CHAPTER THREE

NIGERIA AND SOUTH AFRICA: HISTORICAL BACKGROUND AND CONSTITUTIONAL FRAMEWORK

3.1 INTRODUCTION

The purpose of this study is to compare aspects of gender equality in Nigeria and South Africa. It would therefore be appropriate to give a brief historical background of Nigeria and South Africa, the sources of law in Nigeria and South Africa, the equality provision of the Constitutions of the two countries and the agencies charged with the promotion of human rights (and in particular women's rights) in Nigeria and South Africa. This chapter aims to achieve all these.

3.2 HISTORICAL BACKGROUND AND CONSTITUTIONAL FRAMEWORK OF NIGERIA

3.2.1 A brief historical background of Nigeria

Nigeria is in West Africa bordering the Gulf of Guinea, situated between Benin and Cameroon. It is bordered in the West by the Republic of Benin in the East by Cameroon and in the North by both Republic of Chad and Niger.

The climate in Nigeria varies, ranging from equatorial in the South, tropical in the centre and arid in the North. Nigeria's natural resources include the following: petroleum, tin, and columbite, iron ore, coal, limestone, lead, zinc and natural gas.[1]

The Portuguese are the first European explorers to land in what is now Nigeria, in 1472.[2] Nigeria is the most populous country in Africa and the largest in area of the West African states and has the sixth largest area in Africa. Nigeria became an independent nation in 1960. A country of great diversity because of the many ethnic, linguistic and religious groups that live within its border, Nigeria is also a country with a long past. The history of the peoples that constitute the present day Nigeria dates back more than 2,000 years. The earliest archaeological finds are of the Nok, who inhabited the central Jos Plateau between the Niger and Benue rivers between 300 B.C and 200 A.D.

A number of states or kingdoms with which contemporary ethnic groups can be identified existed before 1500. Of these, three dominant regional groups are the Hausa in the Northern kingdoms of the savanna, the Yoruba in the west and the Igbo in the east. Like many other modern African states, Nigeria is the creation of European imperialism. Its very name, after the Niger River, the country's dominating physical feature, was suggested in the 1890s by British journalist Flora Shaw, who later became the wife of colonial governor Frederick Lugard. The modern history of Nigeria – as a political state encompassing 250 to 400 ethnic groups of widely varied cultures and modes of political organisation – dates from the completion of the British conquest in 1903 and the amalgamation of Northern and Southern Nigeria into the colony and Protectorate of Nigeria in 1914.[3]

Nigerian history is fragmented in the sense that it evolved from a variety of traditions, but many of the most outstanding features of modern society reflect the strong influence of the three regionally dominant ethnic groups – Hausa, Ibo and Yoruba. These three major ethnic group constitute more than sixty percent of the total population of Nigeria.[4] There are more than 250 to 400 other ethnic minorities, for examples the Kanuris, Edos,

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1 See (www.odci.gov/cia/publications/factbook/ni.htm) accessed on 27 August 1999.

2 See generally Crowder (1978).

3 See (www.emulateme.com/history/nigehist.htm) accessed on 4 February 2000.

4 *Ibid.*

Tivs, Efiks, Ibibios, Igalas, Igarra, Urhobos, Itsekiris, and Ijaws among others.[5] English is the only official language in Nigeria.

There are several dominant themes in Nigerian history that are essential in understanding contemporary Nigerian politics and society. First, the spread of Islam, predominantly in the North but later in South-western Nigeria, which began a millennium ago. The creation of the Sokoto caliphate and the jihad (Islamic holy war) of 1804-8 brought most of the Northern region and adjacent parts of Niger and Cameroon under a single Islamic government. The great extension of Islam within the areas of present-day Nigeria dates from the nineteenth century and the consolidation of the caliphate. This history helps account for the dichotomy between North and South and for the division within the North that has been so strong during the colonial and post-colonial eras.[6]

Secondly, the slave trade, both across the Sahara Desert and the Atlantic Ocean, had a profound influence on virtually all parts of Nigeria. The transatlantic trade in particular accounted for the forced migration of perhaps 3.5 million people between the 1650s and the 1860s, while a steady stream of slaves flowed North across the Sahara for a millennium, ending at the beginning of the twentieth century. Within Nigeria, slavery was widespread, with social implications that are still evident today. The Sokoto caliphate, for example, had more slaves than any other modern country, except the United States in 1860. Conversion to Islam and the spread of Christianity are intricately associated with issues relating to slavery and with efforts to promote political and cultural autonomy.

Thirdly, Nigeria is a federation. Nigeria became a federation in 1954, gained its independence on 1 October 1960 and became a Republic in 1963. In almost four decades since the independence of Nigeria in 1960, Nigeria has experienced a number of successful and attempted military *coups d'état* and a brutal civil war. Corrupt civilian and military governments have siphoned off the profits from the oil boom, and Nigeria has faced economic collapse in the 1980s and 1990s. The present geographic structure of Nigeria is a federation, consisting of a federal government at the centre and

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5 Crowther *op.cit.* 40.

6 See (www.qub.ac.uk/english.imperial/nigeria/nigeria.htm) accessed on 4 February 2000.

36 states. The states are not autonomous. There is only one Constitution operating in the whole of Nigeria and the 36 states do not have their own Constitutions. Both the federal and the state governments exercise legislative power. Only the federal government can legislate on matters contained in the exclusive legislative list and both the federal and the state governments can legislate on matters contained in the concurrent list. Matters such as printing of currency, armed forces, police force, customs and excise, immigration, census, shipping and admiralty are contained in the exclusive list, so only the federal government can legislate on such matters.[7] Matters such as taxation and education are contained in the concurrent list, so the states are free to legislate on such matters.[8]

Fourthly, Nigeria is the most populous nation in Africa with an estimated population of 113 million people.[9] Nigeria is inhabited by a large number of tribal groups ranging in size from a few thousands to many millions, speaking between them several hundred languages and dialects.

3.2.2 A brief political history of Nigeria

The colony of Lagos was ceded to the British in 1861.[10] The cession marked the beginning of British incursion into Nigeria. Prior to 1914 Southern Nigeria and Northern Nigeria exist separately. The Southern Nigeria and Northern Nigeria are amalgamated in 1914 when the British gained control of the two protectorates. The people of the Northern Nigeria are predominantly Muslims having been conquered by the Arabs in the 17th Century. The people of Southern Nigeria are predominantly Christians due to the influence of the missionaries from the West.[11]

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7 Second Schedule Part I, 1999 Constitution of the Federal Republic of Nigeria.

8 Second Schedule Part II, 1999 Constitution of the Federal Republic of Nigeria.

9 Available on the internet (www.odci.gov/cia/publications/factbook/ni.html) accessed on 20 October 1999.

10 See generally Crowther *op. cit.*

11 Available on the internet (www.emulateme.com/history/nigehist.htm) accessed on 4 February 2000.

Nigeria became an independent country in 1960 and a republic in 1963. The first civilian government came into power in 1960. The civilian administration was toppled in January 1966 when Nigeria recorded its first military coup. Since January 1966, the military has become a regular feature in Nigeria politics. There was a counter coup in 1966. The July 1966 military government headed by General Yakubu Gowon was in power until July 1975 when it was toppled by another military coup. The July 1975 military government was headed by General Murtala Mohammed (who was assassinated in February, 1976). General Obasanjo who became the head of state after the assassination was in power until 1 October 1979 when he handed over power to a democratically elected government. This was the first time when the military government handed over power to a civilian government instead of seizing power from a civilian administration.[12]

The civilian government of 1 October 1979 was toppled in another military coup on 31 December 1983, barely four years after being elected. The Government of General Buhari that took over power in December 1983 was itself toppled on 27 August 1985 in a palace coup. General Ibrahim Babangida the Chief of Army Staff under the Buhari administration headed this military government.

General Babangida promised to hand over power to a democratically elected government in 1990. The government later reneged on its promise to hand over in 1990 and promised to hand over power on 1 October 1992. Democratic elections are held culminating in the election of civilian governors in states, the National Assembly and local government chairmen. One feature of this election was that there was no election to the post of President. The Presidential election was postponed until June 1993. The implication of this was that for more than one-year Nigeria operated a diarchy, with military government at the centre and civilians in the states, national assembly and local government.

The postponed presidential election was held on 12 June 1993. The election was widely believed to have been won by Bashorun MKO Abiola, a Southerner based on election results announced before further announcement was stalled. The military government

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[12] For constitutional history of Nigeria and the role of the military see generally: Nwabueze (1982); Achike (1992). See also Nwabueze (1992).

of General Babangida halted the announcement of election result and annulled the presidential election when it became obvious that the election had been won by a Southerner. The military continued in power. Civilian unrest in the country coupled with international pressures forced General Babangida to step down. He handed power to an interim government headed by Chief Shonekan on 27 August 1993.

The Interim government was forced to resign on 17 November 1993, after less than three months in power. The military was once again back in power. This palace coup brought General Sanni Abacha, the defence minister in the interim government, to power.

General Abacha ruled Nigeria with an iron fist for almost five years. He was on the way to entrenching himself as the civilian president of Nigeria without a democratic election when he died on 8 June 1998. General Abdul Salam Abubakar continued the military administration of General Sanni Abacha, but promised to hand over power to a democratically elected government on 29 May 1999.

General Abubakar fulfilled his promise and handed over power to a civilian government headed by President Olusegun Obasanjo (a former military head of state), after a series of democratic elections.

Nigeria now has a democratically elected government in place since 29 May 1999. Of the Nigeria's 39 years of independence, the military have ruled for more than 28 years. One can only hope that the military have finally bowed out of politics in Nigeria and retired permanently to the barracks and defending the territorial integrity of Nigeria

3.2.3 The Nigerian legal system

Nigerian has a multiplicity of legal systems, based on the English common law, and customary law, consisting of Islamic law and African customary law. The sources of Nigerian law are as follows: the Constitution, legistation, customary law, the received English law, and judicial precedents.

3.2.3.1 The Constitution[13]

The Constitution currently in force in Nigeria is the Constitution of the Federal Republic of Nigeria, 1999, which came into effect on 29 May 1999. The Constitution is the supreme law from which all other laws derive their source.[14] Section 1 of the Nigerian Constitution provides as follows:

> This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
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> The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
>
> If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency, be void.

3.2.3.2 Legislation

These are laws passed by the local legislature. A federal law is referred to as an "Act" and a state's laws are called "Laws". Each of the 36 states of the federation can make laws. Under a military government, federal laws are referred to as "Decrees" and those by the states are called "Edicts". Although the military is no longer in power in Nigeria, some of the military Decrees are still applicable in Nigeria. Some of these Decrees have been incorporated into the Laws of Federation of Nigeria, 1990.[15] Under the military administration, the executive also exercises legislative powers. The local governments are also allowed to make laws such laws are referred to as by-laws.

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13 The 1999 Constitution of the Federal Republic of Nigeria is available on the Internet. See (www.odili.net/republic/Constitution.html) accessed on 12 August 1999. The Constitution is also available in Chapter XIV Constitutions of the Countries of the world.

14 S. 1 of the Constitution of the Federal Republic of Nigeria, 1999.

15 See for example, Detention of Persons Decree No 2 of 1984 now Cap 414 LFN 1990.

3.2.3.3 Customary law

Customary law is another major source of law in Nigeria. Customary law consists of customs accepted by members of a community as binding on them. Customary law has been described as the mirror of accepted usage.[16]

Customary law in Nigeria may be divided in terms of nature into two classes – ethnic or non-ethnic customary law. Ethnic customary law is indigenous. Each system of such customary law applies to member of a particular ethnic group. There are many ethnic customary laws in Nigeria, in fact we have as many ethnic customary law as there are ethnic groups. Even among the ethnic groups we have sub-groups, and some of these sub-groups have their own ethnic law. Muslim law is a non-ethnic customary law in Nigeria. It is a religious law based on the Muslim faith and applicable to members of the faith in Nigeria. Muslim law is not indigenous law; it is a "received" customary law introduced into the country as part of Islam.[17]

Ethnic customary law is generally unwritten. Muslim law (non-ethnic) on the other hand is principally in written form. The sources of the Muslim law are the Holy Quoran, the practice of the prophets, the consensus of scholars and analogical deductions from the Holy Quoran.[18] One of the main features of ethnic customary law is its flexibility, its rules change from time to time, and it reflects the changing social and economic conditions.[19] Muslim law on the other hand is rigid, as it is written and cannot be changed.

In Nigeria, there are two main ways of establishing ethnic customary law;

> By proof – the applicant brings experts from the community to prove that the particular custom is accepted by members of the community.

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16 *Owonyin v Omotosho* (1961) 1 All NLR 304 at 309.

17 See generally Obilade (1979).

18 Obilade *op.cit.* 88. See also Fyzee (1981) 109.

19 Obilade *op. cit.*

By judicial notice –the Evidence Act of Nigeria[20] provides that if a particular custom is notorious, the court can take judicial notice of it and need not be proved.

There is no problem of proof in non-ethnic customary law as it is written and the adherents follow it religiously. The only problem is that it is subject to several interpretations because there are many schools of thought in Islam.[21]

3.2.3.4 The received English law

The received English law operating in Nigeria consists of the following:

- The principles of common law;
- The doctrines of equity; and
- The Statutes of General Applications. By this is meant that all laws in force in England on 1 January 1900 are applicable in Nigeria as Statutes of General Applications. For example, the Sales of Goods Act, 1893, the Infant Relief Act, 1874 are directly enforceable in Nigeria. Some states of the federation have re-enacted these laws.[22]

3.2.3.5 Judicial precedent

Judicial precedent is another source of law in Nigeria, interpreting previous sources. Judicial precedent operates on the principles of *stare decisis* (that is, keep to what has been previously decided). This rule operates where there is a hierarchy of courts. The lower courts are bound by the decisions of the court of higher jurisdiction.

In Nigeria, the Supreme Court occupies the highest hierarchy in Nigeria[23], directly under the Supreme Court is the Court of Appeal.[24] The Court of Appeal is bound by the

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20 S. 14 Evidence Act Cap 112 LFN 1990.

21 See generally, Goldziher (1981); Mallat & Connors (1989); Coulson (1971).

22 See *e.g.* Laws of Federation of Nigeria, 1990, the Western State Laws of 1959 and the Eastern States Laws of 1959.

23 S 230 1999 Constitution of the Federal Republic of Nigeria.

decisions of the Supreme Court. Directly under the Court of Appeal are the State High Courts[25] and the Federal High Courts.[26] The State High Courts and the Federal High Courts are courts of co-ordinate jurisdiction. The decision of the Court of Appeal is binding on all the State High Courts and the Federal High Courts. However, the decision of a State High Court does not bind another High Court or the Federal High Court.

Directly under the State and Federal High Courts are the Magistrates' Courts. The Magistrates' Courts in the South have both civil and criminal jurisdiction, while Magistrates' Courts have only criminal jurisdictions in the North. The Districts Courts exercise the civil jurisdiction in the North. Under the Magistrates/District Courts are the Customary Courts in the South and Area Courts in the North. The Area Courts is the equivalent of Customary Courts in the South.[27]

Reports of cases decided by the Courts are another vital source of law in Nigeria. Only the cases of superior Courts of records are reported. These are the Supreme Court, the Court of Appeal, the state high Courts and the federal high Courts.

3.2.4 The equality provision in the Nigerian Constitution

Women constitute approximately 53.8 million of the estimated 112 million people in Nigeria.[28] The equality provisions could be found in Chapter II and Chapter IV of the Constitution. Chapter II deals with Fundamental Objectives and Directive Principles of State Policy. However, Chapter II of the Constitution is not justiciable.[29] Section 17 of the Constitution provides that every citizen shall have equality of rights, obligations and opportunities before the law but this provision is not enforceable. Section 42 of the Constitution forbids discrimination on the basis of sex. As Chapter II of the

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24 S 237 1999 Constitution of the Federal Republic of Nigeria.

25 S. 270 1999 Constitution of the Federal Republic of Nigeria.

26 S. 249 1999 Constitution of the Federal Republic of Nigeria.

27 Obilade *op. cit.*

28 Available on the internet (www.crlp.org/nigeria) accessed on 15 September 1999.

29 See Ss. 14, 15(2), 17(1), 17(2)(a), 17(3)(a),(e).

Constitution is not justiciable only the equality provision in Chapter IV of the Constitution which deals with Fundamental Rights shall be discussed in this study. Section 42 of the 1999 Constitution deals with the right to freedom from discrimination. It provides as follows:

> (1) A citizen of Nigeria of a particular community, ethnic group, place of origin, sex, religion or political opinion shall not by, reason only that he is such a person:
>
> (a) be subjected either expressly by, or in practical application of any law in force or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinions are not made subject; or
>
> (b) be accorded either expressly by or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.
>
> (2) No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth.
>
> (3) Nothing in subsection(1) of this section shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the state or as a member of the armed forces of the federation or members of the Nigerian police forces or to any office in the service of a body corporate established by any law in force in Nigeria.

Section 42 (1) of the Constitution reaffirms the equality of all Nigerians irrespective of sex, religion, and political opinions. Section 42 generally forbids discriminatory treatment among Nigerians. A discriminatory treatment may be defined as

> affording treatment to different persons attributable wholly or in part to their respective description by race, tribe, place of origin, political opinion, or sex whereby persons of such descriptions are not made subject or accorded privileges which are not accorded to persons of another such description:[30]

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[30] Akande (1982) 39.

The prohibition of discrimination on the basis of sex first appears in the 1979 Constitution of Nigeria.[31] Prior to 1979 it was possible for many states to deny women the right to vote. The women in the Northern part of the country got the opportunity to vote for the first time during the 1979 general election.[32] Section 42(3) of the 1999 Constitution contains an internal qualifier in addition to the general limitation clause contained in Section 45 of the Constitution. The internal qualifier allows governments to implement special programmes and measures for the assistance of specific classes of person who may suffer from particular disabilities or disadvantages. In Nigeria, ethnic differences are acute and the minorities must be involved in the total development of a united Nigeria. Special advantages are necessary to enable the less advanced communities catch up with the rest of the country.

The Constitutional prohibition of irrational discrimination constitutes an important expansion in the area of the legal protection of human rights.

Section 42(2) prohibits discrimination based on the circumstances of one's birth. This provision is generally believed to be an attempt to remove any disability attached to illegitimacy. Indeed the original draft of the Constitution Drafting Committee specifically stated that no citizen of Nigeria should be the subject of discrimination merely on the ground "that he was born out of wedlock".[33] The objection to this provision and one which many members of the Drafting Committee as well as of the Constituent Assembly expressed, is that it is repugnant to morality.[34] Among the arguments advanced was the fact that under Islamic law, a bastard has no right to the estate of his deceased putative father and a constitutional provision which presumably nullifies this would be contrary to the way of life of a large majority of the population.[35]

The major devise to encourage equality in Nigeria is the policy of "federal character"[36]

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31 See s. 39 1979 Constitution of Nigeria, Cap 62 LFN 1990.

32 Women in Southern Nigeria are allowed the vote in 1957.

33 *Ibid.*

34 Akande *op. cit.* 42.

35 *Ibid.*

36 See S. 14(3) 1999 Constitution of the Federal Republic of Nigeria.

The term "federal character" of Nigeria" is defined as follows[37]:

> "federal character" of Nigeria" refers to the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation notwithstanding the diversities of ethnic origin, culture, language or religion which it is their desire to nourish, harness to the enrichment of the Federal Republic of Nigeria.

The "federal character" of Nigeria" has been adopted as the basic principle to guide governmental action at all levels. However, if ethnic and state considerations have to be the salient factors in determining public appointments, it is more than likely that hankering after power and high federal offices would lead to inordinate and aggressive identification with the ethnic group or the state to the detriment of higher loyalty to the nation.[38] The operation of this stipulation in practical terms can be seen in the appointments of ministers and special advisers.

Under this policy of "federal character", persons are appointed to government posts from all over the federation irrespective of the disparities in their qualifications. University admission in Nigeria is based on a quota system. There is a Joint Admissions and Matriculation Board (JAMB).[39] This Board conduct matriculation examinations into the Nigerian universities. There are several criteria for admission. First universities decide the cut-off mark for each of the courses in the universities. These cut off marks are referred to as the "Merit" point; the first admission list is determined on merit. After this other criteria such as "catchment areas" and "educationally disadvantages areas" are used.[40] The "catchment areas" are usually indigenes of the states where the university is situated.[41] The entry requirement for "catchment areas" is usually lower than the merit points. In addition to the "catchment areas" there is also provision for students from the "educationally disadvantaged" areas. This enable students from states classified as "educationally disadvantaged" areas to get admission in spite of low JAMB scores. "Educationally disadvantaged" areas keep changing. There was a time Lagos state (a state in the South) was one of such states,

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37 See S. 210(1) 1979 Constitution of Nigeria Cap 62 L.F.N. 1990.

38 Akande *op. cit.* 15.

39 Cap 193 LFN 1990.

40 Cap 193 LFN 1990.

41 Cap 193 LFN 1990.

now it has been removed. Nearly all states in the North are classified as "educationally disadvantaged".[42]

The principle of "federal character" is also reflected in admissions to Federal Government Colleges in the Country. There is a separate "cut off" mark for boys and girls. The "cut off" marks for boys are usually higher than the "cut off" mark for girls. Each state of the federation also have separate "cut off" marks. States in the South usually have higher "cut off" marks than states in the North. This is due to the fact that pupils from the Southern states usually perform better than students from the Northern states.

A case that put the "federal character" policy in admission to Federal Government Colleges is the case of *Badejo v Minister of Education*,[43] A girl from Ogun state (one of the states in the South) obtained a score of 400 out of the total point of 600, but she was not able to get admission into any of the Federal Government Colleges, while a fellow pupil (another girl) from Kano State (one of the states in the North) who score 200 out of the total point of 600 was admitted into a Federal Government College. In an action brought by the father of the girl from Ogun State, the issue of whether the father of the girl has the *locus standi* to bring the matter to the Court, took such a long time to be decided, that by the time the Court held that the father can bring the action, the admission exercise for that academic year was already over and the Court refused to adjudicate on the matter as the action was already moot. The Court thus missed a unique opportunity to adjudicate on the policy of "federal character" as regards admission to Federal Government Colleges. It is submitted that the Court would have been able to justify the discrimination on the grounds that such discrimination is not unconstitutional and that it is in the interest of the country that the educational gap between the South and the North should be bridged. The disparity in the College admission is also to encourage girls from the North to go to Colleges. Enrolment is generally low for both boys and girls in the North and especially low for girls.

The "federal character" policy also ensures that people from different states of the federation participate in governance. Presently, at least one minister is appointed from

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42 Cap 193 LFN 1990.

43 *Badejo v Minister of Education* (1990) 4 NWLR 254 CA.

each state of the federation. This policy is also observed by successive military administrations. However, it is still possible to favour some states over the others by making sure that important ministerial posts, such as finance and defence go to particular areas while other states get only ministers of states (junior minister).

3.2.4.1 Comments on the equality provision of the Nigerian Constitution

The equality clause of the Nigerian Constitution does not explicitly incorporate aspects of discrimination against women such as pregnancy, marital status and sexual orientation. Emphasis is placed on prohibition on the basis of sex alone. This work will only comment on the prohibition on the basis of sex, as the object of this work is to look at aspects of gender equality in Nigeria and South Africa.

The equality clause in the Nigerian Constitution does not forbid discrimination on the basis of gender,[44] pregnancy, age, marital status and sexual orientation. The equality clause cannot be expanded to include these grounds as it is a closed list.[45]

Women in Nigeria continue to be discriminated against, even after the 1979 Constitution (the first Constitution of Nigeria to prohibit discrimination on the basis of sex). Until 1990, women in the public service received only fifty per cent of leave bonus paid to their male colleagues.[46] In the public service, where husband and wife are working together in the same place, the wife forfeits her housing allowance on the assumption that she now lives with her husband and does not require separate accommodation.[47] The fact that the couple would probably need a bigger place of accommodation is never considered. Automatically, it is the woman who loses her housing allowance, never the man. Women are not allowed to stand as sureties for bail in Nigeria in spite of the fact that there is no law in force to the contrary.

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44 For the distinction between sex and gender See Chapter 1 above.

45 S. 41 1999 Constitution of the Federal Republic of Nigeria.

46 For example the conditions of Service for the Ogun State University, stipulates that women (whether married or unmarried) should be paid only one-half of leave bonus paid to men. Fortunately, this section has been suspended.

47 Ogun State University Conditions of Service. This provision has been suspended. Married women working in the University are now able to claim their housing allowances, even where their husbands are also employed by the University.

Until very recently, women were not allowed to claim children allowance under the Nigerian Tax Law.[48] Men are allowed to claim children allowance up to a maximum of four children. Men are also allowed to claim spouse allowance without any documentary evidence, whereas women must produce documentary evidence before they are allowed to claim allowance for their spouses, even where such spouses are actually maintained by them. Fortunately, the law has been changed.[49] Women are now able to claim spouse and children allowances under the Nigerian Tax law without any documentary evidence.

Women in Nigerian continue to be discriminated against on the grounds of marital status. A woman in the public service who is not married is denied maternity leave as to grant maternity leave is to encourage immorality.[50] In Nigeria, the law is still used to maintain morality. This law has since been relaxed and women in most states of the federation are now able to get maternity leave irrespective of their marital status.

The adoption of Islamic law in some states in Northern Nigeria has seen discrimination of the basis of marital status resurfacing. The chairman of Talata Marafa local government area in Zamfara State (a state in the North) has issued a three-month ultimatum to single women working in the local government to get married or be sacked.[51] This ultimatum has been described as ludicrous.[52]

Women activists believe that women in the areas where Islamic law has been adopted would further retreat into backwardness, ignorance, primitivity and sheer social slavery.[53] Expectedly, child marriage, a burning social issue in the North and of great concern to the federal government, would be given more impetus with the introduction of Islamic law. An Islamic scholar, Abdufatah Oyegunle, said that "in accordance with Islamic law, a young girl is not supposed to experience her third menstrual cycle in her parent's house. In effect, if a young girl starts her period at the age of 9, 10 or 11 years,

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48 See for example, S. 21(33) Personal Income Tax Law (Laws of Lagos State of Nigeria, Cap 91).

49 See *Unequal Rights* (1995).

50 Zamfara State (a state in Northern Nigeria) still practices this..

51 *Tell Magazine*, 27 December 1999, page 20.

52 *Ibid.*

53 *Ibid.*

within the next one year, she ought to be married off".[54] In most cases the girls are married off. These early marriages are responsible for the high rate of *Vesico-vaginal fistula* (VVF). This is a condition that results from obstructed birth which causes damage to the young girl reproductive organs causing her to suffer from incontinent passage of urine and faeces.

The adoption of Islamic law by some states in the North is unconstitutional. Section 10 of the 1999 Constitution prohibits the adoption of state religion. The section provides as follows: "The Government of the Federation or of a state shall not adopt any religion as state religion".

In spite of the uncontroverted provisions of the Constitution, more states in the North are adopting Islamic law with dire consequences to women. The former Chief Justice of the Federation, Justice Mohammed Bello (a Muslim) has faulted the adoption of Shari'a (strict Islamic law) by some states in the North and affirmed that the Constitution is superior to the Islamic law.[55] The former chief justice cited Section 1 of the 1999 Constitution to back up his position. Section 1 of the Constitution provides as follows:

> (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.
>
> (2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.
>
> (3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency, be void.

The former Chief Justice cited further obstacles against the adoption of Islamic law. He cited the provisions of Section 36(12) of the 1999 Constitution. Section 36(12) provides as follows:

> Subject as otherwise provided by this Constitution, a person shall not be convicted of a criminal offence unless that offence is defined and the penalty therefore is prescribed in a written law, and

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54 *Tell Magazine op. cit.*

55 (www.ngrguardiannews.com/news2/nn776113.htm) accessed on 11 February 2000.

> in this subsection, a written law refers to an Act of the National Assembly or a law of a state, any subsidiary legislation or instrument under the provision of a law.

The penalty prescribed for most Islamic offences are not contained in any law in Nigeria. Penalty for Islamic offences are provided for in the Quoran which is not recognised as law by the national assembly of Nigeria. For example, Islamic law prescribes death by stoning as punishment for adultery for women and flogging for men committing adultery.[56] Islamic law is not a written law within the meaning of Section 36(12) of the 1999 Constitution.

States that have adopted Islamic law are using the provision of Section 38(1) of the 1999 Constitution to justify such adoption. It provides as follows:

> Every person shall be entitled to freedom of thought, conscience and religion, including freedom to change his religion or belief, and freedom (either alone or in community with others and in public or in private) to manifest and propagate his religion or belief in worship, teaching, practice and observance.

It is submitted that the provision of Section 38(1) applies only to an individual and not the state. The state cannot therefore adopt a state religion based on the provision of Section 38(1). The provision of Section 10 of the Constitution, which prohibits the adoption of state religion, is clear and unambiguous.

The adoption of Islamic law as state religion by some states in the North is not only unconstitutional, but also poses a great danger to human rights especially women's basic human rights. The governor of Zamfara State (the first state in the North to adopt Islamic law) stated that "Islamic law is being adopted in order to fight prostitution, gambling and other social vices.[57] Zamfara state has offered prostitutes in the state US$240 each if they can abandon prostitution and get married.[58]

It is submitted here that the adoption of Islamic law by some states in the North would deny women the rights to free movement as well as the right to work to earn a decent wage, thereby keeping them in perpetual servitude in an already patriarchal society.

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56 See the *Holy Quoran* Chapter 4.

57 *Tell Magazine op.cit.* 22.

According to some NGOs, dedicated to women's rights, the adoption of Islamic law may be the first step towards abusing women's human and constitutional rights as seen in Afghanistan, Algeria, Bangladesh and other countries. In these countries, in the name of Islam and segregation of the sexes, women and girls no longer have access to education, health care services, jobs and other means of gaining an economic livelihood or the right to freedom of movement.[59] Ayesha Imam, the regional coordinator (Africa and Middle East) for women living under Muslim laws stated that the introduction of laws purporting to be Islamic are not only unconstitutional, but also poses a great danger to human rights of women.[60]

Zamfara state government has also introduced segregation of sexes in transportation. Sitting arrangements are compartmentalised with the men sitting in the front seats and women in the back seats. According to the governor, in due course, the state government would procure special buses and taxis for women passengers.[61] The idea of this form of segregation is to discourage undue interaction between the sexes. In order to uphold morality among students, boys and girls are not allowed to share seats. Male pupils would take the front seats (naturally), while the female students will sit at the back. It does not matter if the girls cannot see from the back (what are they doing in schools anyway).

Pushing the Islamic law to an almost ridiculous extent, the Zamfara state government has also tacitly banned women from participating in sporting activities. There is also a new rule and regulation that girls should desist from wearing skimpy sportswear. At the moment, only judo and karate are allowed for girls as the authorities claim their gears cover all parts of the body, exposing only the face and hands. The government stated further that to prevent indecent exposure, sportswear should be designed to cover knees as mandated by Islam.[62]

Islamic law will negatively affect the nation's struggle to empower the girl-child and women. Inferentially, even though Islamic law will be oppressive to the men, the odds

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58 SABC News (Morning live 8 February 2000).

59 *Tell Magazine op.cit.*

60 *Ibid.*

61 *Ibid.*

62 *Ibid.*

are evidently stacked more against the female gender in their emancipation and empowerment.

The adoption of Shari'a by some states in the North would also affect the ability of Nigerians to move freely within the country and to reside in any part of the country as provided in Section 41 of the 1999 Constitution. It provides as follows:

> Every citizen of Nigeria is entitled to move freely throughout Nigeria and to reside in any part thereof, and no citizen of Nigeria shall be expelled from Nigeria or refused entry thereby or exist there from

Non-Muslims would not want to live in states that have adopted Islamic laws. Although states that have adopted Islamic law have given assurances that such laws would not be imposed on non-Muslims, the reality however, is that everyone residing in these areas would be affected one way or the other by the adoption of Islamic laws. For example, a Christian woman (Phedilia Okonkwo) residing in Zamfara State was reportedly arrested in her home for storing, possessing and consuming liquor, contrary to Decree 15 of Zamfara State. A combined team of a policeman, a soldier and a staff of the Gusau local government stormed the house to arrest the woman. They searched everywhere in the house until they found a carton of beer in her bedroom. The woman was charged and found guilty of the charges. She was remanded in prison for 11 days in spite of being seven months pregnant. She was only released after her husband paid N5, 000 (Five thousand Naira) as bail pending sentence.

This above case confirms the fears of the non-Muslim residents in the states that have adopted Islamic law. The assurances given by the state governors that non-Muslims would not be affected by the adoption of Islamic laws gives little relief.

In spite of outcries against the adoption of Islamic laws, more states in the North are adopting Islam as state religion. The Kaduna State (another state in the North) House of Assembly has raised a committee to sample public opinion on the implementation of the Shari'a legal system in the state.[63] The committee was mandated to "collect memoranda from Muslims, Christians and traditionalists". This is a prelude to the adoption of

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[63] This story is available on the internet (www.odiii.net) accessed on 17 February 2000.

Islamic lay by the state. More than 5,000 lives have been lost during anti-Shari'a riots in many parts of Northern Nigeria.[64]

The adoption of Islamic laws by some states in the North is the greatest test being faced by the new civilian administration at the centre. State governors that have sworn to uphold the Constitution are breaking its provisions without any consequences. This has great implication for the continued existence of Nigeria as a single and united entity.

Women are also being discriminated against on the basis of pregnancy. Women in private companies are not allowed to get pregnant until certain number of years has elapsed since their appointment. There are credible reports that several businesses operated the policy of "get pregnant, get fired".[65] Female staffers of Afribank are not allowed to go on maternity leave with pay unless a period of at least two years has elapsed since the last confinement. This is discriminatory against women, since there are no corresponding rule against men. The rule also infringes on the right of women to reproductive choice.

Nigerian women are still discriminated against under the Citizenship law. Chapter III of the Constitution[66] sets out the circumstances under which a person can acquire Nigerian citizenship. Nigerian citizenship is by descent[67] and every Nigerian whether male or female are able to confer Nigerian citizenship on their children whether they are born out of wedlock or not.[68] This is commendable, as women in some countries are not able to confer citizenship on their children.[69]

Nigerian women married to non-Nigerian men cannot confer Nigerian citizenship on their husbands, whereas Nigerian men married to non-Nigerian women are able to

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64 *Ibid.*

65 See (www.state.gov/www/global/human_rights/1998_hrp_report/nigeria.htm) accessed on 23 February 2000.

66 1999 Constitution of the Federal Republic of Nigeria.

67 See S. 25 1999 Constitution of Nigeria.

68 See *Shugaba Darman v Minister of Internal Affairs and others* (1981) 2 NCLR 459, where the plaintiff whose father was from Chad was allowed to claim Nigerian citizenship as the mother is a Nigerian of the Kanuri tribe.

69 See *e.g. Dow v Attorney General (Botswana)* (1992) LRC (Const) 623 (Bot CA).

confer Nigerian citizenship on their spouses. Section 26 of the Constitution provides as follows:

> (1) ... a person to whom the provisions of this section apply may be registered as a citizen of Nigeria, if the President is satisfied that:
>
> (a) he is a person of good character
>
> (b) he has shown a clear intention of his desire to be domiciled in Nigeria and
>
> (c) he has taken the Oath of allegiance ...
>
> (2) the provisions of this section shall apply to:
>
> (a) any woman who is or has been married to a citizen of Nigeria or
>
> (b) every person of full age and capacity born outside Nigeria any of whose grandparents is a citizen of Nigeria.

The provisions of section 26(2)(a) clearly discriminates against Nigerian women who are married to non Nigerian men as their foreign husbands cannot be registered as a Nigerian citizen. Foreign husbands of Nigerian women must naturalise if they desire citizenship. This provision negates the express provisions of section 42 of the Constitution which prohibits discrimination on the basis of sex (among other grounds).

It is suggested that section 26(2)(a) of the Constitution should be amended to accord Nigerian women married to foreigners the same rights as Nigerian men married to foreigners. Nigeria ratified CEDAW without any reservations and efforts should be made to ensure that all discriminating laws in Nigeria are changed.

There are still some rules and regulations in our statute books that continue to discriminate against women. Regulation 122 of the Nigerian Police Act[70] prohibits the enlistment of married women into the police force. This provision is discriminatory as this regulation does not apply to men. Regulation 127 of the Nigerian Police Act requires unmarried police women who becomes pregnant to be discharged from the force and shall not be re-enlisted except with the approval of the Inspector General of Police. Regulation 124 of the Police Act also requires a woman police officer who wants to get married to first apply in writing to the Commissioner of Police to request for permission to marry and to give the name, address and occupation of the person she intends to marry. Such permission will only be granted if the intended husband is of

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[70] Cap 352 LFN 1990.

good character and the woman police office had served in the force for a period of not less than three years.

The above regulations from the Nigerian Police Act are highly discriminatory as they violate the right to equality and the right not to be discriminated against on the basis of sex, pregnancy and marital status. Such laws should be expunged from the laws of Nigeria.

Rule 03303 of both Kano and Kaduna states (in Northern Nigeria) Civil Service Rule provides:

> Any woman civil servant married or unmarried who is about to undertake a course of training of not more than six months duration shall be called upon to enter into an agreement to refund the whole or part of the cost of the course in the even of her course being interrupted on ground of pregnancy.

In 1992, the Kastina State House of Assembly actually passed a bill to dismiss all unmarried women in the state civil service who do not marry within a specified time. Fortunately, the Governor did not sign the bill.

Women in Nigeria are also discriminated against when vacancies are being advertised in the National dailies. Nigerian newspapers still carry job advertisements that are sex specific and gender biased. For example, a job advertisement for a secretary, typist or nurse will usually include the clause "preferably women", while advertisements for accountants, engineer and doctors would include the clause "preferably men". It is not uncommon to see an advertisement like "wanted, an attractive lady between 20 and 25 for the post of a secretary/typist". Advertisements such as the above help to reinforce gender stereotyping as it is generally believe that women are better in certain jobs like nursing and secretarial work, while a male accountant, doctor or engineer is assumed to be better than his female counterparts.

It is suggested that the Nigerian Law Reform Commission should set up a committee to review all Nigerian laws. Those laws found to be discriminatory against women should be repealed.

3.2.5 Agencies supporting human rights and women's rights in Nigeria

3.2.5.1 Introduction

In Nigeria, there are some agencies charged with the realisation of human rights and women's rights. In this respect the National Human Rights Commission and the National Commission for Women are discussed.

3.2.5.2 The National Human Rights Commission

The National Human Rights Commission (the Commission) was established by Decree 22 of 1995 that came into effect on 27 September 1995. The Commission was established because of the desire of the federal military government headed by Abacha "to create an enabling environment for extra-judicial recognition, promotion and enforcement of all rights recognised and enshrined in the Constitution of the Federal Republic of Nigeria 1979 (as amended) and under other law of the land".[71] The Commission was to provide a forum for public enlightenment and dialogue on and to limit controversy and confrontation over allegations of human rights violation by public officers and agencies and to affirm the sacred and inviolable nature of human and other fundamental rights.[72] The Commission was also established to facilitate Nigeria's implementation of its various treaty obligations.[73]

The Commission was established by a Decree.[74] The Decree established a Governing Council (the Council). The Council is responsible for the discharge of the functions of the Commission.[75] Members of the Council are appointed by the Head of State, on the recommendation of the Attorney General of the Federation. Members of the Council (except the Executive Secretary) are to hold office for a term of four years and may be appointed for one further term of four years and no more.[76]

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71 See the Preamble to the Decree.

72 See the Preamble to the Decree 22 of 1995.

73 See the commencement section of the Decree.

74 S. 1 Decree 22 of 1995.

75 For membership of the Council See S.2 Decree 22 of 1995.

76 S. 2 Decree 22 of 1995.

The functions of the Commission includes the protection of human rights as guaranteed in the 1979 Constitution, the UN Charter and the UDHR and other international human rights treaties which Nigeria has ratified. The Commission is also to monitor and investigate all alleged cases of human rights violations in Nigeria and make appropriate recommendations to the federal military government for prosecution and such other actions, as it may deem expedient in each circumstance.[77] The Commission is also to assist victims of human rights violations and take appropriate redress and remedies on their behalf and to undertake studies on all matters pertaining to human rights and assist the federal government in the formulation of appropriate policies on the guarantee of human rights.

The Commission is to publish from time to time and to report on the state of human rights position in Nigeria. The Commission is also empoared to organise local and international seminars, workshops and conferences on human rights issues for public enlightenment.[78]

The Attorney General of the federation is empoared to give to the Council such other directives of a general nature with regard to the exercise by the Council of its functions under the Decree.[79] The Decree also contains a schedule setting out rules relating to the proceedings of the Council and its committees.

3.2.5.2.1 Comments on the activities of the National Human Rights Commission

The establishment of the Commission was a step in the right direction. However, the Abacha government was not committed to upholding human rights ideals. The Abacha government was just paying lip service to the ideals of human rights. It is surprising that a government that has violated all known norms of human rights ranging from detention without trial, suppressing all forms of opposition, denying citizens the right to choose their leader, extra judicial tribunals and extra judicial killings, could set up a National Human Rights Commission.

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77 S.3 Decree 22 of 1995.

78 S.5 Decree 22 of 1995.

The lack of commitment of Abacha administration to human rights ideals was demonstrated by the extra judicial execution of Ken Saro Wiwa and 8 other (the Ogoni 9) on 10 November 1995, just one month and eleven days after the Human Rights Commission came into effect.

The Commission lack credibility as an independent monitoring body. The scope of the Commission's activities was hindered by lack of adequate funding and organisational support. It was further hampered by the lack of a clear mandate to do anything other than convene meetings.[80] Repeated requests by NGOs and other bodies to the Commission to review the cases of alleged coup plotters and political detainees went unansared. Some NGO's co-operated with the Commission. In July 1997 a Nigerian NGO the Constitution Rights Project (CRP) organised a workshop in conjunction with the Commission on the role of the police in civil society. The forum provided an opportunity for dialogue between the human rights community and the Nigerian police force. In May 1997, the Commission published its Prisons Report, which described the overcrowding and congestion in the prisons that prevented them from meeting minimum international standards. The report identified some of the causes for the overcrowding, but it did not address the serious sanitary and health problems or the petty corruption and extortion present in the prison system.[81]

The Commission needs to be re-organised and re-constituted. The Commission should derive its powers from the Constitution and not from a Decree. The 1999 Constitution of the Federal Republic of Nigeria is in the process of being amended. The Constitution must provide for institutions promoting democracy,[82] and the Commission should be listed as one of such institutions. By so doing, security of tenure of the Commission would be assured. The Commission should promoted respect for human rights and a culture of human rights, the Commission should also monitor and assess the observance of human rights in Nigeria and should have the power to require relevant organs of state to provide it with information on the measures taken towards the realisation of human

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79 Sections 17 and 18 of the Decree.

80 See generally (www.state.gov/www/global/human_rights/1998_hrp_report/nigeria.htm) accessed on 23 February 2000.

81 (www.state.gov/www/global/human_rights/1998_hrp_report/nigeria.htm) accessed on 23 February 2000.

82 See *e.g.* Chapter 9 of the Constitution of Republic of South Africa, Act 108, 1996.

rights. The ministries of agriculture, transportation, housing, health, education and National planning should be required to make annual reports to the Commission on what they are doing to improve the quality of life of the populace especially women. The National Assembly should by legislation grant additional powers and functions to the Commission.

3.2.5.3 National Commission for Women

Women in most parts of Africa are not free from discrimination and abuse. In Nigeria spousal abuse was common, especially those of wife beating in polygamous families. Police did not normally intervene in domestic disputes, which seldom are discussed publicly. The Penal Code[83] (which applies in Northern Nigeria) permits husbands to use physical means to chastise their wives as long as it does not result in "grievous harm", which is defined as loss of sight, hearing, power of speech, facial disfigurement, or other life-endangering injuries.

There are no laws barring women from particular fields of employment, but women often experienced discrimination because the government tolerates customary and religious practices that adversely affect them.

The need to address these forms of discrimination and abuse led to the establishment of the National Commission for Women. in 1986.[84] The National Commission for Women was created to ensure the participation of women in national development, to promote the welfare of women, improve the participation of women in civic, political, cultural, social and economic development of Nigeria.[85]

The objectives of the Commission are stated in Section 2 of the Act. The objectives include the following:

- promotion of the welfare of women in general;

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83 See the Chapter 6 below on Violence Against Women in Nigeria.

84 National Commission for Women Act Cap 246 LFN 1990.

85 See the Preamble to the National Commission for Women Act Cap 246 LFN 1990.

- promotion of the full utilisation of women in the development of human resources and to bring about their acceptance as full participants in every phase of national development, with equal rights and corresponding obligations;
- promote responsible motherhood and maternal health of women;
- support the work of non-governmental organisations and play a co-ordinating role between Government and Nigerian women's organisations;
- formulate and propagate moral values within the family units and in the public generally and to establish programmes with institutions and organisations to inculcate moral education in women and children;
- work towards total elimination of all social and cultural practices and
- tending to discriminate against and de-humanise womanhood.

The National Commission for Women also has special functions to formulate policies and programmes within the context of National Development Plans, aimed at enhancing the position and development of women in the social, economic and political context. The Commission is further expected to monitor and liaise with appropriate government ministries, departments, bodies, non-governmental organisations and international bodies, including United Nations organs on matters concerning women and development.[86]

The Commission is to monitor and submit reports on women education and counseling, health of women and children and existing legislation.[87] The Commission is to co-ordinate, structure and monitor the activities of women's voluntary organisations and evaluate their performances.[88] The Commission is to conduct research and planning aimed at improving the status of women and the attainment of policy objectives generally in relation to women.[89]

The National Commission for Women has been upgraded to the Federal Ministry of women's Affairs in 1995. Under the military administration of General Sanni Abacha the activities of the Ministry is not co-ordinated. The Ministry of Women's Affairs is caught up in administrative bureaucracies common to all other federal ministries. There is a lot of red tape, which is preventing the ministry from functioning effectively. The

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86 S. 8 National Commission for Women Act Cap 246 LFN 1990.

87 S.9(a) Cap 246 LFN 1990.

88 S.9(b) Cap 246 LFN 1990.

89 S.9(c) Cap 246 LFN 1990.

ministry has now prepared the proposed National Policy on Women. The proposal is still awaiting approval of the National Assembly.

There are also state ministries of women affairs to monitor the affairs of women at state levels. Unfortunately some states governments have scrapped their respective ministry of women's affairs.[90]

3.3 HISTORICAL BACKGROUND AND CONSTITUTIONAL FRAMEWORK OF SOUTH AFRICA

3.3.1 A brief historical background of South Africa

The Republic of South Africa is a country on the Southern-most tip of the African continent. South Africa is made up of 1,219,912 sq. km of land. South Africa is a county blessed with an abundance of natural resources including fertile farmlands and unique mineral resources such as gold, uranium, chromium, coal, iron ore, nickel, tin platinum, copper, and natural gas. South African mines are world leaders in the production of diamonds and gold as well as strategic metals such as platinum.[91]

The estimated population of South Africa is about 43,930,000 people. 75.2 % of the population is black, 13.6% is white, 8.6% is coloured, and the other 2.6% is Indian. There are 11 official languages in South Africa, including English, Afrikaans, Tsonga, Xhosa and Zulu. The administrative capital of the republic is Pretoria, while the legislative capital is Cape Town and the judicial capital is Bloemfontein.

The first documented human inhabitants of South Africa are the San (called Bushmen by Europeans) who probably migrated from Central Africa some forty thousand years ago. The San lived as hunter-gatherers and had a nomadic lifestyle whose movements are dictated by animal migration and weather patterns.

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90 The civilian government of Edo and Ogun States have scrapped the State's ministry of women's affairs.

91 Available on the internet see (www.os.students.standard.edu) accessed on 5 March 2000.

The San are nearly wiped out through disease, battle, and assimilation. The few survivors live mainly in the Northern wastelands of Southern Africa with a somewhat altered lifestyle. The San of old lived in nomadic clans or tribes whose men hunted large game with poison tipped arrows while the women gathered fruit, roots and small animals. The language of the San, containing the characteristic clicks of some African languages, had a significant influence on the languages of some of the African black tribes.[92]

The next group to move into Southern Africa are the Khoikhoi (called Hottentots by the Europeans). The khoikhoi came South about four thousand years ago with herds of cattle and sheep. The Khoikhoi are semi-nomadic hunters and pastoralists. However, they are closely connected with the San and the distinction between the two groups was often ambiguous.

The last of the great African migrations to South Africa was made by the large and culturally diverse Negroid peoples categorised under the Bantu language group. As a result of a population explosion in central Africa, the black tribal peoples moved South along the eastern coast of the continent seeking land for crops and cattle grazing. The exact date of this movement is unknown, but by the 3rd century AD, the large tribes had reached modern day Kwazulu/Natal; by the 15th century they had moved inland to occupy most of eastern South Africa. Contact with the San and Khoikhoi was quite limited, but there was some intermarriage and the Zulu and Xhosa languages adopted the characteristic click of the Khoisan.

The black tribal peoples are pastoralists who grew maize and had domesticated cattle, oxen, and sheep. Land was held in common amongst the people and their iron age culture was connected by extensive trade links. Based on linguistic theories, the tribes are classified as either Nguni (Zulu, Swazi, Xhosa) or Sotho-Tswana (Tswana, Pedi, Basotho). The Nguni occupied the area mostly around the South and east coasts of South Africa and the Sotho-Tswana mainly lived on the highveld.

South Africa was colonised by the English and Dutch during the 17th Century. The Dutch established the new colonies of Orange Free State and Transvaal. The discovery

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92 Available on the internet (www.facts.com/cd/c01001.htm) accessed on 15 February 2000.

of diamond around these lands around 1900 resulted in an English invasion which sparked the Anglo-Boer War. The Dutch descendants – called "Boers" (from the Dutch word for 'farmer') or "Afrikaners" revolted against English Rule in 1899. The Anglo-Boer War lasted until 1902. The Transvaal, Orange Free State, Cape Colony and Natal are all combined to form the Union of South Africa, which was allowed semi-independent status from Great Britain. South Africa declared its independence on 31 May 1910 from the United Kingdom.

Following independence, an uneasy power sharing between the English and Dutch held sways until 1948 when the Afrikaner National party was able to gain a strong majority. Strategists in the National Party invented apartheid as a means to cement their control over the economic and social system. Apartheid is an Afrikaans word meaning "apartness". Initially, the aim of the apartheid system was to maintain white domination while extending racial separation.

Apartheid was a system based on racial discrimination and segregation. Under this form of government, the South African population was divided up into sections according to race, education and political power. The three main groups that Apartheid created are whites, blacks, coloured and Indian. The group of people that had the most power was the whites. Each group had different rights and some groups have more rights and power than others. Whites had the most power, while blacks had few if any rights. Blacks are not allowed to participate in political matters and are subjected to repressive laws and regulation.

Apartheid became known as an extreme form of discrimination. Race laws touched every aspect of social life. All inter-racial acts are banned, including marriages between whites and non-whites. Non-whites are turned away from "white-only" jobs. In 1950, the Population Registration Act[93] required that all South Africans be racially classified into one of three categories: white, black (African), or coloured (of mixed decent, mostly Indian and Asian).[94] Classification into these categories was based on appearance, social acceptance and descent for example, a white person was defined as "in appearance obviously a white person or generally accepted as a white person". A

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93 Act 30 of 1950.

94 Available on the internet (www.os.students.stanford.edu) accessed on 14 February 2000.

person could not be considered white if one of his or her parents are non-white. The determination that a person was "obviously white" would take into account "his habits, education and speech and deportment and demeanour". A black person would be of or accepted as a member of an African tribe or race, and a coloured person is one that is not black or white. The Department of Home Affairs was created for the classification of the citizenry. Non-compliance with the race laws was dealt with harshly. All blacks are required to carry "pass books" containing fingerprints, photo and information on access to non-black.

In 1951, the Bantu Authorities Act established a basis for ethnic government in African reserves, known as "homelands". These homelands are independent states to which each African was assigned by the government according to the record of origin (which was frequently inaccurate). All political rights including voting, held by an African are restricted to the designated homeland. The idea was that they would become citizens of the homeland, losing their citizenship in South Africa and any right of involvement with the South African Parliament, which held complete hegemony over the homelands.

It is not the intention of the writer to open old wound by discussing about the Apartheid era, but a discussion of the period is necessary in order to fully understand the topic under discussion. The topic deals with gender equality in Nigeria and South Africa. To really appreciate the conditions of women (especially) black women in South Africa, it is important to understand how Apartheid impacted on women.

3.3.2 The South African legal system

South Africa has a multiplicity of legal system. The sources of South African law are Constitution, legislation, customary law, indigenous law, common law, judicial precedents and writings of modern authors. Each of these sources of law is now looked at in some detail.

South Africa has an un-codified legal system. This means that there is no one primary sources (the code) from where the law originates and can be found.

3.3.2.1 Constitution

All over the world, the Constitution of a country constitutes a major source of law. In South Africa, prior to 1994, the Constitution denied the franchise to the majority of the population, and in addition, it did not provide any general norms or standards with which the whole body of law had to comply.

The 1996 Constitution[95] regulates the structure of state, but it includes a Bill of Rights. Therefore it provides a general norm which has a direct or indirect influence on all the sources of law. The Constitution has a direct influence on legislation because the Courts can strike down any legislation which is in conflict with the Constitution. The Constitution stipulates that in the interpretation of any legislation and the development of the common law and customary law, a Court must promote the spirit, purport and objectives of the Bill of Rights.[96] Section 39(1)(c)[97] stipulates that a Court, when interpreting the bill of right, must take international law into account and may consider foreign law. With this obligation, the Constitution directly incorporates the principles of international human rights law as another source of law in South Africa.

3.3.2.2 Legislation

Legislation is law laid down by an organ of the state, which has the power to do so. These laws are embodied in writing and are known as 'statutes' (or Acts). Parliament is the highest organ that can pass legislation on the national level. The Constitution empowers Parliament to enact laws.[98] Provincial legislatures and municipal councils pass subordinate legislation. Subordinate legislation passed at the provincial level is known as 'provincial acts' and subordinate laws passed by the municipal councils is known as 'by-laws'.

Prior to the new constitutional democracy of 1994, the South African parliament was a product of the apartheid system and was undemocratic. The majority of the population

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95 Act 108 of 1996.

96 S. 39(2).

97 Act 108 of 1996.

98 S. 55 Act 108 of 1996.

was not allowed to vote and therefore was not represented in parliament. The Constitution now provides for a fully democratic parliament where the whole of society can participate in the legislative process. Parliament consists of two houses: the national assembly and the national council of provinces.[99] The purpose of the national council of provinces is to give the provinces a say with respect to national legislation that affects the provinces.[100]

3.3.2.3 Customary law

Customary law is generally unwritten. It is fixed practices in accordance with which people live because they regard it as the law. Customary law, therefore does not concern all customs or practices, such as practices of polite behaviour. In modern law custom does not play such an important role as a formative source of law. It is seldom that a new legal principle, which does not already exist in legislation or common law, will be established by custom.[101] Any assertion of a custom as law has to be proved. The requirements for proof are laid down by the appellate division in the case of *Van Breda v Jacobs.*[102] In this case, the Court had to decide whether a specific custom among the fishermen operating between Cape Point and Fishoek amounted to law. The custom dictated that a fisherman should refrain from throwing his nets in front of another who had been first in locating a school of fish. The Court required that the following be proved before a custom could qualify as law:

> It must be reasonable
>
> Its content and meaning must be certain and clear.

The formative character of custom does not only lie in the creation of laws, but also in their abrogation. Rules of common law and customary law can be abrogated by disuse if they have not been observed for a long time. For example, in the case of *Green v Fitzgerald*[103] the Court found that the rule that adultery amounts to a criminal offence

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99 See Chapter 4 of the Constitution of the Republic of South Africa Act 108 of 1996.

100 See generally Kleyn & Viljoen (1998) 88.

101 Kleyn & Viljoen (1998) 105.

102 *Van Breda v Jacobs* 1921 AD 330.

103 *Supra.*

Fitzgerald[103] the Court found that the rule that adultery amounts to a criminal offence had been abrogated by disuse. It should be noted that a statute could not be abrogated by disuse. The statute must be repealed by another statute.

3.3.2.4 Indigenous law

Many black communities in South Africa live according to indigenous law, which also takes on the form of unwritten customary law. Indigenous law is applied in the ordinary Courts, when the parties so choose.[104] The Law of Evidence amendment Act[105] stipulates that a Court can judicial notice of indigenous law, provided that it is not in conflict with the principles of public policy or natural justice. Judicial notice means that indigenous law does not have to be proved according to the requirements in *Van Breda v Jacobs.*[106] In some instances an expert may be required to give testimony on the content of rules of indigenous law. For example, a claim for compensation for adultery, the husband must prove that adultery took place.

3.3.2.5 Common law

South African common law is mainly the seventeenth and eighteenth-century Roman-Dutch law that was transplanted to the Cape.[107] This forms the basis of modern South African law and has binding authority. Many of the general legal principles that operates in South Africa today stem from common law. Examples are that murder, robbery and rape are crimes; that compensation must be paid for damages caused unlawfully; and that the buyer who takes possession of the thing bought must pay the agreed price. These principles do not have their origin in modern legislation, but rather in the rich tradition of Roman law and its reception in Western Europe, especially in the Netherlands.

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103 *Supra.*

104 Kleyn & Viljoen (1998)

105 45 of 1998.

106 *Supra.*

107 Kleyn & Viljoen *op. cit.* 88.

It should be noted that not all the principles of Roman-Dutch law are transplanted to South Africa. The Courts have ruled that some of the old principles of Roman-Dutch law have become abrogated by disuse.[108]. The Courts have also adapted certain Roman-Dutch principles to suit modern-day South African needs.[109] It should be noted that according to current practice, South Africa common law is not limited to the seventeenth and eighteenth-century law of the Netherlands (Roman-Dutch law in the strict sense of the word). It is a much wider concept. Sometimes, English law has, by means of precedent, influence South African common law. Some common law principles are, for this reason, not pure Roman-Dutch law anymore.

3.3.2.6 Judicial precedents

The principle of judicial precedent simply means 'keep to what has been previously decided'. The Courts must take into account their previous judgments in similar cases because they are bound by the approach followed in the past. According to the doctrine of precedents, previous judgments create (binding) precedent which must be followed. The underlying principle of the doctrine is that the law which was applied to a specific factual situation should be applied to all similar situations.

The Court must find out if an existing precedent is applicable to the case before it. If the facts of the existing precedent are not materially the same as those in the case before the Court, the two cases can be 'distinguished'. The implication of this is that the Court does not have to apply the precedent to the facts before it.

The system of judicial precedent means that lower Courts are bound by the decisions of higher Courts, and, furthermore, that a Court is also bound by its own previous decisions, unless they are wrong. The system of judicial precedent operates where there is a hierarchy of Courts and the judgments of the Courts must be reported in law reports so that precedents are easily accessible.

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[108] See *e.g. Green v Fitzgerald* 1914 AD 88 where *e.g.*, the appellate division abolished the Roman-Dutch rule that adultery is a criminal offence.

[109] Kleyn and Viljoen *op. cit* 88.

3.3.2.6.1 Hierarchy of Courts

In South Africa, the Constitutional Court is the highest Court. This is so because the Constitution is the supreme law. Prior to the new Constitutional democracy, the Supreme Court of Appeal was the highest Court of the land. Section 166 of the Constitution[110] provides for the judicial system as follows:

The Courts are:

- The Constitutional Court,
- The Supreme Court of Appeal;
- The High Courts, including any high Court of appeal that may be established by an Act of Parliament to hear appeals from High Courts;
- The Magistrates' Courts; and
- Any other Court established or recognised in terms of an Act of Parliament, including any Court of a status similar to either the High Courts or the Magistrate Courts.

3.3.2.6.2 Constitutional Court

The Constitutional Court is the highest court in all constitutional matters; and may decide only constitutional matters, and issues connected with decisions on constitutional matters and makes the final decision whether a matter is a constitutional matter or whether an issue is connected with a decision on a constitutional matter.[111] Only the Constitutional Court may decide disputes between organs of state in the national or provincial sphere concerning the constitutional status, powers or functions of any of those organs of state. The Constitutional Court also decides the constitutionality of any parliamentary or provincial Bill. The Court also decides on the constitutionality of any amendment to the Constitution and decide that the Parliament or the President has failed to fulfill a Constitutional obligation. It is only the Constitutional Court that can certify a

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110 Act 108 of 1996.

111 S. 167(3) of the Constitution Act 108 of 1996.

provincial Constitution.[112] The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is Constitutional and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a Court of similar status before that order has any force.[113] The Constitutional Court consists of a President, Deputy President and nine other judges.[114] A matter before the Constitutional Court must be heard by at least eight judges.

3.3.2.6.3 The Supreme Court of Appeal

The Supreme Court of Appeal is the highest Court of appeal except in Constitutional matters, and may decide only appeals, issues concerned with appeals and any other matter that may be referred to it in circumstances defined by an Act of Parliament.[115] The Supreme Court of Appeal consists of a Chief Justice, a Deputy Chief Justice and the number of judges of appeal determined by an Act of Parliament.[116] A matter before the Supreme Court of Appeal must be decided by the number of judges determined by an Act of Parliament.[117]

The Supreme Court of appeal is bound by the decision of the Constitutional Court in all constitutional matters. The Court is also bound by its own previous judgment unless they are wrong. The judgments of this Court bind all subordinate Courts in the country.

3.3.2.6.4 High Courts

Usually every province has its own high Court, and sometimes a local division of the high Court. These Courts are in the first instance bound by judgments of the supreme Court of appeal. If there are no such applicable judgments these Courts are bound by their own previous judgments, unless they are wrong. A single judge is bound by the decisions of a full bench (two or more judges). The high Court of a specific province is

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112 S. 167(4) Act 108 of 1996.

113 S. 167(5) Act 108 of 1996.

114 S. 167 (1) Act 108 of 1996.

115 S. 168 (3) Constitution of the Republic of South Africa, Act 108 of 1996.

116 S. 168 (1) Act 108 of 1996.

117 S. 168(2) Act 108 of 1996.

not bound by the judgments given in another province, the latter being of persuasive force only, since they are Courts of co-ordinate jurisdiction. In cases where the Supreme Court of appeal itself has not yet given judgment on a specific issue, it is not bound by the judgments of the high Courts. Such judgments have only persuasive force in the Supreme Court of Appeal.[118]

A High Court may decide any Constitutional matter except a matter that:

(i) only the Constitutional Court may decide; or

(ii) is assigned by an Act of Parliament to another Court of a status similar to a High Court; and

any other matter not assigned to another Court by an Act of Parliament.[119]

3.3.2.6.5 Lower Courts (Magistrate Courts)

Magistrates and other lower Courts are bound by judgments of the supreme Court of appeal. In the absence of such applicable judgments they are bound by the judgments of the high Court in their respective provinces. The judgments of lower Courts do not serve as precedents, which must be followed; therefore they are not reported.

Magistrate' Courts and all other Courts may decide any matter determined by an Act of Parliament, but a Court of a status lower than a High Court may not enquire into or rule on the Constitutionality of any legislation or any conduct of the President.[120]

3.3.2.7 Writings of modern authors

Many academics and other lawyers write books and articles in law Journals. These are very useful sources of law. These writings of lawyers and academics do not create

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118 See generally S. 169 of the Constitution of the Republic of South Africa Act 108 of 1996.

119 S.169 (a) and (b) Act 108 of 1996.

120 S.170 i*bid.*

binding authority but they can sometimes have persuasive authority. A court may decide to follow the opinion of a particular author, or to depart from one of its previous precedents. A court may decide to follow the opinion of a particular author, or to depart from one of its previous precedents because it was incorrect, in light of such an opinion. Such opinions can also lead to the amendment of legislation. In this way modern authors can influence legal reform.

Courts refer to academic writers especially in areas of new legal development. For example, in *George v Liberty Life Association of Africa*[121] Landman P (President of the Industrial Court) relied on the writings of Banton M (on discrimination)[122] to determine who are the beneficiaries of affirmative action.

3.3.3 Equality clause of the South African Constitution

3.3.3.1 Introduction

Equality lies at the heart of the 1996 South African Constitution. The Preamble to the Final Constitution[123] acknowledges the injustices of the past and stressed the need to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. The Interim Constitution[124] speaks of the 'need to create a new legal order in which all South African will be entitled to a common South African citizenship in a sovereign and democratic state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'. The Postscript to the Interim Constitution also looks toward a 'future founded on the recognition of human rights, democracy and peace co-existence and development opportunities for all South

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121 *George v Liberty Life Association of Africa* 1996 8 BLLR 958 (IC).

122 Quoted in Kleyn & Viljoen *op. cit* 99.

123 Constitution of the Republic of South Africa, Act 108 of 1996.

124 Act 200 of 1993.

Africans, irrespective of colour, race, class, belief or sex'.[125] Constitution Principles I, III and V are all directly and explicitly concerned with equality. Constitution Principles acted as guidelines for the preparation of the final Constitution.

- Constitution Principle I provides as follows:

> The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races.

- Constitutional Principle III provides:

> The Constitution shall prohibit racial, gender and other forms of discrimination and shall promote racial and gender equality and national unity.

- Constitutional Principle V is as follows:

> The legal system shall ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programme or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.

Equality is one of the core values embodied in the South African Constitution.[126] The theme of 'an open and democratic society based on freedom and equality' is a leitmotif of the Bill of Rights.[127] Considering the past history of apartheid and the creation of a segregated society, it is easy to understand why 'equality' means so much in South Africa. The importance of the equality right to the post-apartheid Constitutional order is obvious. The apartheid social and legal system was squarely based on inequality and discrimination. The Constitutional Court in *Brink v Kitshoff NO*[128] pointed out as follows:

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125 It is an established principle of Common law that reference to the Preamble to a statute is permissible as a limited guide to the meaning of that statute: See *Kauesa v Minister of Home Affairs & others* 1995 (1) SA 51 (Nm) at 81C-82C.

126 See *Fraser v Children's Court Pretoria & others* 1997 (2) SA 261 (CC).

127 Kentridge (1999).

128 *Brink v Kitshoff NO* 1996 (4) SALR 197 (CC).

> Apartheid systematically discriminated against black people in all aspects of social life. Black people are prevented from becoming owners of property or even residing in areas classified as 'white', which constituted nearly 90 per cent of the land mass of South Africa; senior jobs and access to established schools and universities are denied to them; civic amenities, including transport systems, public parks, libraries and many shops are also closed to black people. Instead, separate and inferior facilities are provided. The deep scars of this appalling programme are still visible in our society.

The 'deep scars' of decades of systematic racial discrimination can be seen in all the key measure of quality of life in South Africa. White South Africans are significantly healthier and better nourished than their black fellow-citizens, they enjoy relatively high standards of literacy and education.[129] Infant mortality rates and life expectancy among black South Africans are equivalent to those of the poorest nations of the world.[130] In South Africa, wealth and poverty are notoriously unequally distributed.[131]

The legacy of inequality inherited from the past means that the constitutional commitment to equality cannot simply be understood as a commitment to formal equality. It is not sufficient simply to remove racist laws from the books and to ensure that similar laws cannot be enacted in future. This will only result in a society that is formally equal but that is radically unequal in every other way. The equality provision of the South African Constitution aims at achieving real and substantive equality.

3.3.3.2 Comments on the equality clause of the South African Constitution

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129 De Waal *et al op. cit.* (2000) 183.

130 In 1991, the human development index for South African whites was calculated at 0.901 (comparable to that of Singapore or Luxembourg), for coloured 0.663, Indians 0.863 and Africans 0.500. The index is a measure of people's ability to live along and healthy life, to be able to communicate, to participate in the life of the community and to have sufficient means to obtain a decent living. (Central Statistical Service RSA Statistics in Brief (1996)).

131 A Gini coefficient is used to measure the inequality of distribution of personal income and consumption in a society. A perfectly equal society will have a coefficient of 0 while a maximally unequal society will have a coefficient of 100. South Africa's coefficient was measured at 58.4 in 1993, ranking it (behind Brazil at 63.4) as the second most unequal society in the world. The richest ten per cent of the population was responsible for almost half (47.3 per cent) of the country's consumption expenditure. World Bank Development Report 1997 (1997).

This study will only consider the equality provision under the Final Constitution.[132] Section 9 of the Constitution provides as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance person, or categories of person, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, m religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

The equality clause of the South African Constitution is very comprehensive. The above provision is the most progressive provision of any Constitution in the world today. It is understandable that equality means so much in South African in view of the part history of apartheid. It is as if the equality provision is stating that never again will there be inequality in South Africa.

Section 9 of the Constitution, which is the equality clause, is divided into five subsections. The first part deals with the principle of equality before the law and confers the right to equal protection and benefit of the law. The second subsection provides for affirmative action. The third part lists the grounds upon which unfair discrimination are prohibited on a vertical level (by the state). The fourth extends the prohibition of unfair discrimination on the same grounds to the horizontal level. This means that the section cannot only be enforced against the government and its agencies; it could also be enforced against private persons.[133] The final subsection presumes the state or private person discrimination on the listed grounds to be unfair.

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[132] Act 108 of 1996.

[133] For the distinction between horizontal and vertical application and between direct and indirect application of the Bill of Rights See Woolman (1999) and De Waal *et al* Chapter 3.

The grounds under which discriminations are prohibited are wide. The grounds include mutable (pregnancy, conscience, belief, religion, marital status) and immutable (sex, colour, race, ethnic or social origin, age, disability and birth) circumstances. The grounds are not closed. They can be extended by the Courts to include other analogous grounds. Section 9(2) endorses additional conception of equality. According to the Constitutional Court, this provision recognises a conception of 'restitutionary equality':[134]

> Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied . One could refer to such equality as remedial or restitutional equality.

The equality provision of the final Constitution is similar to those in the interim Constitution. There are however, two differences in the formulation:

(1) The listed grounds of unfair discrimination in section 9(3) are more extensive than those in section 8(2) of the interim Constitution. The new grounds are pregnancy, marital status and birth.

(2) Section 9(4) is a horizontally-applicable right to non-discrimination. In other words, people have a right not to be unfairly discriminated against by other people. Under the interim Constitution, the right to non-discrimination applied directly against the state only.[135]

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134 *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 60-61.

3.3.3.3 *Judicial interpretations of the equality clause*

Most of the Constitutional Court's equality jurisprudence deals with section 8 of the interim Constitution. The two rights are similar enough for the Court's interpretation of section 8 of the interim Constitution to apply to the final Constitution.

In *Harksen v Lane NO*[136] the Constitutional Court tabulated the stages of an enquiry into a violation of the equality clause as follows:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:

(i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

In determining whether there is discrimination, a preliminary enquiry is made as to whether the impugned provision or conduct differentiates between people or categories of people. This is a threshold test: if there is no differentiation then there can be no question of a violation of any part of section 9. If a provision or conduct does

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135 De Waal (2000) *op. cit.* 184.

136 *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 53.

differentiate, then a two-stage analysis must be applied. The first statement ((a) above) concerns the right to equal treatment and equality before the law in section 9(1). It tests whether the law or conduct has a rational basis: is there a rational connection between the differentiation in question and a legitimate governmental purpose that it is designed to further or achieve? If this answer to this is no, then the impugned law or conduct violates section 9(1) and it fails at the first stage.

If, however, the differentiation is shown to be rational, then the second stage of the enquiry ((b) above) is activated. A differentiation that is rational may still constitute unfair discrimination under section 9(3) or (4). In principle, both unfair discrimination and differentiation without a rational basis can then be justified as limitations of the right to equality in terms of section 36. These are the steps formulated by the Constitutional court in *Harksen v Lane*.[137]

The structure of the enquiry appears quite systematic: One first considers whether there has been a violation of the right to equality before the law and then considers whether there is unfair discrimination. If the equal treatment right in section 9(1) has been violated there will be no need to consider whether there has been a violation of the non-discrimination right.[138] The Constitutional Court has held that it is neither desirable nor feasible to divide the equal treatment and non-discrimination components of section 9 into watertight compartments: the equality right is a composite right.[139] In *National Coalition for Gay & Lesbian Equality v Minister of Justice*, the Constitutional Court held that a Court need not 'inevitably' perform both stages of the enquiry.[140] This was because he first-stage rational basis inquiry would be 'clearly unnecessary' in a case in which a Court holds that the discrimination is unfair and unjustifiable. In other words, in those cases in which a Court finds that a law or conduct unjustifiably infringes

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137 *Harksen v Lane NO* 1998 (1) SA 300 (CC).

138 This approach was adopted by Heher J in *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W). The judge found that the common law offence of committing unnatural sexual acts and the offence created by S. 20A of the Sexual Offences Act 23 of 1957 had no rational basis and are therefore a violation of S. 9(1), he then proceeded to consider whether there was any justification for the violation in terms of S. 36 (the Limitation clause). Finding that there was none, he held that the offences are unconstitutional and did not consider whether they also constituted unfair discrimination.

139 *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 22.

140 *Supra.* para 18.

section 9(3) or (4), there is no need to first consider whether the law or conduct is a violation of section 9(1).[141]

What is prohibited under the Constitution is unfair discrimination. It seems surprising that not all discrimination is unfair or that there could be such a thing as fair discrimination.[142] An example where discrimination was held not to be discriminatory is the case of *President of the Republic of South Africa v Hugo*.[143] In 1994, President Mandela granted a remission of sentence to all mothers who are in prison at the time and who had children under the age of twelve years. The respondent, a prisoner who was the father of a child under twelve, argued that the President's order unfairly discriminated against him on the basis of gender. The Court found that the President's Act constituted discrimination on two grounds: 'sex coupled with parenthood of children below the age of 12'.[144] The first of these was a listed ground. This means that the Act should be considered unfair discrimination unless it could be justisfied by the general limitation clause.[145]

The majority of the Court treated it as an acceptable generalisation that, in South African society, as in many other societies, mothers are primarily responsible for nurturing and rearing children. This imposes a tremendous burden upon women and is one of the root causes of women's inequality in society. If, on the basis of this generalisation, the President had denied an opportunity to mothers which he afforded to fathers his action would have been an unfair discrimination. However, the President did the opposite. On the basis of the generalisation he afforded an opportunity to mothers, which he denied to fathers. Though this was discrimination, it was not unfair. The decision of the President benefited children and gave women prisoners with minor children an advantage. The effect of the act was to do no more than deprive fathers of

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141 This was the approach adopted by Davis J in *National coalition for Gay & Lesbian Equality v Minister of Home affairs* 1999 (3) SA 173 (C). The judge held that provisions of immigration legislation granting favourable status to spouses of South African citizens constituted unfair discrimination on grounds of sexual orientation, without first considering whether the measure ws a violation of the right to equal treatment.

142 In *President of the Republic of* South *Africa v Hugo* 1997 (4) SA 1 (CC para 37, 9 and 40 Goldstone J talks of 'fair discrimination'.

143 *Supra*

144 *Ibid.* para 33.

145 S. 36 of the Constitution of the Republic of South Africa, Act 108 of 1996.

minor children of an early release to which they had no legal entitlement. There are far larger numbers of fathers in prison than mothers. The release of such large numbers of prisoners would have led to public outcry. Thus it could not be argued that the decision not to afford male prisoners the same opportunity impaired their sense of dignity as human beings or their sense of equal worth. The discrimination could also be justified on the fact that the purpose of the President's Act was to achieve a worthy and important societal goal. The President's Act was designed to benefit three groups of prisoners – disabled prisoners, young people and mothers of young children as an act f mercy. The fact that all these groups are regarded as being particularly vulnerable in our society, and that in the case of the disabled and young mothers, they belonged to groups who had been victims of discrimination in the past, influenced the Court to arrive at the decision that the discrimination was not unfair. The discrimination was against a class of individuals (fathers) who had not historically been subject to disadvantage.

Mokgoro J, in a dissenting judgment, held that denying fathers' release from prison on the basis of a stereotype about their aptitude in child rearing was an infringement of their equality and dignity.[146] Mokgoro J was not persuaded by arguments that mothers of young children are more disadvantaged than others in the penal system and held that there was no correlation between the nature of the disadvantage and the measures taken to alleviate that disadvantage.[147] Accordingly, Mokgoro J concluded that the measure amounted to unfair discrimination.[148] However, Mokgoro J considered that the infringement was justifiable under the limitation clause. From the dissenting judgment of Mokgoro J it could thus be seen that discrimination can be justified if it satisfies the requirements of the limitation clause.

Kriegler J in his dissenting judgment premised his dissent with the majority judgment on a principled objection. He accepted that the release of the others was praiseworthy and likely to benefit some children. 'The essence of the equality clause was to end deeply-entrenched patterns of inequality in our society'.[149] The stereotype that women

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146 At para 92 (H).

147 At para 94 (D). See also *Egan v Canada* (1995) 29 CRR 79.

148 At para 106 (E).

149 At para 83 (E).

are responsible for inhibiting the progress of women in society.[150] The President, by releasing mothers of minor children, because of this perception was perpetuating a stereotype, which was the main cause of the inequality of women in the society. Thus, the benefits to a few are outweighed by the serious disadvantage to society as a whole.

This writer aligned herself with the majority decision in the *Hugo's* case. The majority decision promotes substantive equality. Equality does not mean that men and women are the same. The special advantage given to women by the President, though discriminatory, but it is not unfair discrimination.

Generally, discrimination is usually unfair. Where a particular act impact more on some people than others, then that act is unfair. It is noteworthy that an instance of "unfair discrimination" can be justified under the limitation clause.[151] An example of where an unfair discrimination was justified is the case of *Pretoria City Council v Walker.*[152] In this case, the Constitutional Court examined the impact of two policies of the Pretoria City Council. The Council had jurisdiction over the formerly exclusively white areas of Pretoria ('old Pretoria') and over the townships of Atteridgeville and Mamelodi. The residents of old Pretoria are mostly white and those of the two townships are mostly black. In old Pretoria ratepayers paid consumption-based tariffs for the water and electricity services supplied by the Council. Actual consumption was measured by meters placed in each property. In Atteridgeville and Memelodi, users paid a flat rate per household, no matter how much or how little water or electricity they consumed. Walker, a resident of old Pretoria, complained that the flat rate in Mamelodi and Atteridgeville was lower than the metered rate and this therefore meant that the residents of old Pretoria subsidised those of the two townships. He also complained that only residents of old Pretoria are singled out by the council for legal action to recover arrears owed for services whilst a polity of non-enforcement was followed in respect of Mamelodi and Atteridgeville.

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150 On gender stereotyping see further: *Mississippi University for Women v Hogan* 458 US 718 (1982 where gender stereotyping was defined as "fixed notions concerning the roles and abilities of male and females". In *Miron v Trudel* (1995) 29 CRR (2d) 189 the Canadian Supreme Court defined stereotyping as "distinctions based on presumed rather than actual characteristics".

151 S. 36 of the Constitution of South Africa Act 108 of 1996.

152 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC.

The majority of the Constitutional Court considered the actions of the Council to be indirect discrimination on the basis of race – which is a listed ground in the equality clause, and in which case, the discrimination has to be presumed unfair. However, the majority went on to hold that the first set of actions that the respondent complained of (the flat rate and cross-subsidisation) was not unfair discrimination.[153] The second action (selective recovery of debts) was held to be unfair discrimination.[154] In arriving at this decision, the Court took into consideration that the respondent (Walker) was white, and therefore belonged to a group that had not been disadvantaged by the racial policies and practices of the past. In an economic sense, his group was neither disadvantaged nor vulnerable, having been benefited rather than adversely affected by discrimination in the past.[155]

The Court found further that the decision of the Council to confine the flat rate to Atteridgeville and Mamelodi and to continue charging the metered rate in old Pretoria was dictated by circumstances. First, the Council inherited a situation in which the townships are not equipped with metering equipment, while houses in old Pretoria are. Moreover, since old Pretoria is a wealthier and more developed area than Atteridgeville and Mamelodi, it was a fair assumption that old Pretoria would have accounted for a major proportion of the total consumption of water and electricity in the municipality. To have applied a flat rate throughout the entire municipality would have been unscientific,[156] and would have resulted in far greater prejudice to individual users than the application of the flat rate in Atteridgeville and Mamelodi alone. In the circumstances, the adoption of a flat rate as an interim arrangement while meters are being installed in the residential areas of the two townships was the only practical solution to the problem.[157]

On cross-subsidisation, the Constitutional Court disagreed with the hold of the Court of first instance that the levying of different rates for the same services is always unfair. The Constitutional Court stated that the case was an example of an instance in which it was not unfair. The cross-subsidisation was temporary and would be phased out once

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153 Per Langa DP para 68F.

154 Per Langa DP para 81D.

155 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC para 47.

156 Para 53 (A).

157 Para 53 (B).

meters had been installed in the townships and a consumption-based tariff introduced. In the meantime, the fact that the white town subsidised consumption in the black townships could not be said to 'impact adversely on the respondent in any material way. There was no invasion of the respondent's dignity nor was he affected in a manner comparably serious to an invasion of his dignity'.[158]

The Constitutional Court held that the selective recovery of outstanding service charges by the Council amounted to unfair discrimination. In old Pretoria, defaulters (such as the respondent) are summonsed and services are suspended. In the townships, there are no suspensions nor was any legal action taken against defaulters. According to the Court, had the Council set in place a properly-formulated policy directed at achieving the important societal goal of transforming both the living conditions and culture of non-payment of service charges in the townships, the policy might well have been consistent with the goal of furthering equality for all. It would therefore have been a measure aimed at achieving substantive or restitutionary equality and not in conflict with the equality right. Instead, the policy of taking no legal action to enforce payment of arrears had nothing to do with the ability of the residents to pay, or the introduction of metered charges and was applicable to all residents of Atteridgeville and Mamelodi irrespective of their financial circumstances or their ability to pay for the services. The Court held that the Council had not discharged the burden of showing that the racial discrimination was not unfair. The Court stated that[159]

> No member of a racial group should be made to feel that they are not deserving of equal 'concern, respect and consideration' and that the law is likely to be used against them more harshly than others who belong to other race groups. That is the grievance that the respondent has and it is a grievance that the council officials foresaw when they adopted their policy. The conduct of the council officials seen as a whole over the period from June 1995 to the time of the trial in May 1996 was on the face of it discriminatory. The impact of such a policy on the respondent and other persons similarly placed, viewed objectively in the light of the evidence on record, would in my view have affected them in a manner which is at least comparably serious to an invasion of their dignity. This was exacerbated by the fact that they had been misled and misinformed by the council. In the circumstances, it must be held that the presumption has not been rebutted and that the course of conduct of which the respondent complains in this respect, amounted to unfair discrimination within the meaning of section 8(2) of the interim Constitution.

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158 Langa DP at para 65 (I).

159 *Pretoria City Council v Walker* 1998 (2) SA 363 (CC para 81.

In a recent decision a Durban Court held that the City Council must restore the electricity and water supply of a woman who could not pay her bills. The woman has nine other dependants.[160]

3.3.3.4 Affirmative action

Affirmative action means preferential treatment for disadvantaged groups of people.[161] An affirmative action programme require a member of a disadvantaged group to be preferred for the distribution of some benefit over someone who is not a member of that group. The grounds of preference are usually race or gender.[162]

The term affirmative action was first conceptualised in the United States in 1965 and has been the basis for a series of programmes, which include special efforts to recruit and promoted minority groups, *viz* women and black people who had been excluded from participation in the mainstream of the country's private and public decision-making processes.[163] An affirmative action plan identifies jobs in which insufficient numbers of women and blacks are employed in comparison to the number of women and blacks available in the labour market and among the economically active population. [164] In South Africa, affirmative action is used as a process to redress and reverse the imbalances created by legislated discrimination, which specifically marginalized the bulk of the population. [165]

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160 *Sunday Times* 26 March 2000 4.

161 De Waal *et al op. cit.* 204.

162 In South Africa, the government's most ambitious affirmative action is the Employment Equity Act 55 of 1998. The Act aims to redress inequalities in the public and private sector labour markets. The Act obliges employers to take steps to increase the representation of members of so-called 'designated groups' in their workforce. The designated groups are black people, women and people with disabilities.

163 De Waal *et al op. cit.* 204.

164 *Gender and the Private Sector (Gaps)* Commission for Gender Equality, (1999) 22.

165 *Ibid.*

In *Public Servants' Association of South Africa v Minister of Justice*[166] the Court held that the words 'design' and 'achieve' denotes a causal connection between the designed measures and all the objectives. In that case, no white males (all of whom had considerable work experience) who applied for senior posts in the Department of Justice are interviewed for the vacant positions. This was because the Department was virtually the exclusive domain of white males. To address this situation, the Department apparently adopted a policy that no white males would be considered for certain posts. According to the Court, these actions, though forming part of an affirmative action programme, are haphazard, random and overhasty. They therefore could not in any sense be said to be 'designed' to, or constructed to, achieve affirmative action goals.[167] The Court held that the actions of the Department, therefore, did not constitute 'measures designed to achieve affirmative action' and consequently are invalidated as unfair discrimination based on race and gender.

An affirmative action programme must be designed to protect and advance persons disadvantaged by unfair discrimination in the past. In *Motala v University of Natal,*[168] an Indian student who had obtained 5 distinctions in matric was refused admission into medical school. The medical school had decided to limit to 40 the number of Indian students admitted to its programme. This was because the poor standards of education available to African students meant that a merit-based entrance programme would result in very few African applicants being accepted into medical school. It was argued that because the Indian community had also been disadvantage by apartheid, a measure favouring African students over Indian students amounted to unfair discrimination.

The Court held that the admission policy was a measure designed to achieve the adequate protection and advancement of a group disadvantaged by unfair discrimination. This judgment is correct as apartheid society had a distinct hierarchy of races. Whites are at the top, Africans at the bottom and the coloured and Indian communities are situated in between. It is therefore, perfectly legitimate to apply

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166 *Public Servants' Association of south Africa v Minister of Justice* 1997 (5) BCLR 577 (T).

167 See *Kauesa v Minister of Home Affairs* 1996 (4) SA 965 (NmS), where the Namibian High Court held that the affirmative action clause in the Namibian Constitution, which is comparable to S. 9(2) of the South African Constitution, does not sanction affirmative action measures and restructuring of a degree and nature that would violate the dignity of persons.

168 *Motala v University of Natal* 1995 (3) BCLR 374 (D).

affirmative action measures in proportion to the degree of disadvantage suffered in the past. The Court however, should have considered whether the measure adopted by the medical school is reasonable and carefully constructed so as to achieve equality. The Court failed to do this in the case of *Motala v University of Natal.*[169] The Court simply based its judgment on the basis that Africans are more disadvantaged than Indians.

In *Auf der Heyde v University of Cape Town*[170] the plaintiff applied for and goet a job as a Senior Lecturer in chemistry for a "three-year contract". The letter of appointment stated that the appointment was for the period specified and "does not carry any commitment to permanent appointment". Before the expiration of the 3 year contract, an advert was placed for the post of a lecturer. The applicant applied together with his 2 Black colleagues. The 2 black colleagues are given the job. The applicant contended that he had been unfairly discriminated against on the basis of his race and gender. The university contended that in terms of its Equal Opportunity Employment Policy blacks and women are favoured. One of the 2 black appointed was a foreigner. The University contended that the justifiable claim that South African citizens have on the university's post must be balanced by the need to seek freely good applicants and to appoint the best of them to each particular post.

The Labour court held that reasonable expectation on the part of the applicant that his contract would be extended or that he would be offered a permanent position would not amount to unfair dismissal if his contract was not extended or where he was not offered a permanent position. The Labour court held further that the dismissal of the applicant was unfair for want of compliance with a fair procedure and ordered the university to pay to the applicant within 14 days of the date of judgment compensation equivalent to 12 months remuneration.[171]

In *Walters v Tansitional Local Council of Port Elizabeth & Another*[172] the applicant, a while female, with experience in job evaluation was short listed for the post of principal personnel officer (job evaluation) together with other applicants, including the second respondent, a black male who was an external candidate. The selection committee

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169 *Supra.*

170 *Auf der Heyde v University of Cape Town* (2000) 8 BLLR 877 (LC).

171 *Auf der Heyde v University of Cape Town* (2000) 8 BLLR 877 (LC) para 84.1.

172 *Walters v Transitional Local Council of Port Elizabeth & Another* (2000) 21 ILJ 2723 (LC).

interviewed the candidates and recommended the second respondent for the post. The applicant launched an application in the Labour Court. She relied on three causes of action – alleged infringement of her constitutional right to equality, the concept of unfair labour practice[173] and a delictual claim.

The court considered the applicant's claim based on a residual unfair labour practice of unfair discrimination on the grounds of political opinion, favouritism or race. The court explored the facts ad came to the conclusion that it culd not be said that the council had discriminated against the applicant on the grounds of political opinion and favouritism.[174] The court, however, found that the council had discriminated against the applicant on the grounds of race. The council was not permitted to rely on affirmative action, as the council had not formulated an affirmative action plan in accordance with the Agreement on Equal Employment and Affirmative Action[175] and so the council could not find refuge in item 2(2)(b) of schedule 7.

From the above cases, it could be deduced that for an institution to rely on affirmative action it must have laid down guidelines on which the affirmative action policy is to be based.

In a recent case reported in the Sunday Times, the Labour Court ruled that under the Labour Relations Act[176] "affirmative action discrimination" could be a fair basis for hiring someone, but not for dismissal. Guido Penzhorn (Acting Labour Court Judge) gave the ruling in a case brought by a dismissed staff of the Technikon Natal. In the case Antoinette McInnes, who was marketing manager of the Technikon successfully applied for a job as a lecturer in the Marketing Department. She designed the course and began teaching marketing on the basis of an annual contract. When in November, 1997, it was decided to make her post a permanent one, she was recommended for the job above external applicant Malusi Mpanza.

The Vice-Principal of the Technikon Natal said that the decision should be reconsidered in view of the Technikon's affirmative action policy. The selection committee

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173 As contemplated in item 2 of schedule 7 to the Labour Relations Act 66 of 1995.

174 *Walters v Transitional Local Council of Port Elizabeth & Another* (2000) 21 ILJ 2723 (LC.

175 Labour Relations Act Act 66 1996, schedule 7 to the Act.

176 66 of 1995 as amended by Labour Relations Amendment Act 127 of 1998.

reaffirmed its preference for McInnes, but recommended that Mpanza be hired. Mpanza was hired and was also paid double the salary McInnes had been earning – and more than even the Head of Department. The Acting Labour Court Judge stated that it was clear Mpanza had been hired on the basis of race, and that McInne's employment had come to an end because of her colour. The Judge stated further that the Technikon's "subtle and sophisticated" affirmative action policy did not require "blatant racial discrimination in favour of Africans." He said that there was no policy that candidates from a targeted group be paid more than other applicants or offered more than the advertised salary. He ordered that McInnes be reinstated and given back pay from 2 February 1998.

Despite affirmative action policies, women are still on a road to nowhere.[177] Preliminary results of a Commission for Gender Equality study into the private sector show that less than one in four jobs in the private sector are held by women against almost two-thirds in the public sector.[178] Black empowerment companies have done very little to improve the position of women in the workplace. The study found firmly entrenched racist and cultural stereotypes – such as "black women cannot be depended upon as they are always having babies", and "men are heads of households and therefore should be in higher positions".

Of the companies interviewed, 47 per cent did not have a gender policy and 41 per cent did not have a sexual harassment policy. Only 72 per cent complied with the Labour Relations Act in terms of maternity leave. This survey shows that little empowerment is happening in the private sector.[179]

3.3.4 Agencies supporting human rights in South Africa

In terms of Chapter 9 of the Constitution of South Africa[180] some state institutions supporting constitutional democracy are established. The institutions include the Human Rights Commission and the Commission for gender equality.[181]

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177 See *Business Times* Sunday 16 May 1999 1.

178 *Ibid.*

179 For the full report See GAPS – Gender and the Private Sector – Commission for gender equality, (1999) See also Conference on Gender and the Private Sector Report, February 2000.

180 Act 108 of 1996.

3.3.4.1 The Human Rights Commission[182]

The Human Rights Commission was established to promote respect for human rights and a culture of human rights. The Commission is established to promote the protection, development and attainment of human rights and monitor and assess the observance of human rights in South Africa.[183] The Commission has power to investigate and to report on the observance of human rights, to educate the people, to take steps to secure appropriate redress where human rights have been violated and to carry out research.

In terms of the Constitution, the Commission is empoared to require relevant organs of state to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.[184] In terms of this provision, the Commission is empoared to ask each organs of state what they have done and what they are doing towards the realisation of socio-economic rights in the country. This power creates a reporting obligation on the part of the organs to make annual reports to the Commission. This power is similar to those held by international human rights committees.[185]

This is a unique feature of the South African Constitution. This provision reinforces the commitment of the state to full realisation of socio-economic rights. The reporting obligation to the Commission recognises the socio-economic imbalances inherited by post-apartheid South Africa and the abject poverty experienced by many South Africans and the commitment to protecting socio-economic rights and advancing social justice.

The Commission in realising the Constitutional duties thrust upon it undertook a series of workshops and meetings with various institutions with expertise in socio-economic

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181 S. 181 Act 108 of 1996.

182 See the Human Rights Commission Act 54 of 1994.

183 See S. 184 (1) Act 108 of 1996.

184 S. 184 (3) of the Constitution.

185 *E.g.* the ECOSOC, The Committee on the Elimination of Discrimination Against Women.

rights who are prepared to assist the Commission in developing its mandate. The purpose of the workshops and the various meetings was to develop a comprehensive plan of action for the monitoring process. Draft Protocols (questionnaires) are developed to serve as monitoring tools for the realisation of socio-economic rights. The main objectives of the protocols are to enable the Commission to[186]

> Gain an understanding of the impact of past discriminatory policies on the current status of socio-economic rights.
> Test government departments' understanding of their Constitutional duties.
>
> Develop a baseline understanding of the current policy and legislative measures being taken by government to respect, protect, promote and fulfil socio-economic rights.
>
> Establish whether government has appropriate information systems and a plan of action for the realisation of the rights.

The Centre for Human Rights, University of Pretoria, was commissioned to assist the Commission in analysing the information received from the various government departments. The analysis of the government's responses was based on an interpretation of the relevant Constitutional provisions as well as relevant international human rights standards, including the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights.

The Commission has the power to enter and search any premises and also to attach and remove any articles.[187] The Commission has wide-ranging powers.

3.3.4.2 The Commission for Gender Equality

The Commission for Gender Equality was established to promote respect for gender equality and the protection, development and attainment of gender equality.[188] The

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186 See Thipanyane (1998) 1 ESR Review 11.

187 See S. 10 Human Rights Commission Act No 54 of 1994.

188 S. 187 (1) of the Constitution Act 108 of 1996; See also Commission for Gender Equality Act 39 of 1996.

South Africa Constitution distinguishes discrimination based on the basis of gender from discrimination based on sex. This is another unique feature of the Constitution.[189] Women experience a myriad of problems, which are not experienced by men. For example, unequal pay for work of equal value, inferior benefits under social assistance programmes and insecure tenure to land and housing.

The Commission for gender equality was established to address these realities. Its main functions are to promote respect for gender equality and the protection, development and attainment of gender equality. The Commission is tasked with a number of specific duties in terms of both the Constitution and the Commission for Gender Equality Act.[190] The Commission has the power to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.[191] The Commission has a duty to monitor issues concerning gender equality, but it has no express constitutional duty to monitor the realisation of socio-economic rights. This duty is assigned to the Human Rights Commission.

The Commission has the power to receive individual complaints, and to make recommendations to Parliament on issues emanating from its monitoring and evaluation processes, resolving disputes through mediation, conciliation or negotiation; submitting a report to Parliament on particular issues relating to gender equality, conducting further research; lobbying for change where it has identified an inadequate commitment to women's rights, and educating the public and creating an awareness of women's equal rights.

The Commission for Gender Equality as part of its mandate has conducted a series of conferences and workshops. The workshops are aimed at gathering information on current initiatives for the advancement of gender equality and identifying problems experienced by women at all levels. The Commission has held conferences on gender and the private sector, poverty hearings, women participation in politics and the reform of the Witchcraft Suppression Act.[192]

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189 See S. 9 of the Constitution Act 108 of 1996.

190 Act 39 of 1996.

191 See Pillay (1998) 1 *ESR Review* 13.

192 Act 3 of 1957.

incidence of witchcraft violence in the Northern Province. The main purpose of the conference was to review the Witchcraft Suppression Act and to consider its repeal.

The Witchcraft conference was very important because witchcraft violence are discriminatory and biased as the victims are mostly older, African women, it occurs more in the rural areas and the problem is greater among the illiterate.

The conference did not concern itself with debates as to the existence of witchcraft but rather to review the Witchcraft Suppression Act[193] and to address the problems caused by the Act. The Witchcraft conference is a significant contribution from the Commission because of the high incidence of violence associated with suspicion of witchcraft. While traditional African beliefs are important, people should be educated that not all misfortune are as a result of witchcraft. People should also be encouraged not to take laws into their own hands and that they should report all cases of witchcraft suspicion to the police.

The Commission has published a number of publications among which are the following[194]

3.4 A COMPARISON OF HISTORICAL BACKGROUND AND CONSTITUTIONAL FRAMEWORK OF NIGERIA AND SOUTH AFRICA

Both Nigeria and South Africa have a history of colonisation. Both countries also have a multiplicity of legal systems.

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192 Act 3 of 1957.

193 Act 3 of 1957.

194 Working woman's manual, 1999; Gender and the private sector (GAP), 1999; Conference on Legislative Reform for Witchcraft Suppression Act 3 of 1957, 1999; Redefining politics – South African Women and Democracy, 1999 and Gender and the private sector report, 2000.

The sources of law in both countries are almost similar except for the fact that South African common law include Roman-Dutch law unlike Nigeria, where the common law comprises only of English law. All other sources of law are almost similar.

Both countries have history of oppression. Colonialism, apartheid and ethnicity in South Africa. Colonialism, ethnicity and military dictatorship in Nigeria. Both countries are now enjoying constitutional democracy. Both countries have Bill of Rights in their Constitutions. Fundamental rights under the Nigerian Constitution are divided into fundamental human rights and fundamental objectives. Civil and political rights are contained in fundamental human rights chapter, and they are fully justiciable. while socio-economic rights are contained in chapter two as fundamental objectives and directive principles of state policy.

South African Bill of Rights contains civil and political rights and socio-economic rights in one chapter. While the civil and political rights are fully justiciable, only "access to" some of the socio-economic rights are protected.

The Bill of Rights in the South African Constitution is however more detailed, for example the right to political rights is provided for separately, while political rights is embodied in the right to peaceful assembly and association in Nigeria. The right to vote and be voted for is not included in the Nigerian Bill of Rights. The Bill of Rights also does not provide for free and fair election at regular interval.

Both countries have equality provision in their Constitutions. The equality provision in the South African Constitution is however more detailed. The South African Constitution contains more grounds on which discrimination is prohibited.

Inequalities exist in both jurisdictions. Both countries have devised measures to address inequalities. In Nigeria, there is the policy of "federal character" while the South African Constitution provides for affirmative action.