may serve as a basic text on women's rights in Nigeria and South Africa. The work establishes the fact that there are also several experiences that could be exchanged from both jurisdictions. Finally the author hopes the study will be a ready source of legal bibliography on the human rights of women in Africa.

1.3 REASONS FOR COMPARISON

The author has chosen to compare women's rights in Nigeria and South Africa, for a variety of reasons:

- Nigeria and South Africa are both sub-regional powers within the continent of Africa.

- Secondly, both jurisdictions have a multiplicity of legal systems. In Nigeria there is a dual legal system, which combines English law with African customary law. Islamic law is a species of customary law in Nigeria. There are also many different forms of customary law. South Africa has a complex common law comprising the English common law and Roman Dutch law, on one hand, and very diverse indigenous law systems comprising African customary law, Hindu/Muslim law, and Jewish law, on the other hand.
- Thirdly, the racial problems in South Africa and the strong ethnic problems in Nigeria are similar. While the main problem in South Africa was and still is racial conflict, the main problem in Nigeria remains that of ethnicity and the North/South dichotomy. South Africa has devised many ways of solving the racial conflict, like the Employment Equity Act,⁸ the Promotion of Equality and Prevention of Unfair Discrimination Act⁹ and affirmative action provisions in the Constitution. Nigeria has the policy of “federal character”.¹⁰ This study examines these devices and how effective they are in solving the racial problems in South Africa and the ethnic problems in Nigeria respectively.
- In the fourth place, South Africa has a new democratic Constitution, which is being hailed as one of the most progressive Constitutions in the world. Nigeria is also now enjoying a constitutional democracy after decades of military misrule. The equality provisions under the Constitutions of both countries are also compared.
- In the fifth place, both countries are committed to alleviation of poverty, especially poverty among women. African customary law exists in both jurisdictions. This work established the link between customary law as practised in Nigeria and South Africa. African customary law is well known for its adverse effects on the rights of women. Institutions such as polygamy, the levirate, sororate and widow inheritances are examined.

⁸ Act 55 of 1998.

⁹ Act 4 of 2000.

¹⁰ The concept of the “federal character” is discussed in Chapter 3 below.

- At present there is no work comparing the rights of women in Nigeria and South Africa.
- Nigeria and South Africa are among the most disproportionate countries in the world, in terms of distribution of wealth. This is due largely to the effects of apartheid in South Africa and military misrule in Nigeria, which has concentrated wealth in the hands of a few military officers corrupt officials and some individuals who have benefited from the non-transparent government contracting systems.

1.4 OVERVIEW OF CHAPTERS

The work is divided into 5 parts (A - E)

Part A – Introduction

This part consists of one chapter.

Chapter One

This is the introductory chapter, comprising of a brief overview of the work, its scope and limitations, the objectives of the study, the methodology adopted, a survey of work already done in this field, definition of terms and the proposed contribution of the study. Furthermore, the theoretic stance adopted in the study is spelt out here.

Part B – International human rights protection of women in Nigeria and South Africa

This part consists of one chapter.

Chapter Two

This chapter focuses on international human rights protection, with particular reference to the human rights of women. Regional protection of human rights of women is also covered with particular attention focused on the domestic impact of the applicable treaties ratified by Nigeria and South Africa.

In this chapter, a brief overview of all major international human rights instruments dealing with the human rights of women is considered. Nigeria and South Africa have both ratified CEDAW. This work examines what both countries are doing to prevent all forms of discrimination against women and whether they are fulfilling the reporting obligations under the Convention. Implementation of CEDAW in both countries are also considered. The comments of CEDAW Committee in respect of the country reports of both countries are compared.

The chapter also focuses on the rights of women under the African Charter on Human and Peoples' Rights. The proposed Protocol to the African Charter on human rights of women is also considered.

Part C – Legal and constitutional framework in Nigeria and South Africa

This part consists of one chapter.

Chapter Three

In this chapter a brief history of Nigeria and South Africa is given. Their legal systems, the equality provisions under the Constitution and the institutions charged with the promotion of human rights in general, and women's rights in particular are discussed. A comparison of the legal and Constitutional framework in both countries is also undertaken in this chapter.

Part D – Substantive law

This part consists of six chapters. The part compares the substantive law in Nigeria and South Africa in relation to certain legal aspects that have significant impact on women.

Chapter Four

This chapter focuses on socio-economic rights in Nigeria and South Africa. The socio-economic rights of women are very important when it is considered that 7 out of 10 world's poor are women. The chapter focuses on the alleviation of poverty among women, and the role of the legal system in addressing this problem. This chapter review the mechanisms for poverty alleviation in both countries and progress made in this respect are monitored.

Chapter Five

Reproductive rights of women in both countries are examined, the abortion laws in both countries are also considered. Female Genital Mutilation (FGM) is discussed. Maternal health and mortality in both countries are compared.

Chapter Six

This chapter is dedicated to a discussion on violence against women in both jurisdictions. The impact of international human rights law on violence against women is also discussed here. Special attention is focussed on gender related offences like rape, marital rape and domestic violence.

Chapter Seven

This chapter is devoted to the political rights of women in Nigeria and South Africa. This chapter also discusses the effects of religion (Islam) in women's participation in politics especially in Northern Nigeria. Some states in Northern Nigeria have recently adopted Islam as the state religion contrary to the express provision of section 10 of the 1999 Constitution of the Federal Republic of Nigeria. The work also examines the effects the adoption of Shari'a law is having on women in these areas.

Chapter Eight

This chapter focuses on customary law marriages, in both Nigeria and South Africa and their effects on women. A comparison of customary law marriages in both jurisdictions is also undertaken

Chapter Nine

This chapter focuses on customary law in Africa and its adverse effects on the human rights of women. The chapter considers harmful practices against women. Widowhood in Nigeria and South Africa are considered. The customary rule of interstate succession and its adverse effects on the proprietary rights of women are also considered.

Part E: Conclusion and recommendations

This part consists of one chapter.

Chapter Ten

This is the concluding chapter. In this chapter, there is a general review of all the points articulated in the study. Similarities and differences between women's rights in Nigeria and South Africa are drawn. Reasons for the differences are enumerated and finally recommendations are offered on how to improve the equality of women in Nigeria and South Africa.

1.5 CONCEPTUAL CLARIFICATIONS

In this study, the following terms occur frequently and the study is predicated on terms such as equality, gender, sex, feminism, patriarchy and gender discrimination. It is therefore necessary to explain them within the context of this work.

1.5.1 Equality

Equality is the condition of possessing substantially the same right, privileges and immunities and being liable to substantially the same duties.¹¹ Equal protection means equality under the same conditions and among persons similarly situated.¹² Classifications must not be arbitrary and must be based upon some difference in classes having substantial relations to legitimate objects to be accomplished.¹³ The author is of the view that men and women should have equal access and opportunities. This work examines whether in reality there is no discrimination between men and women.

Equality is a difficult and deeply controversial social ideal. The idea of equality is a moral idea that people who are similarly situated should be treated similarly. The logical correlative is the idea that people who are not similarly situated should not be treated alike. The most famous expression of this idea is that of Aristotle (384-322BC). According to Aristotle, equality in morals means that those things that are alike should be treated alike, while things that are unlike should be treated unlike in proportion to their unlikeness.¹⁴ Equality is not simply a matter of likeness. It is equally a matter of difference. It is important that those who are different should be differently treated. In certain cases it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.¹⁵

Treating people equally (formal equality) may in certain situations reinforce rather than redress, social disadvantage. Formal equality poses the question of whether individuals are to be similarly treated in broad and abstract terms. It focuses on fairly superficial indicia of

¹¹ See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

¹² *Ibid.*

¹³ See Chapter 2 below for more on equality, formal and substantive equality.

¹⁴ Nicomachean Ethics V.3.1131a-1131b (Translated by Ross W 1925) quoted in Chaskalson *et.al.* 14-3; See also Westen (1982) 95 *Harvard LR* 537 at 543.

¹⁵ See, *e.g.*, *R v Big M Drug Mart Ltd* (1985) 1 SCR 295 at 347, *Andrews v Law Society of British Columbia* (1989) 56 DLR 1 at 10; *Edmonton Journal v Alberta (Attorney General)* (1989) 2 SCR 1326; at 1331-2; *Minority Schools in Albania* Case No. 82 Advisory Opinion of 6 April 1935 by the Permanent Court of International Justice in Annual Digest and Reports of Public International Cases 1935-1957 at 389-90; *The Belgian Linguistic Case* 1968 1 EHRR 252 at 284.

individual similarity and thereby fails to recognise underlying patterns of group-based disadvantage, which belie the appearance of equality. The existence of these deep-rooted, pervasive and self-perpetuating patterns of inequality, in other words structural inequality, means that actual social equality cannot be achieved by the application of apparently neutral standards to all.¹⁶

A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all persons in a formally equal way is not going to change the patterns of the past, for that inequality needs to be redressed and not simply removed.¹⁷ Substantive equality means that those who are deprived of resources in the past are entitled to an 'unequal' share of resources at present.¹⁸ In truth this is no more than an application of the Aristotelian injunction that equality requires that those who are not alike should be differently treated in proportion to their difference. The value of a contextual approach to equality is that it helps us to identify those differences, which require differential treatment in order to achieve actual, substantive equality.

Gender equality means equality between women and men, including: equal employment, equal opportunities, equal access to resources and regards, equal power to influence decisions made within society. Gender equality does not mean that men and women are the same, but that opportunity and life chances will not depend on their gender.

1.5.2 Gender

¹⁶ *Prinsloo v van der Linde* 1997 (3) SA 1012 (CC); *Symes v Canada* (1994) 4 SCR 695.

¹⁷ *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), (para 41); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC); *Pretoria City Council v Walker* 1998 (2) SA 363 (CC); *Fedsure Life Assurance v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC); *Lotus River Ottery Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (C).

¹⁸ *Supra*.

The term 'gender' refers to the socially constructed roles of women and men in public and private life.¹⁹ Gender also refers to the economic, social and cultural attributes and opportunities associated with being male or female: the family, the workplace and in the public sphere.²⁰ What society considers the economy, religion, culture and tradition shape gender attributes. These attributes change as society changes. Historically, women's gender roles have been accorded less political, economic, social and cultural value than those of men. To varying degrees in all societies, discrimination against woman is systemic and reflected in the structure and functioning of public institutions, de jure and de facto family relations, access to economic resources and legal systems.

Women's ability to exercise and enjoy their human rights is shaped not only by gender, but also by factors such as race, class, ethnicity or other characteristics, as well as the general factors affecting the human rights situation in a particular context. For example, the continued growth in the feminisation of poverty both reflects and reinforces systemic gender discrimination.

1.5.3 Sex

Sex is the sum of the peculiarities of structure and function that distinguishes a male from a female organism, the character of being male or female.²¹ Sex also means the biological differences between a male and a female as opposed to gender, which is generally used to distinguish the cultural and social characteristics of being women and being men.

Sex is the biological category: it refers to the division of male and female. Gender however is the social-cultural category. It refers to the expectations, attitudes and ideas that attach them to 'male' and 'female'.²² To be female is simply to have a certain anatomy. To be a woman is to be surrounded by a whole set of gender assumptions: ideas of femininity appropriate roles and behaviour. The problem is that most people do not recognise the difference between sex and gender. They see all their attitudes about being a woman as part

¹⁹ Storkey (1987) 108.

²⁰ United Nations Handbook on Gender (1997).

²¹ Black Law Dictionary (1990).

²² Corrin (1999) 246.

of the natural order of things. They are 'givens'. The ideas that people have of women and men are culturally conditioned and socially constructed and are not necessarily true.

Feminists reject the idea of male superiority arguing that the basis of such theorising is faulty. The dualistic nature of Western thought has accepted various binary oppositions. According to Diana Coole, these binary oppositions have structured debates about women and their gender: mind-body; subject-object;²³ reason-passion (or appetite); form-content; culture-nature; order-chaos; and so on. Correlating to them is a further polarity; male-female. Indeed this is often treated as the primary dualism and used to illustrate, or give meaning to, the rest.

These pairs are generally conceived in terms of good or bad, superior or inferior so that the first mentioned (man) becomes a standard or norm, identified by what it is not (woman). The important task therefore is to uncover these ideas and assumptions about the sexes: to examine what are these gender stereotypes in the society. "What is it to be manly?" Most people would have a set of ideas including some of the following: aggressive, dominant, brave, self-reliant, active, persistent, rational, and so on. Men are more scientific than women are, and less emotional. "Femininity", on the other hand is being passive, weak, flatterable, gullible, affectionate, sensitive, less rational but more caring than a man. These stereotypes, and many others, are not merely widely held, but form the basis for the way many people live. They are used by advertisers to sell their products, by schools in organising their timetables, by TV writers in scripting their characters, by clergymen in writing their sermons, by judges in giving sentence and by parliamentarians in passing laws. Most of people allow stereotypes to structure their behaviour.

It is important to ask why these stereotypes persist? The feminists believe it is because they are part of the patriarchal culture; they are the way men justify their domination of women; they are the Court of appeal for behaviour and laws which if applied to men themselves would be seen as blatantly unjust. Women have been denied many things based on these assumptions. They have been seen as too irrational to study law, too feeble to take on a 'man's job', too unreliable to be given the vote, and too emotional to have their finger on the

²³ Coole (1994) 1.

button.²⁴ At the same time rigid assumptions about what it is to be a nice girl, a clean housewife, a good mother, an efficient secretary have all reinforced women's roles as subservient to men. Ironically, women have fulfilled their role expectations all too well, and the predictions have become self-fulfilling.

This division between sex and gender means that women should no longer accept the 'normal' as the 'natural'. An appeal to the 'natural' has always been a stock response of patriarchy. It is natural for a woman to do the housework. It is natural for a man to earn more. It is natural for boys to be mechanical, for girls to like dolls. But this 'natural' almost always has nothing to do with 'nature' or with biology. More often than not it is merely a statement of what is normal. Yet what is normal is to see things as a man sees them. To be normal is to be male. "Why can't a woman be more like a man?"

A challenge to the male norm has now come on several fronts. Science, social science, history and the arts have been displayed as predominantly male. Sociology and psychology have traditionally been full of male assumptions. What has been presented as neutral, objective data, especially on women, are studies done by men with very male-centred methodologies? History was always the story of men (his-story). Economics ignored the enormous part played by women in the domestic economy. The psychology of woman was almost invariably written by men. Even studies on motherhood and women's sexuality have been carried out by men and, as far as the feminists are concerned, with disastrous results.

1.5.4 Patriarchy

Patriarchy originally means 'rule by the father'.²⁵ This is the right of the first-born male to the family property. It is a system whereby family property is devised to the first-born male and where the first-born male is dead the property goes to the deceased first-born male. Under this system women are never considered. Patriarchy has also been used by feminists to mean the use and abuse of power by men and male-dominated ideas and institutions over women.

²⁴ *Ibid.*

²⁵ Corrin (1999) 244.

Patriarchy exists everywhere; it is the 'prevailing religion of the entire planet'²⁶ Women live in a male-controlled world, and this control is exercised not merely on the fringes of their experience, but in the very act of identifying themselves as women. Women have to define who they are through male eyes and have to win male approval or pay the price. Patriarchy is the power structure visible everywhere at work, in the home, at school, in the Church, in the market and in the public sphere. Although there are women prime ministers, head teachers, administrators or managing directors, they are in minority. The mere presence of women in decision-making capacities does not challenge patriarchy, because the vast majority of these women are themselves upholding and reinforcing patriarchy by the kinds of decisions they make. Some of the women who had been able to overcome the influence of patriarchy and are occupying important positions, could be described as social-male, for in their attitudes they are acting like men, for they believe that only in so doing can they be regarded as counterparts by the men. The system is bigger than any individual. Indeed any individual woman opposed to patriarchy is unlikely to be in a position to make her opposition felt. She will have had to play the male game to achieve any status in the first place. Patriarchy dominates everything.²⁷

According to Rich, patriarchy is a familial-social, ideological, political system in which men by force, direct pressure, or through ritual, tradition, law and language, customs, etiquette, education and the division of labour, determine what part women shall or shall not play and in which the female is everywhere subsumed under the male.²⁸

Patriarchy is a difficult reality of male control, as it permeates everything including how we speak and think of ourselves. Analyses of patriarchy have shown the potent destabilizing force that feminism can become when challenges are made to the core of our personal lives as political. By challenging politics as relations of power within our lives, feminist critiques caused people to consider all forms of relationships as political and therefore able to be criticized and changed. The phrase 'the personal is political' is used in such contexts to emphasise the breadth of political realities and how these can be analysed and changed. For Zillah Eisenstein the public/private split is vital in this regard:

²⁶ See Daly (1978) 39.

²⁷ Storkey *op. cit.* 93.

²⁸ Rich (1977) 57.

The division of public and private life as one that differentiates the woman (private) from the man (public) is the overarching ideological tool of patriarchy. Patriarchy is ultimately the politics of transforming females and males (biological sex) into women and men (politicized gender), while differentiating the woman from the man by privileging the man.²⁹

1.5.5 Gender discrimination

Gender discrimination is any distinction, exclusion or restriction made on the basis of sex, pregnancy, marital status, domestic or family responsibilities or sexual orientation, which is aimed at or has the effect of impairing or nullifying the recognition, enjoyment or exercise by women or men, irrespective of their marital status on the basis of equality between women and men, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.³⁰

Gender discrimination also include any act or conduct which has the effect of creating or sustaining systemic forms of domination and disadvantage which perpetuate and reinforces unequal gender relations and prevent women from being able to develop to their full human potential and participate fully in society.³¹

The writer chooses to discuss gender equality instead of sex discrimination because gender discrimination also includes discrimination on the basis of sex, pregnancy and marital status amongst others.

1.6 PHILOSOPHICAL APPROACH ADOPTED IN THE STUDY

The approach adopted in this study is similar to those of feminists, especially the radical school of feminism that located women's oppression in patriarchy, culture and biology.

²⁹ Eisenstein (1984) 16-17.

³⁰ United Nations Handbook on Gender (1997).

³¹ Storkey *op. cit.* 104.

Women all over the world experience discrimination and inequalities. While feminists may not agree about the causes of oppression, they all agree that women are oppressed and that something must be done to stop the oppression and address all the injustices women have suffered in the past and are still suffering in order to have a more egalitarian society.

This section discusses feminism and feminists' legal theories. The writer traces the inequality of women from the liberal feminism to the social feminism and concludes that the radical feminists' view best explain the dichotomy between men and women. In this study therefore the radical feminists position that women oppression is rooted in patriarchy, culture and biology is adopted.

Feminism is the philosophical belief that advocates the equality of women and men and seeks to remove inequalities and to redress injustices against women.³² Feminism is not a monolithic ideology; feminist theory embraces a variety of views on the nature of women and argues for a pluralistic vision of the world that regards as equally important the experiences of women of all races and classes.

Feminism has no single theory or form of practice, but consists of many variations. Feminists generally agree that the inequalities between the sexes that exist throughout the world are unacceptable - and that they must be understood in order to be reduced and ultimately, done away with. Beyond this consensus there is much debate - about the primary causes of women's subordination, whether there are more differences than similarities amongst women themselves so that all generalisation involves serious distortion, and whether there are significant differences between women and men to which feminism must pay attention if equality between the sexes is to be achieved.³³

Feminism works from the assumption that gender is a social construct created within a hierarchy of male domination and female subordination. Feminism arises from this initial premise and, in spite of the divergent views among feminists, this is the point of reference on

³² Richards *Feminism* available on the internet (www.feminist.com) accessed on 3 July 2000.

³³ Richards *op. cit.*

which all feminist theories revolve. One common feature to the various feminist theories and unique to all of them, is the rejection of patriarchy.³⁴

The debate that has shaped feminists theorizing during the 1980s and 1990s has been the ‘equality and difference’ debate. Equality and difference both rich, complex and contested terms have come to represent distinct and competing perspectives within feminists theory, in which they stand for two fundamentally antagonistic accounts of the nature of gender and of the feminists project.³⁵ Those interested in delineating ideological positions have mapped the pursuit of ‘equality’ onto liberal or socialist forms of feminism and the pursuit of ‘difference’ onto radical or cultural feminism.³⁶

Throughout its history, women’s liberation has been seen sometimes as the right to be equal, sometimes as the right to be different.³⁷ The central tension between these two positions arises from a dispute as to whether a commitment to gender-neutrality can ever be achieved by pursuing a strategy of equality. Some feel that, in the context of a patriarchal society, the pursuit of equality might inevitably result in requiring everyone to assimilate to the dominant gender norm of masculinity. Those who believe the former to be possible fall within the ‘equality’ perspective; those who are skeptical adopt a ‘difference’ perspective. Put bluntly, women appear to be faced by a clear choice: in a society where the male is the norm, one can – as a woman – seek either assimilation or differentiation. One can aim to transcend one’s gendered particularity, or to affirm it: pursue ‘gender-neutrality’ or seek ‘gender-visibility’.³⁸

Gender difference is seen as a manifestation of sexism, as a patriarchal creation used to rationalise the inequality between the sexes. The widespread presumption that women are not fully rational was repeatedly used as a justification for continuing to exclude them from the public sphere. The equality theorist believed that such myths should be countered. According to them, if different gender characteristics exist, they are socially constructed in a sexist society to the benefit of men and the disadvantage of women. The equality theorist

³⁴ Storkey *op. cit.* 104; Bender *op. cit.* 30; Smart *op. cit.* 160.

³⁵ Squires (1999) 113.

³⁶ *Ibid.*

³⁷ Bock & James (1992) 4.

³⁸ Squires *op. cit.* 116.

believes further that gender differences are created and perpetuated in the interests of men their project therefore is to advocate the transcendence of gender differences.

The idea that women 'are different' has been used to exclude women from valued and fulfilling social engagement. The notion that women might not be capable of the rational, abstract, universalising form of reasoning needed to engage in public arenas of work and politics needs to be countered with an assertion of women's similarity to men. As Fraser notes, 'from the equality perspective, gender difference appeared to be inextricable from sexism. The political task was thus clear: the goal of feminism was to throw off the shackles of 'difference' and establish equality, bringing men and women under a common measure'.³⁹ From the equality perspective gender difference is synonymous with inferiority and is to be rejected in the name of a more genuinely inclusive just social order.

In contrast, difference theorists accept and even celebrate gender differences. They accepted the notion that men and women are different, but that difference should not be read as inferiority. Equality theorists argue that 'gender difference' is either a straightforward myth or a contingent result of social conditioning, but in either case needs to be transcended. Difference theorists, on the other hand, argue that 'gender difference' is either a biological given or a result of social conditioning, but in either case needs to be recognised and valued.⁴⁰ Unlike the equality theorist who argues for women's integration into the existing social order, the difference perspective seeks to reverse the order of things: to place at the centre that which is currently marginalised, to value that which is currently devalued, to privilege that which is currently subordinated. The nurturing, peace-loving, intuitive and emotional qualities of women are celebrated rather than subordinated. The individualistic, competitive, rational qualities of patriarchal society are viewed with suspicion and hostility rather than admiration and longing. The difference theorists aim to lessen the power, not to join the ranks, of the male order. According to them, the goal of feminism is to make clear the fundamental difference between men and women and to enable women to gain a positive sense of their common identity as women. Once this is gained, women can then demand that their distinctive voice is heard and their perspective valued.

³⁹ Fraser (1997) 100.

⁴⁰ Squires *op. cit.* 118.

The 'difference theorist' approach is summarized by Ferguson as follows:⁴¹

The creation of women's voice, or a feminists standpoint, or a gynocentric theory, entails immersion in a world divided between male and female experience in order to critique the power of the former and valorize the alternative residing in the latter. It is a theoretical project that opposes the identities and coherencies contained in patriarchal theory in the name of a different set of identities and coherencies, a different and better way of thinking and living.

According to the difference theorist, the denial of gender difference represses women's authentic nature. A genuinely inclusive just social order will necessarily recognize women's specificity and embody female as well as (or perhaps instead of) male values.⁴²

This writer supports the views of the difference theorists. Women are different from men and the differences should be recognised and valued. Women should not seek to be like men but in acknowledging the difference between the sexes, women should not be treated as inferiors.

There are three main feminists groups that can be identified these are the liberal feminists, Marxist feminists and the radical feminists. These groups would now be discussed briefly with emphasis placed on radical feminists. Radical feminism is highlighted because the writer aligns herself more with the radical feminists and like them believes that women oppression is rooted in patriarchy, culture and gender stereotyping.

(a) Liberal feminists

Liberal feminists contend that liberal values should be as applicable to women as they are to men. Liberal feminists focus on gaining equal opportunity for women as individuals. According to the liberal feminists, sexual equality is the right of an individual not to be treated differently from another individuals. For the liberal feminists equality is achieved, not when women as a group or as individuals are the social equals of men, but when women and men face the same choices, enabling each individual to maximise her own self interest by her individual choice.

⁴¹ Ferguson (1993) 3-4.

⁴² Squires *op. cit.* 118.

(b) Marxist feminists

Marxist or Socialist feminists locate the sources of women's oppression in the structure of capitalism and regarded structural changes as necessary in order to overcome women's oppression. Marxists feminists have transposed the Marxist theory of class to gender. Modern feminists, including socialist feminists, have become disenchanted with the Marxist approach as it does not explain the oppression of women as women, but rather emphasises the prejudice, which attached to women as workers. The Marxist feminists also overlook the subjection of women in both the private and public spheres and an analysis of gender and patriarchy.⁴³

(c) Radical feminists

Radical feminists stress that women and men have conflicting interests. They favour separatism and emphasize the need to develop a woman's culture, rather than building coalitions with men as liberal and Marxist feminists did. 'Radical' feminism means feminists who are 'women-identified' and who analysed oppression primarily in terms of sex. Their focus was women as a group rather than as individuals.

According to the radical feminists, the dividing line was sex, and the two classes are men and women. Men, as a sexual class, are the oppressors. Women, as a sexual class, are the oppressed. Sex is a form of oppression independent of social class. The root problem was therefore not with the social class dominance of the economic system; it was with the male dominance of the patriarchal system. Liberal feminism had accepted patriarchy without any significant challenge, because patriarchy formed the very underpinnings of liberalism. Marxist feminism did recognise patriarchy, but saw it as secondary to the class struggle. In the end, when capitalism is removed, along with it will go the very foundations of patriarchy. The memory of a patriarchal system might of course remain for some time later and still affect the relations between men and women, but the crippling blow will have been dealt. The radical feminists, however, are not happy with that. Patriarchy, the legitimised and

⁴³ See Smith (ed) (1993) 6.

institutionalised domination of men over women was the very problem itself. For the radical feminists, patriarchy is the enemy.⁴⁴

Radical feminists expose the public and private division, and they bring their analysis into the very domain of the private. The personal is political has become a key phrase. The politics of patriarchy do not stop at the front door. They come right into the home. They are present even in the bedroom. This is why nothing escapes the scrutiny of radical feminism. Sex itself is as much a part of its investigation as is the world of work. The politics of orgasm are as important as the politics of capitalism. For the male-as-norm in society is what is under attack. Instead, what is significant for women is significant for social analysis. No area can any longer be seen as 'neutral'. It is all male-centred. Patriarchy dominates everything.⁴⁵

But having identified patriarchy as the fundamental problem questions still remains. How was it brought about, and how is it reinforced? Is it simply upheld by the exclusion of women from public life, or by woman's complex relationship to the two worlds of production and reproduction, what underlies patriarchy to make it so effective? The answers are to be found in biology and culture.

The cause of women's exploitation is found in the biological differences between men and women. Anatomy is indeed destiny. Bearing children, menstruating, lactating and undergoing menopause all mark women off from men and ensure their oppression. Emphasis on 'culture' rather than 'nature' has become the mainstream radical feminists preoccupation. It is patriarchal culture, which takes differences of 'nature' and makes them into something far bigger. In order to change patriarchy then it is pointless to try to change biology; much more important is to work on the attitudes and ideas people hold.⁴⁶

While it is true that there is nothing like global sisterhood, the needs of white women are different from that of their black sisters yet, women share certain experiences irrespective of their colour or class. Factors such as patriarchy culture and gender stereotyping cut across race and class.

⁴⁴ Smith (ed) *op. cit.* 6.

⁴⁵ Storkey *op. cit.* 120.

⁴⁶ Storkey *op. cit.* 104.

In this work, the radical feminists approach is adopted. Women are examined as a group rather than as individuals. This work examines the equality of women in Nigeria as a group while in South Africa the radical feminists approach is adopted by looking more at the experiences of black women as a group. The work also examines African cultural practices such as patriarchy, widowhood and succession and its effects on the equality of women.

1.7 METHODOLOGY

This study collects and collates relevant material on gender equality and women's human rights in Nigeria and South Africa. Special emphasis is placed on the African customary law and its adverse effects on women. Work already done in the area is also reviewed.

The methodology adopted in this study can be categorised as follows:

Primary sources: These consist of relevant legislation, cases, conventions and other human rights instruments. All major instruments global and regional and domestic, dealing with human rights of women are studied. The approach here is to consider the legal frameworks – the international human rights instruments entered into by Nigeria and South Africa, those signed, those ratified or acceded to, reservations (if any), reporting obligations, especially under CEDAW. The comments of CEDAW Committee on the country reports are compared. At the domestic level, the equality provisions of the Constitutions of both countries are compared. Relevant statutes and case law are also reviewed.

Secondary sources: These consist of relevant books and journal articles. Extensive reading of all available materials on human rights and women's rights commenced the study. An initial literature search was made; major books and journals articles on human rights and women's rights are studied.

Internet resources: The Internet was very useful as a tool of modern research. Many web sites are visited and most of them proved very useful. Through the use of the Internet, the whole world has indeed become a global village.

Qualitative research: Limited qualitative research was undertaken, consisting of interviews with approximately 350 respondents. Interviews are conducted in Nigeria with 200 respondents covering South-western and Northern Nigeria. In South Africa interviews are also conducted with 150 respondents in Gauteng, Northern Province and KwaZulu Natal Province. The object of the interviews was to sample opinion generally on the concept of human rights, women's rights, gender equality and most especially the effects of African customary law on women in both jurisdictions. The interviews covered issues such as equality between men and women, gender stereotyping, harmful traditional practices against women such as female genital mutilation, male child preference, early marriages and widowhood practices. Questions are also asked about customary rule of intestate succession, violence against women, women's participation in politics, socio-economic rights of women, and reproductive rights including the contentious issue of abortion. The interviews also focused on the effect of Islam on women in Northern Nigeria. This is even more pertinent now than in the past, due to the fact that some states in Northern Nigeria are adopting strict Islamic laws (Shari'a) with dire consequences to women. In South Africa, interviews are also conducted to discover the effect of the equality clause of the Constitution on indigenous law and to see how the new constitutional order has impacted on women.

Comparative method: The question is why two apparently different legal systems are being compared. Comparative law offers the only way by which law can become international and consequently a science.⁴⁷ A comparative analysis of all information was undertaken. Positions of women in the two countries are compared.

In natural and medical sciences, there is an international exchange of discoveries and opinions. This is so familiar a fact that it is easy to forget its significance. There is no

⁴⁷ Zweigert & Kotz (1987) 3.

such thing as German physics or Belgian chemistry or American medicine.⁴⁸ All that can be said is that the contributions of the various nations to the different departments of world knowledge have been outstanding, average or modest. This is not applicable to law. National pride became the hallmark of juristic thought. Comparative law has started to put an end to such narrow-mindedness. Comparative law is an intellectual activity with law as its object and comparison as its process. The primary aim of comparative law, as of all sciences is knowledge.

As in all intellectual activity, every investigation in comparative law begins with the posing of a question or the setting of a working hypothesis – an idea. Often it is the feeling of dissatisfaction with the solution in one's system, which drives one to inquire whether perhaps other legal systems may not have produced something better. When the author first visited South Africa, she was very impressed with the new constitutional order and the development of a human rights culture, coming from Nigeria where brutality was the order of the day under the draconian regime of Abacha (at the time). It was this disillusionment with successive military administration that prompted the author to embark on her first comparative exercise.⁴⁹

The author is of the opinion that Nigeria and South Africa could both benefit from a comparison of the legal systems of both countries. A pure and disinterested investigation of foreign legal system can also sharpen one's own law and so produces the idea of a working hypothesis.

Unlike most of the other subjects in the law school curriculum, comparative law is not a body of rules and principles. It is a method, a way of looking at legal problems. It would be more logical to speak of the comparative method. Tradition however is more powerful than logic in determining the meaning and use of words and comparative law remains the accepted term in English speaking countries. The German term *Rechtsvergleichung*, and to a lesser degree the French *droit comparé* (law compared), are more accurate in that they emphasise the nature of the subject as

⁴⁸ *Ibid.*

⁴⁹ Imasogie (1997).

a process or method.⁵⁰ It is difficult in the comparison of law to get rid (even relatively) of the national bias, yet the elimination of this obstacle is one of the conditions of cultivating comparative law.⁵¹

Generally, comparative lawyers compare the legal systems of different nations. This can be done on a large scale or on a smaller scale. To compare the spirit and style of different legal systems, the methods of thought and procedures they use, is sometimes called macro comparison. In this study, instead of concentrating on individual concrete problems and their solutions, research is done into methods of handling legal materials, procedures for resolving and deciding disputes or the roles of those engaged in the law. For example, one can compare different techniques of legislation, styles of codification and methods of statutory interpretations and discuss the authority of precedents, the contributions made by academics to the development of law and the diverse styles of judicial problems.⁵² Micro comparison, by contrast, has to do with specific legal institutions or problems that is with the rules used to solve actual problems or particular conflict of interest. For example: when is a manufacturer liable for the harm caused to a consumer by defective goods? What rules determine the allocation of loss in the case of traffic accident? What factors are relevant for determining the custody of children in divorce cases? If his father or mother disinherits an illegitimate child what rights does he have? The list of possible examples is endless.⁵³

As much as possible in this study, the micro comparison method is adopted. It is not the whole of the legal systems of the two countries that are being compared, but aspects of the two legal systems, which highlight the central concern of the study – gender equality.

⁵⁰ Zweigert & Kotz *op.cit.* 4.

⁵¹ Szabo & Peter (1977) 54.

⁵² Zweigert & Kotz *op.cit.* 5.

⁵³ Zweigert & Kotz *op. cit.* 4.

1.8 WORK ALREADY DONE IN THIS FIELD

The subject of human rights is not new. Women's right is also not a new subject. Volumes have been written on both human rights and women's rights internationally, regionally, in South Africa, and in Nigeria. The concept of human rights as part of academic discourse is however more advanced in South Africa than in Nigeria. Several chapters have been written on family law,⁵⁴ equality,⁵⁵ Constitutional law,⁵⁶ women's rights⁵⁷ and indigenous law.⁵⁸ Many journal articles have also been written on the concept of equality and the equality provisions of the Bill of Rights in the South African Constitution.⁵⁹ Many seminars and symposia have been held on human rights and women's rights. The Commission for Gender Equality has had many seminars and workshops aimed at sensitising the populace on gender generally and showing how different laws impact on women. All these are aimed at improving the legal position of women in South Africa.

In Nigeria, because of the past history of military rule and dictatorship, the concept of human rights is not taken seriously. Women's right is even newer. Not much has been written on human rights and women's rights in Nigeria. There are three notable publications in Nigeria dealing with women's right.

The first is *Women and Children under Nigerian Law*,⁶⁰ published by the Federal Military of Justice Lagos. This publication is the summary of the National Conference on Better Protection for Women and Children. This publication considered the rights of women and children under the Nigerian laws. The publication considers issues such as the legal status of widows under Nigerian laws, women and children under Islamic law, Muslim women and

⁵⁴ See e.g. Heaton (1998); Maithufi (1998) 61 *THRHR* 61; Nhlapo (1995) *International Journal of Law and the Family* 208.

⁵⁵ De Waal *et al* (2000); Chaskalson (1999); Albertyn & Kentridge (1998); Van Reenen (1997) 12 *SAPR/PL* 151.

⁵⁶ De Waal *op. cit.*; Chaskalson *op. cit.*

⁵⁷ Van Zyl (1998) 31-1-50; UNISA (1998); Mokgoro (1993) 4 *Women and Development Law Review* 15; Mongwe (1995); Meyerson (1999) 116 *SALJ* 50; Meyerson (1991) *Acta Juridica* 135.

⁵⁸ Dlamini (1998); Nhlapo (1994) *Third World Legal Studies* 95.

⁵⁹ Van Der Meide (1999) 116 *SALJ* 100.

⁶⁰ Kalu & Osinbajo (eds) 1989.

marriage under the Shari'a. In the epilogue of the publication, some mention is made of the international and domestic legal protection for women.

While the publication is a major contribution to knowledge, it does not deal specifically with the right of women to equality and equal protection before the law. None of the articles in the publication considers the right of women to equality and the freedom to be free from all forms of discrimination. The publication also combines the issue of women with that of children and as such not much attention is paid to issues that directly impact on women like violence against women, socio-economic rights of women, political rights of women, marginalisation of women in the judiciary, and the development of African customary law with a view to improving the rights of women to succession.

The second major publication, *Women in Law*,⁶¹ is a publication of the Southern University Law Centre, Louisiana and the Faculty of Law, University of Lagos, Nigeria. Unlike the previous publication, this work is devoted solely to the rights of women under the law. While this publication considers some of the issues that are not dealt with in the former publication, it is itself lacking because it combines the rights of women in Nigeria with the rights of women in the United States of America which is a much more developed society than Nigeria.

Another major contribution to women's rights in Nigeria is the book *Unequal Rights: Discriminatory Laws and Practices Against Women in Nigeria*.⁶² This is a publication of the Constitutional Rights Project of Nigeria. This publication attempts to outline the discriminatory laws and practices against women in Nigeria. The book is however too general. It does not focus on the constitutional provision of equality. The Constitution as the supreme law of the land ought to be a major focus for any work on rights.

This research work deals with a comparative study of aspects of gender equality in Nigeria and South Africa. This is the first time an attempt is being made to examine the equality provision in the Nigerian Constitution and its impact on women in Nigeria. The work hopes to expose the inadequacies in the equality provision of the Nigerian Constitution and the right

⁶¹ Obilade (ed) (1993).

⁶² Constitutional Rights Project (1995).

to equal protection of the law. Nigeria is a party to a number of international instruments on human rights and women's rights. This work examines how Nigeria is fulfilling its obligations under these instruments. The reporting obligation of Nigeria under CEDAW is further examined and how far Nigeria has adjusted its laws to the international standards are further discussed.

Despite the fact that most women in Nigeria are subject to customary law, African customary law remains undeveloped in Nigeria. African customary law is not part of the law curriculum at the Nigerian Universities and also at the Law School. Customary law is taught as a minute part of the Nigerian legal system and also briefly as part of jurisprudence. Little literature is available on customary law in Nigeria. The major contribution to customary law in Nigeria is *The Nature of African customary law*⁶³ written more than four decades ago. Some journal articles have been written on African customary law in Nigeria⁶⁴ and most books on family law and land law have discussed customary law in passing.⁶⁵ African customary law is still not enjoying the pride of place it ought to enjoy, considering the fact that the vast majority of the population are subject to African customary law.

South Africa has the most progressive Constitution in the world. The equality provision of the South African Constitution⁶⁶ is among the best in the world. The establishment of a numbers of institutions to promote human rights and gender equality in South Africa demonstrates the commitment of the people of South Africa to equality and gender equality.⁶⁷ South Africa has a lot to offer to Nigeria as a country that is committed to an open and democratic society and the full achievement of equality including gender equality

1.9 DIFFICULTIES AND LIMITATIONS

⁶³ Elias (1956).

⁶⁴ See *e.g.* Achike (1974).

⁶⁵ See *e.g.* Nwogugu (1974); Kasunmu (1966).

⁶⁶ S. 9 of the Constitution of Republic of South Africa, Act 108 of 1996.

⁶⁷ See *e.g.* Human Rights Commission Act 54 of 1994, Commission for Gender Equality Act 39 of 1996.

By its very nature, the study is selective. The topic is very wide and the issue of gender equality touches on almost all facets of life. The study therefore focuses on some aspects of gender equality and not all the issues potentially covered by the topic. For example, the girl child is not discussed in much detail in the study, even though discrimination against women starts from birth. Although economic empowerment of women is very important, labour law is not one of the focuses of this work except as it affects reproductive rights and equality. The author has chosen to discuss a limited number of topics that have greater impact on women than men. These topics include socio-economic rights, education, reproductive rights, political rights and gender related offences like rape, marital rape and domestic violence. The number of chosen topics is still rather extensive, because a discussion of one or two topics will not do justice to the comparison.

It is very difficult to do extensive research especially qualitative research covering all the geographic areas in South Africa and Nigeria. A work of that nature will require extensive funding and will be very time consuming. It is impossible for a single person to cover all these areas. The work would therefore serve as a foundation for further research into the subject rather than a comprehensive overview of all aspects affecting women in Nigeria and South Africa.

The comparison is based on the experiences of black African women in South Africa, rather than on all women. This is because it is the experiences of black African women that are similar to those of women in Nigeria. The term “black” in this work would therefore not have the meaning it has in South Africa. Generally, “black” in South Africa includes Indians and Coloureds.

Another major difficulty is the non-availability of statistics in Nigeria, especially current statistics. South Africa is more advanced in terms of data collection and statistics are more readily available compared to Nigeria.

The temporal scope of the study also needs to be limited. By its very nature law is dynamic. It is not possible to capture all the changes in law, therefore some more recent cases and development in law may not have been included. Due to the fast pace of change in South Africa especially, not all materials are included. There are also extensive materials on the

subject, and it is not possible to reflect all perspectives. The cut-off time for the study is 31 December 2000.