A CRTTICAL APPRAISAL OF THE EFFICACY OF INTERNATIONAL LAW AS A TOOL TO ACHIEVING GENDER EQUALITY

BY

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PG/11/12/20/5250

A DISSERTATION SUBMITTED IN PARTIAL FUFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF MASTERS OF LAW DEGREE

FACULTY OF LAW.

DELTA STATE UNIVERSITY.

OLEH CAMPUS

2016

CERTIFICATION

I, EVELYN OMAVOWAN OBORO, hereby certify that apart from reference to legal work and authors, which have been duly acknowledged, this dissertation is a product of my personal effort and it has not been resented elsewhere for any Degree.

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APPROVAL

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ACKNOWLEDGMENTS

I wish to express my profound gratitude to Jehovah God Almighty who cared for me throughout the duration of this programme.

My Sincere gratitude goes to Professor M.O.U Gasiokwu, the Dean of the Faculty of Law, Delta State University, who set up the Post Graduate Programme of the Faculty of Law. 1 am also sincerely grateful to my Amiable Supervisor Dr. (Mrs.) B.O. Alloh whose advice on this dissertation has made this research work a reality.

I am indebted to my Dear Friend Barr (Mrs.) Pleasure Ebbah-Mukoro who contributed to the success of this research work.

I take this opportunity to record my gratitude to Prof. D.F. Tom, Dr. Peter Gasiokwu and to all my other Lecturers and friends who contributed in one way or the other to see me trough this programme. God will bless you all in Jesus name. Amen

DEDICATION

This Project is dedicated to God Almighty and to my academic model and inspirer, Prof. Amos .A. Utuama (SAN) and to my dearest husband Mr. Festus Ese Utuama, my beloved ones, Elohor, Eguono, Kesiena and Edirin, for their love, support and encouragements.

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TABLE OF ABBREVIATIONS AND ACRONYMS

BPFA:	The Beijing Platform For Action
CEDAW:	Convention on the Elimination of Discrimination Against Women
CSW:	Commission on the Status of Women
DAW:	The Division for the Advancement of Women
DEDAW:	Declaration on the Elimination of Discrimination Against Women
ECOSOC:	Economic and Social Council
NGOs:	Non-Governmental Organizations
UN:	United Nations

ABSTRACT

Law is often perceived as an instrument for social change. Though there are constitutional and legal provisions for gender equality in Nigeria, such provisions do not fully contemplate issues of particular concern to women such as reproductive rights since male indicators are constantly used to measure achievements in human rights protection. This research examines the efficacy of law as a tool to achieving gender equality. The research employs the doctrinal and non-doctrinal research methods.

The research explains that Problems such as male dominance in political/legal structures and lack of the political will to tackle some of the problems will create practical obstacles to the realization of gender equality and the realization of the full potential of the law. In this respect, legal protection for women will be difficult where practical measures are not implemented domestically. Similarly, honoring international commitments subsequently becomes problematic as they do not guarantee change nationally and they, too, are sidelined. In consequence, gender equality will not be given priority domestically and aimed at protecting women and women's rights will become ineffective, scant and/or not enforced. The research concludes that the only way to achieve gender equality is through a multi-level approach domestically and internationally in order to guarantee the needed change with regards to gender equality.

CHAPTER ONE

1.0. INTRODUCTION:

Gender equality and protection of the law with respect to women are enjoyed by very few women and relying on the State to promote and make such provisions is not enough. The realization of gender equality and protection of the law can only be obtained through combined efforts at the international level, by states which must create meaningful international obligations; the national level, by the same states to give effect to such international obligations; and the ground level, through individuals and non-governmental organizations that provide the impetus for governments to forge and implement international and national commitments. For the purpose of this research, equality of opportunity (*de jure or formal or abstract equality*) and equality of outcome (*de facto or substantive equality*) are central to an understanding of gender equality.[1]

1.1. STATEMENT OF THE PROBLEMS:

Gender issues have made their appearance from as early as the seventh century when women sought to reinterpret the scriptures which deemed women intellectually inferior by nature and given to sin.[2] Women fought for universal suffrage in the early 1 900s and have constantly battled for equality and are still struggling even three centuries after that. The basis of the struggle for gender equality is firmly rooted in the notion that gender equality is a fundamental human right and also that women's rights are human rights. What exactly does equality on the basis of gender constitute?[3] Even where 'formal' gender equality is guaranteed in national constitutions or legal systems which provide for *procedural* equality, there is a gap between this and *substantive* equality which takes into account the actual lived experiences, needs and interests of

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[1]Hilary Charlesworth and Christine Chinkin, The Boundaries of International Law: A Feminist Analysis (Manchester: ManchesterUniversity Press, 2000), p. 217. UNICEF has produced a report that reveals startling global gender inequalities throughout a girl's/woman's life cycle. See UNICEF, The State of the World's Children. Women and Children: The Double Dividend of Gender Equality (New York, UNICEF 2006, pp 4-5.

[2]Gerda Lemer, The Creation of FenzEnst Consciousness: From the Middle Ages to Eighteen-Seventy (New York: Oxford University Press, 1993), p.13.

[3]The Department of Economic and Social Affairs of the United Nations defines gender equality as "equal opportunities, rights and responsibilities for women and men... It implies that the interests, needs and priorities of both women and men are taken into consideration". United National, Department of Economic and Social Affairs, The World's Women 2005: Progress in Statistics (New York: United Nations, 2006), p. 1.

women.[4] An individual's right to equality should not include only notions of abstract equality but also substantive equality where he or she will necessarily have to be treated differently in order to protect his or her right to equality.[5]

At the national level, women are confronted with the seemingly unending struggle to attain gender equality because of male elitism and its stronghold in the power/governance structure.[6] National policies of even the developed world are generally formulated by men, yet they are referred to as national policies despite the fact that women are under-represented in the policy making process. This is now extended to the international level, particularly in policymaking, where women are directly affected. At the international level, the problem persists as attempting to gain consensus on gender issues is even more difficult due to the varied cultural and religious backgrounds of the nations that comprise the international community.

The role of women in society is often defined within the context of cultural and religious parameters. Cultural and religious practices generally have negative impacts on women and girls but are integral to the social glue necessary for defining

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[4] See Karin Van Marie, "The Capabilities Approach; 'The Imaginary Domain' and Asymmetrical Reciprocity': Feminist Perspectives on Equality ad Justice", Feminist Legal; Studies, 11 ':2003), pp. 266-27.
Equal rights will not always be appropriate, as in the case of pregnancy where a gender specific right would be more suitable.

[5] Charlesworth and Christine Chinkin, The boundaries of international law, pp. 10 and 32.

[6] "Development Index (GDI) and at 22 out of 75 countries with a value of 0.66 for i:he Gender Empowerment Measure (GEM). See United Nations Development Programme. Human Development Report 2006. Beyond scarcity: Power, poverty and the global water crisis (New York: UNDP, 2006), tables 24-25, pp. 364 and 368.
The IGD is not a measure of gender inequality. Rather, it is a measure of human development that adjust the human development index (ND!) to penalize for disparities between women and men in the three dimensions of the HDI: a long and healthy life, knowledge and a decent standard of living. The greater the gender disparity in basic human development, the lower is a country's GD! relative to its HDI. Trinidad and Tobago's GD! value, 0.805 should be compared to its HDI value of 0.809. !ts GD! value is 99.5% of its I-WI value. Out of the 136 countries with both HD! and GDI values, 60 countries have a better ratio than Trinidad and Tobago's. the GEM was intended to measure women's and men's abilities to participate actively in economic and political life and their command over economic resources. !n contrast to the GD!, which is concerned with well-being, the GEM focuses on agency. It measures three dimensions in this area: political participation and decision-making power, economic participation and decisions-making power, and command over economic resources. These indicators are, of course, not without their limitations as they are, inter alia, generally skewed due to income figures, not always based on gender disaggregated data, or do not capture important dimensions of gender discrimination in human development, such as violence against women. See pp. 279-280. See also UNDP [online], "Human Development Report 2006: Human Development Indicators. Country Fact Sheets: Trinidad and Tobago", [cited 06 October 2007J. Available from Internet:
http://hdr.undp.org/hdr2006!statistics/couuntries/countryjact_sheets/cty_fs_TTO.html.

society, particularly for the shaping of male culture identity.[7] This is not to say that specific conversations for the general protection of women and children or for the elimination of discrimination against women do not exist because they do, and these are apart from the general human rights conversations which already include these seemingly minority categories. Evidence would suggest that these conversations are not taken seriously by the state as they are not incorporated into domestic law and enforced, as seen for example, with the perpetuation of discriminatory practices against women. As an integral subject of general equality, women are supposedly afforded equal protection of the law at the national level. They are the primary victims of domestic violence and rape; however even when such issues are legislated, they are adequately dealt with because the realm of family life is considered sacrosanct and outside the scope of state intervention and state bodies generally refuse to intervene. Trying to raise this as a human rights issue at the international level has faced many obstacles. In the same manner that the state will not intervene in so called "private" matters of the family, international law equally lacks the capacity to find individuals culpable of violations in private matters. The United Nations Charter guarantees nonintervention into the domestic affairs of a state, except in cases of gross domestic violations of human rights or genocide.[8]

Additionally, public international law only recognises the state as a subject and individuals wishing to have an audience at the level of international law must do so through the agency of their state. In the case of human rights conversations, however, individual agency may be allowed. Under the Convention on the Elimination of All Forms of Discrimination Against Women, one of six core human rights conventions,[9] an optional protocol was adopted by the General Assembly in 1999 to afford individuals as well as groups and non-governmental organisations the right to report violations by the state of the main convention directly to the Committee on the Elimination of Discrimination Against Women. This right is, of course, circumscribed by the state's willingness to accede to the protocol. In the absence of accession, it poses particularly problems for women as abuses meted out in the home are strictly theoretically outside of the sphere of international law due to the

[7]Jill Steans, Gender and International Relations: An Introduction (New Jersey: Rutgers University Press, 1998), pp. 14-125.
[8]Chapter 1, Article 2: 7, United Nations Charter, 26 June 1945, entered into force 24 October 945
[9]Philip Aiston, "Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council", Journal of Transnational Law and Policy, 15:1 (2006)m p. 61.

public/private divide and the notion of the sanctity of the family. This is further aggravated yet by the fact that the political, legal, social, cultural and domestic structures are dominated by men.

1.2. AIM AND OBSECT1VES

Essentially, the aim of this research is to assess the strengths and weaknesses of international law instruments with respect to concrete issues of gender inequality and specific areas of concern to women. The objectives of this research work are to:

1. Carry out a critically assessment of international law as an instrument to assist women in their fight for equality and protection of the law against marginalization;
2. Assess the availability of international law instruments for the promotion of gender equality;
3. Examine the effectiveness of international law as an instrument to effect change in the context of women's rights; and
4. Carry out an assessment of the effectiveness of international institutions in the context of gender equality and the protection of the rights of women.
5. Assess whether the examination of rights as part of the development of international law also contemplates the specific issue of women's rights and, in particular, the right to gender equality.

1.3. METHODOLOGY OF RESEARCH:

The researcher adopts both the doctrinal and non-doctrinal research methods. Doctrinal research deals with retrieval of all necessary source materials from primary and secondary sources, dealing with the subject matter .in this wise, published texts (foreign and indigenous),

journals, laws reports (foreign and indigenous), treaties and laws that are of direct relevance to gender equality are relied upon.

The non-doctrinal method of research involves personal contacts and interviews with lecturers, international law experts and resource persons who have in one way or the other contributed to this area of the law.

1.4. LITERATURE REVIEW

Although, several textual works abound in this area of research, it is important to note that despite the extreme research in this area, none of the work examined has dealt comprehensively with the efficacy of law as a tool to achieving gender equality. Therefore, the researcher has examined several works in this study in order to ascertain the areas that are still fallow and unploughed.

For example, Zillah Eisenstein's[10] work, titled "The Radical Future Of Liberal Feminism", sees patriarchy as a political structure which seeks to control and subjugate women so that their possibilities for making choices about their sexuality, childrearing, mothering, loving, and laboring are curtailed. The work emphasized that patriarchy is a system of oppression that recognizes the potential power of women and the actual power of men. That its purpose is to destroy women's consciousness about her potential power, which derives from the necessity of society to reproduce itself. It was also stated in this work that the priorities of patriarchy are to keep the choices limited for women so that their role as mothers remains primary and that if the system of patriarchy is not fully encompassed within the law, a legalistic definition of patriarchy is limited and insufficient. It was further shown in the work that a woman's subjection to man is reinforced by the relations of property and inheritance, as the redefinition of patriarchal power within the family is based partially on the new distinctions being drawn between religion, civil society, the family and the state.

However, one of the short -comings about the work is that the work did not treat the efficacy of law as a tool to achieving gender equality. The work also exposed the fact that the feudal society

was patriarchal and the transition to capitalism did not destroy patriarchy but only redefined it in liberal terms. The work also revealed that fathers believed to be the masculinist underpinnings of the discipline. The book also examined what the discipline might look like if the central realities of women's day- to-day lives were included in its subject matter. The book also exposed the fact that men's experiences form the basis of most knowledge about International politics and that these gender hierarchies remain in place. Thus, the book is an attempt to make the discipline of international relations more relevant to women's lives. The material in

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[10]ZilIah Eisenstein, The Radical Future of literal feminism, (London. Longman, 1981)

the book has been presented in a way that is accessible to readers in both the discipline of feminist studies. The book provides a comprehensive study on feminist perspectives on international relations. The book also reconceptualize the definition of global security using a feminist perspective and opined that, while it is obvious that not all women are feminists, feminist theories are constructed out of the experiences of women in their many and varied circumstances, experiences that have generally been rendered invisible by most intellectual disciplines. The book also made it clear that the world of international politics is a masculine domain and that theoretical perspective depends on a broader range of human experience are important for women and men alike, as we seek new ways of thinking about our contemporary dilemmas. However, the book did not discuss the efficacy of laws as a tool to achieving gender equality.

Judith butler[11] in her book Gender trouble feminism and the subversion of identity opined that the presumed universality and the unity of the subject of feminism is effectively undermined by the constraints of the representational discourse in which it functions. That the premature insistence on a stable subject of feminism, understood as a seamless category of women, inevitably generates multiple refusals to accept the category.

The book disclosed the fact that the distinction between sex and gender serves

[11]Judith Butler Gender Trouble (New York: Routledge; 1999)

the argument that whatever biological intractability sex appears to have, gender is culturally constructed hence, gender is neither the causal result of sex nor seemingly fixed as sex. It also discusses the means through which sex and gender is given and asked whether it is natural, anatomical, chromosomal or hormonal.

This book referred to the work of Simone de Beauvoir[12] where Beauvoir suggested in the second sex that "one is not born a woman, but, rather, becomes one" and that gender is "constructed". A review of this book has clearly highlighted the need for a research work to bring into focus the major concern of this research work which is the efficacy of law as a tool to achieving gender equality.

Courtney W. Howland,[13] edited a book titled religious fundamentalism and the human rights of women. The book recognizes that human rights issues need input from many different disciplines to achieve the greatest level of credibility and

legitimacy. The book gives a base and structure from which to consider the challenges to women's rights posed by religious fundamentalism, it emphasized
that it is particularly crucial to establish women's right at the heart of human rights
jurisprudence. Finally the book focuses on one of the most difficult challenges facing human rights today as progress in area is the key for guaranteeing the equality of women worldwide. The book explores the acute problems that religious fundamentalist movements around the world are posing for women's equality and liberty rights. It addresses the challenge of religious fundamentalism from distinct but mutually reinforcing perspectives. First, an international human rights perspective that aims to strengthen women's right throughout the world; second, a national law perspective that deals with issues and remedies in individual countries; third, a grassroots perspective that looks to non-legal remedies and alternatives, and fourth, a theological and philosophical perspective that offers alternatives to fundamentalist interpretation of religious doctrines.

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[12]Simone de Beauvoir, sexuality, Existentialist Feminism and the second sex, (London: Vintage, 1997)[13]Courtney w. F-lowland, Religious fundamentalism and the human rights of women, (New
York: St Martins Press;)

Ann Elizabeth Mayer's[14] work, Cultural particularism as a bar to women's rights: Reflections on the middle Eastern Experience represents another commendable effort at presenting an interesting work on this area of the law. The work shows that all women are entitled to the rights set forth in international covenants and conventions such as the 1966 international covenants on civil and political rights and the convention on the elimination of all forms of discrimination against women (CEDAW) which has been in force since 1981. The work examines "Islamic particularism" to justify the denial of civil and political rights to middle eastern Muslim women and expresses the view that discrimination against women constitutes a misguided application of cultural relativism, as many discriminatory features of middle eastern law are directly traceable to religious precepts, Despite these facts, however, the work also failed to provide a proper legal study of the efficacy of law as a tool to achieving gender equality.

Another legal work reviewed by the researcher is Black Women: Shaping Feminist Theory by Bell Hooks[15]. The work provides that feminist in the United States has never emerged from the women who are most victimized by sexist oppression; women who are daily beaten down, mentally, physically and spiritually women who are powerless to change their condition in life. That they are a silent majority and a mark of their victimization is that they accept their lot in life without visible question, without organized protest, without collective anger or rage.

A review of this legal work has clearly highlighted the need for a research work to bring into focus the efficacy of law as a tool to achieving gender equality.

Another work worthy to be reviewed is the work of Annabelle Lever[16] titled, Must privacy and sexual equality conflict? A philosophical examination of some legal evidence. This work examines claims about the relationship of rights to privacy and equality in light of some reasoning. In this work, it was argued that, the right to privacy is fundamentally incompatible with the freedom and equality of women. The work has shown that, there is nothing about valuing privacy which requires us to treat existing privacy rights as just, anymore than valuing equality or democracy need commit us to overlooking inequality and undemocratic government. It is also shown in the work that, the rights to privacy and equality need not conflict, although the right to privacy can justify inequality and that

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[14]Ann Elizabeth Mayer, Cultural Particularism as a bar to women's rights. Reflections on the middle eastern experience, (New York: Routledge, 1996.[15]Bell Hooks, Femist Theory: Margin center (Boston: South End Press, 1984). [17]Annabelle Lever, Must Privacy and sexual equality conflict? A philosophical Examination of some Legal Evidence, Published in social Research: Ar international Quarterly of the social sciences (vol 67 no4), Winter 2000

the majority's account of the right to privacy justifies the oppression of women. However, this work did not discuss the efficacy of law as a tool to achieving gender equality.

Simon de Beauvoir's[16] work on sexuality, existentialist feminism and the second sex, sets out a feminist existentialism which prescribes a moral revolution. It is shown in this work that existence precedes essence, hence one is not born a woman, but becomes one. That the social construction of women as the quintessential other is fundamental to women's oppression. Further, it was asserted in this work that women are as capable of choice as men, and this can choose to elevate themselves moving beyond the 'immanence' which they

were previously resigned and reaching 'transcendence', a position in which one takes responsibility for ones self and the world, where one chooses one's freedom. It was argued in this book that men had made women the 'other' in society by application of a false aura of "mystery" around them. That men used this as an excuse not to understand women or their problems and not to help them, and that this stereotyping was always done in societies by the group higher in the hierarchy to the group lower in the hierarchy. Thus, it is believed that for feminism to move forward, this assumption must be set aside. However, the work did not examine the efficacy of law as a tool to achieving gender equality.

Connell[17] in his work titled The State, Gender and Sexual Politics, wrote on genders and sexuality. According to him, gender is a collective phenomenon, an aspect of social institutions and is internal and external in relation to the state. That sexuality is part of the domain of human practice organized (in part) by gender relations. While sexual politics is the contestation of issues of sexuality by the social interests constituted within the gender relations. To him, the state is a part of a wider social structure of gender relations and that each empirical state has a definable "gender regime" that is the precipitate of social struggles and is linked to the wider gender order of society. This work also opines that women and men tend

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[16]Simone de Beauvoir, sexuality, Existentialist Feminism and the second sex, (London: vintage, 1997) [17] connel, R, The state gender and sexual politics, Review of international studies Vol.19, No. 5 (oct.1990).

to occupy particular positions within the state, and work in ways structured by gender relations. However, the writer did not discuss the efficacy of law as a tool to achieving gender equality.

Adam Jones[18] in his work titled, "Does 'Gender' make the world go round?" feminist critiques of international relations discuses too glibly of 'feminist scholarship'. According to this author, the feminist critique has

subsumed an historical- revision project. Independently of whether they seek to jettison existing theoretical frame works, feminists, by definition reclaim women as subjects of history, politics, and international relations. However, a review of this work has shown that the work did not examine the efficacy of law as a tool to achieving gender equality. Therefore, this dissertation tends to examine the law in this regards.

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[18]Adam Jones,"Does'Gender' make the world go round?" Review of international studies Feminist critiques of international relations studies, vol.22, No.4 (Oct, 1996).

CHAPTER TWO

2.0 LAYING THE THEORETICAL FRAMEWORK FOR THE DEVELOPMENT OF WOMEN'S RIGHTS

There are two main theoretical threads from which the fabric of this thesis is woven. These are feminist legal theory and feminist critical theory. Feminism provides the backdrop against which the issues of gender inequality and inadequate protection of the law for women against violence will be treated. Liberal feminism, in particular, advocate equal rights for women and examines why women are treated as "less than", where men provide the gauge against which they are measured. While liberal feminism addresses the issue of women's formal equality under the law, it has not fully considered issues of social power and women's social, legal and political under-representation in assessing the effectiveness of law as an instrument to advance the status of women or achieve social change more widely. Consequently, a combined theoretical approach is required. Liberal feminist thought, feminist legal theory and feminist critical theory provide the necessary theoretical bases to address not only gender inequality, but also illustrate the ways in which law may be implicated in the subordination of women as well as empower women out of such positions of inferiority.

This research contemplates a critical assessment of law as an instrument to assist women in their fight for equality. Feminist legal theory, therefore, is necessary to expose the masculine nature of jurisprudential theory and practice which will in itself illustrate the difficulty of achieving gender justice in the absence of legal and institutional reform. This is still, however, not enough. Combining feminist legal theory, which exposes the

male bias of law, with feminist critical theory, which offers a space from which women can "emancipate" themselves, allows a comprehensive process of reflection and emancipation. This framework illustrates that the very idea of rights, as currently obtains, is fundamentally conceptually flawed, as the concept of rights presupposes 'man' as its subject, thereby completely bypassing women and other subordination of these 'others'. 'Feminist critical theory. together with feminist legal theory, is used in the examination of these issues, as it can be used as a means of critiquing and then 'rescuing' the idea of rights in favour of women by exposing its biases normative assumptions and politicised knowledge claims.

This combined theoretical framework, therefore provides the setting against which legal and institutional structures for promoting gender equality and protection for women are examined. Moreover, such an analysis will ultimately reveal that these very structures continue to reinforce problems of gender inequality and inadequate protection against domestic violence.

2.1. WHAT IS GENDER?

"One is not born, but rather becomes, a woman."[1]

The key concept in feminist thought is gender. It is therefore appropriate to first interrogate this concept. As elucidated by de Beauvoir's ever popular statement. Feminist theorists understand the term gender not simply as "a set of culturally shaped and defined

[1]Simone de Beauvoir, The Second Sex, trans. and ed.H.M. Parshley (London: Vintage, 1997), p.295.

characteristics associated with masculinity and femininity".[2] This is in accordance with the definition set out in the United Nations' Implementation of the Outcome of the Fourth World Conference on Women which states that:

> ...gender refers to the socially constructed roles played by women and men that are ascribed to them on the basis of their sex. Gender analysis is done in order to examine similarities and differences in roles and responsibilities between women and men without direct reference to biology, but rather to the behaviour patterns expected from women and men and their cultural reinforcement. These roles are usually specific to a given area and time, that is, since gender roles are contingent on the social and economic context, they can vary according to the specific context and can change over time. In terms of the use of language, the word "sex" is used to refer to physical and biological characteristics of women and men, while gender is used to refer to the explanations for observed difference between women and men based on socially assigned roles.[3]

One writer correctly reflected that "sex is biological, gender psychological and therefore cultural".[4] Butler states that the original distinction between sex and gender was conceptualized with a view to disputing Freud's "biology-is-destiny formulation" and that the distinction "serves the argument that whatever biological intractability sex appears to have, gender is culturally constructed…"[5] Socio-cultural constructions of gender are

[2] J. Ann Ticker, Gender in International Relations: Feminist Perspectives on Achieving Global Security (New York: Columbia University Press, 1992). p.7.

[3]United Nations, General Assembly [online], "Implementation of the Outcome of the Fourth World Conference on Women: Report of the Secretary General", A/5/322, 03 September 1996. [Cited 08 June 2004]. Available from Internet: httvJ/www.un,org1documents/a/does/5_J_/plenary/a5_I_-322.hum. The definition of gender as a purely social construction can present somewhat of problem. Alcoff points out that "[i]f gender is simply a social construct, the need and even the possibility of a feminist politics becomes immediately problematic. What can we demand in the name of women if 'women' do not exist and

demands in their name simply reinforce the myth that they do? How can we speak out against sexism as detrimental to the interests of women if the category is a fiction? How can we demand legal abortions, adequate child care, or wages based on comparable worth without invoking the concept of "women"? Linda Alcoff, "Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory", in Michelin Malson et al (eds.), Feminist Theory in Practice and Process (Chicago: University of Chicago Press, 1989), p.310. It should, however, be noted that while Alcoff accepts the notion of gender as a sociocultural construct, what she does take issue with is the poststructuralist approach that argues that gender subjects are produced through discursive practices and so there is no 'essence' or 'being' that is woman.

[4]Millett, quoted in David Glover and Cora Kaplan, Genders (London: Routledge, 2000), p. xxiii

[5]Judith Butler, Gender Trouble: Feminism and the Subversion of Identity (New York: Routledge, 1999), p. 9,

reinforced by both sexes as they tend to deliver what they perceive as expected of them.[6] Critics claim, however, that gender is simply synonymous with *women/femininity*,[7] which is a terribly simplistic and uniformed viewpoint, as 'gender' examines the social construction of gendered identities which includes both men and women while 'women/femininity' deals with the latter to the exclusion of the former and does not necessarily examine the latter's construction. Gender, is the result of a process of cultural socialization and therefore varies across cultures. It refers to the "asymmetrical social constructs of masculinity and femininity as opposed to ostensibly 'biological' male- female differences".[8]

2.2. WHAT IS FEMINISM?

According to Aristotle,

> The male is by nature superior, than the female; the man rules, and the woman is ruled; this principle, of necessity, extends to all mankind. Where there is such a difference as that between soul and body, or between man and animals..., the lower sorts are by nature slaves, and it is better for them as for all inferiors that they should be under the rule of a master."[9]

Similarly, according to Plato,

> there is no pursuit of the administrators of a state that belongs to a woman because she is a woman or to a man because he is a man. But the natural capacities are distributed alike

among both creatures. And women naturally have a share in all pursuits and men in all...[10]

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[6] Anne Phillips, "Introduction'\ in Anne Philips (ed), Feminism and Politics (Oxford: Oxford University Press, 1998), p. 12.
[7]Adam Jones, "Does 'Gender' Make the World Go Round? Feminist Critiques of International Relations", *Review of International Studies*, 22:4 (1960, pp. 406-407. This article has 'engendered' an interesting debate between the author and three scholars from the University of Bristol; *Review of International* Studies, 24(1998), pp-303.
[8]Jacqui True, "Feminism", in Scoff Burchill *et al* Theories of International Relations (Hampshire: Palgrave,2001), p. 236.
[9]The Internet Classics Archive [online], "Politics by Aristotle". Translated by Benjamin Jowett. [Cited 09 August 2007] Available from Internet: hiiv.//classics.mit.edu/Aristotle/PoIitics. 1 .one.html.
[10] Plato, quoted in Lorraine Code, "Introduction", in Lorraine Code (ed). Encyclopedia of Feminist theories (London: Routledge, 2003), p. xxi

Broadly speaking, feminism can be simultaneously understood as theory and social movement. As theory, feminism may consist of "systems of concepts, propositions and analysis that describe and explain women's situations and experiences and support recommendations about how to improve them".[11] According to Randall, however, the best approach to defining feminism is a historical one. She states that, "feminism emerged as a movement and body of ideas that aimed to enhance women's status and power. It called into question power relations between men and women that were conventionally defended as 'natural")[12] The whole nature/nurture debate has persisted for centuries, as illustrated in the above arguments, but it is now accepted (by feminists, at least) that the concept of gender is largely, if not, wholly, a socio-cultural phenomenon.'3 In other words, feminism called for equality between the sexes in economic, social, political, cultural, linguistic and legal spheres which was theorized on a notion of rights.

Feminism should in no way, however, be understood as a monolithic ideology. As Chapman accurately notes, "differences in social and political context produce distinctly in

different forms of feminism"4 such as reflected in Nordic feminism, which is rather philosophical (existential) in nature; and liberal and radical forms of feminism popular in the United States. On a micro level, the vast amount of theorizing and debate has led

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[11]Marilyn Frye, "Feminism", in Lorraine Code (ed), Encyclopedia of Feminist theories (London: Routledge, 2003), p. 195.
[12]Vicky Randall, "Feminism", in David Marsh and Gerry Stoker (eds.), Theory and Methods in Political Science (Basingstoke: Paigrave MacMillan, 2002), p. 110.
[13]The debate continues, however, as to whether gender is natural and essential or cultural and constructed. See Claire Colebrook, Gender (Basingstoke: Palgrave MacMillan, 2004), pp.9-17.
[14]Jenny Chapman, "The Feminist Perspective", in David Marsh and Gerry Stoker (eds, Theory and Methods in Political Science (Basingstoke: Palgrave MacMillan, 1995), p.95.

feminism in myriad diverse directions,[15] so that even within each feminist school of thought there are conspicuous differences. [16]

2.3. THE HISTORICAL DEVELOPMENT OF FEMINISM AND WOMEN'S HUMAN RIGHTS

The development of feminist thought explicitly questions women's exclusion and marginalisation. The term 'feminist' first came into use in English during the 1880's indicating support for women's equal legal and political rights with men.'[17] Feminism, the concept, is widely thought to have its roots in the Age of Enlightenment; however, Lerner has traced the earliest written expression of feminist consciousness all the way back to seventh century Europe, when women sought to reinterpret the scriptures which deemed women intellectually inferior by nature and given to sin.[18] By the beginning of the fifteenth century, feminism took root in liberalist thought. This era witnessed a European-wide public debate led by Christine de Pizan,

known as *the Querrelle-des femmes* and which endured for some 300 years,[19] concerning the misogynistic portrayal of women in literature.

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[15] Chapman, "The Feminist Perspective",supra at P. 4 Palgrave Macmillian, 1995.
[16] One such example is illustrated in Rosemarie Tong's distinction between radical-libertarian feminists and radical-cultural feminists. While they are both premised on the notion that the sex1gender dichotomy is the fundamental cause of women's oppression, they differ on issued of sexuality and reproduction and how to eliminate women's oppression. See Rosemarie Tong, "Radical Feminism", in Lorraine Code (ed.),Encyclopedia of Feminist theories (London: Routledge, 2003), pp. 419-421.
[17] valerie Bryson, Feminist Political Theory: An Introduction (Basingstoke: Palgrave MacMillan, 2003), p. 1.
[18] Bryson, V.,Fennnist Political Theory: An Introduction (Basingstoke: Palgrave MacMillan. 2003), p. 5.
[19] Lerner, C. The Creation of Feminist Consciousness: From the Middle Ages to Eighteen Seventy (New York: Oxford University Press, 1993), p. 144.

There were many influential writers during this period who believed that both men and women possessed a capacity for reason and true knowledge based on individual experience and self-discovery.[20] Descartes, Francoise Poullain de Ia Bare, John Stuart Mill, Marry Astell, Catherine Macaulay[21] and Mary Wollstonecraft all believed that women were necessarily capable of reason and could participate equally in all sphere of life — social, economic, political, academic and that their shortcomings were based entirely on the type of education they received.[22] Astell, however, was politically quite conservative and did not believe in the liberal idea of extending political right to women, as she strongly believed in patriarchy and that women should be subject to the authority of her husband.[23] Mill, too, believed that women could equally partake in professional and political life, but there was one integral caveat: she must be able to successfully jungle her domestic responsibilities with any other she may choose to undertake.[24] While Mill obviously did not

problematise the sexual division of labour and believed that only exceptional women would choose to compete in the work place,[25] he "implicitly

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[20] Feminist critiques of Cartesian philosophy today, however, see this very duality as contributing to a gender dichotomy which supports "an ideology that privileges and autonomous rational masculinity over a relational, emotional, corporeal femininity". Margaret Atherton, "Feminist Critiques of Caitesianism",in Lorraine Code (ed.),Encyclopedia of Feminist Theories (London: Routledge, 2003), p. 72.

[21] Catherine Macaulay's writings, however, were eclipsed by the fame of her close contemporary, Mary Wollstonecraft.

[22] François Poullain de Ia Barre, De L'Egalitd des Deux Sexes: Discours Physique et Moral (OU I'on voit I*'irnportance dese defaire des Prejugez* (Paris: Jean Du Puis, 1673, p. vii.

[23]Bryson, Feminist Political Theory, pp. 9-10.

[24] According to Mill, ". . .the common arrangement, by which the man earns the income and the wife superintends the domestic expenditure, seems to me in general the most suitable division of labour between the two persons. . . if she undertakes any additional portion, it seldom relieves her from this [her domestic/material duties, but only prevents her from performing it properly. The care which she is herself disabled from taking of the children and the household, nobody else takes; those of the children who do not die, grow up as they best can, and the management of the households is likely to be so bad, as even in point of economy to be a great drawback from the value of the wife's earnings". John Stuart Mill, *The Subject of Women* (1869) (New York: Prometheus Books, 1989), p.S3.

[25] Kate Nash, "Liberal Feminism", in Lorraine Code (ed.),Encyclopedia of Feminist Theories (London: Routledge, 2003), p. 303.

challenges the liberal concept of the public/private divide and the masculinist notions of politic upon which this divide rests.[26]

This period also saw the onset of the Industrial Revolution which brought with it changes in the traditional division of labour, which now became more complex and, according to Bryson, the creating of the distinction between the public and the private. During the change, women of the working class were progressively excluded from trades and professions they previously partook in and aristocratic women became restricted to the domestic sphere as they were no

longer needed in the running of their husbands' estates. It was at this point that marriage became an economic necessity as women became increasingly dependent on their husbands for financial support. Issues of unbalanced demography and religious reformation further complicated the situation and the role of women, now so profoundly altered, came into question.[27]

Concurring with the emergence of a clearly delineated public/private realm was the increasing importance of the ancient concept of patriarchy. Historically, the rule of the king over his people was thought to be divinely sanctioned just as a father ruled over his family. Bryson stated that patriarchy in the home was used as justification for a parallel power at the state level.[28] This emergence of the modem secular state embeds, from its very inception, gendered beliefs privileging men and which were accepted as the natural orders of things. The subordination of women within this arrangement continues to be significant today.

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[26] John Hoffman, "Blind Alley: Defining Feminism", *Politics,* 21:3 (2001), p. 194.
[27]Bryson, *Feminist Political Theory,supra* at p. 7.
[28]flryson, *Feminist Political Theory,supra* at p. 8.

1848 was the year of the very first women's rights convention, the Seneca Falls Convention, aid was spurred on by the movement for the abolition of slavery across the Atlantic in the United States. A declaration was issued at the end of the convention and was modeled. This convention demanded that the rights of women as bearers of rights in all sphere of life be acknowledged and respected by society. According to Bryson, the declaration laid the foundation for the structured emergence of feminism as a political movement and an ideology.[29]

2.3.1. FIRST WAVE FEMINISM

Spurred on by their disadvantaged social, economic and legal positions, women formally sought redress. Thus began in the mid-late 19th century was what is known as the first wave of feminism with women seeking formal equality in all spheres of life, including education and legal rights. By 1900, ideological difference in the movement (liberal, socialist, maternal) were overpowered by the growing agreement among those in the movement that the "success on key legal, educational and economic issues could not be gained without greater political leverage"[30] and it was at this point that the focus of the movement shifted and coalesced to that of achieving suffrage and political enfranchisement of women.

Several achievements were gained when the vote was won in many countries by the 1920's. Educational opportunities expanded for English women, both married and unmarried women gained rights and improved maternity and child welfare in both

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[29] Bryson, Feminist Politk'& Theory,sup, at p. 32.
[30] Kathryn Mcpherson, "First-Wave/Second-Wave Feminism", in Lorraine Code (ed), Encyclopedia of *Feminist Theories* (London: Routledge, 2003), pp. 208-209.

England and the United States, and most importantly, winning the vote helped in establishing the legitimacy of women's claim to equal treatment.[31] Notwithstanding these achievements, the patriarchal structures remained largely unchanged and "the ideas and the economic and political

realities underpinning them retained their viability".[32] In any way, the energy required to fuel the drive for enfranchisement left the movement drained and the first wave of feminism receded.

2.3.2 SECOND WAVE FEMINISM

Feminism regained its vigour and returned in the 1960's in its second wave.33 Four main types of feminism emerged here: liberal, radical, Marxist/socialist and psychoanalytic.34 Second wave liberal feminism, too, saw women questioning their role in society, given the increased production of labour-saving devices for the home and advances in contraceptive technology which bestowed upon women a sense of freedom.35 This new wave was characterised by de Beauvoir's The Second Sex, Betty Friedan's. The

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[31]Vicky Randall, Women and Politic: *An International Perspective* (Basingstoke: Palgrave MacMillian, 1987), p.218.

[32] Jean Bethke Fishtain, *Public Man, Private Woman: Women in Social and Political Thought* (Oxford: Princeton University Press, 1981), p.238.

[33]According to Randall, however, the movement was not filly dormant in the interviewing years and states that the reason for the ebb in the movement was a lot more complex than has otherwise been suggested. See Randall, Women and Politic, pp. 218-224.

[34]For the purposes of this dissertation, though, I shall only be looking at liberal feminism, as the feminist issues raised here are the most pertinent to my discussion on law and gender equality. While radical feminism, particularly Mackinnon's offering on radical feminism, explores women's inequality as a product of sexual domination which men, her focus remains too essential as she develop "a monolithic, "grand" feminist jurisprudence which seeks to reduce all aspects of women's oppression to one dimension, and which treads dangerously close to biologistic essentialism". Nicola Lacey, "Closure and Critique in Feminist Jurisprudence: Transcending the Dichotomy or a Foot in Both Camps?, in Nicola Lacey, *Unspeakable Subjects*: Feminist Essays in Legal and Social Theory (Oxford: Hart Publishing, 1998), p. 179. It does not take into account factors such as race or class. Liberal feminism, however, does not regard the legal system itself as contributing to the inferior position of women, while Mackinnon does. See Charlesworth and Chinkin, The Boundaries of International Law, pp. 38-44. This is not to decry Mackinnon's campaign to have sexual harassment recognised as a legal wrong as it has been an effective feminist strategy in many ways. See Lacey, "Closure and Critique in Feminist Jurisprudence", p. 180.

[35] Randall, Women and Politic, p. 222.

Feminine Mystique, Germaine Greer's The Female Eunuch and Juliet Mitchell's Psychoanalysis and Feminism, three of which focus on the psychological aspects of sex and gender.

Women understood female subordination to be more than simply the effect of dominant political forces, but as endemic in all social relations with men.[36] The (initially) radical feminist slogan "the personal is political" was born in this period and brought to the fore the public/private divide, which, as noted earlier, has persisted since the onset of the Industrial Revolution. "The personal is political""involves a recognition that private and public life interpenetrate in complex ways" and is certainly not immune from the dynamic of power.[37] As Green notes, "personal problems are not only private idiosyncratic experiences but part of a social phenomenon amenable to political analysis" and cites the example of both child and spousal abuse which require social and political action for their elimination.[38]

A liberalist notion, the public/private dichotomy refers to both the distinction between state and society as well as between non-domestic and domestic life. 0km goes on to make the point that in both dichotomies, the "state is (paradigmatically) public, and the family domestic, and intimate life are (again paradigmatically) private".[39] The

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[36] Imelda Whelehan, Modern Feminist Thought: From the Second Wave to 'Post-Feminism'(Edinburgh: Edinburgh University Press, 1995), p. 5.
[37] Don Slater, "Public/Private:, in C. Jenks (ed), Core Sociological Dichotomies (London: Sage Publications, 1998), p. 149,
[38] Joyce Green, "Public/Private", in Lorraine Code (ed), Encyclopedia of Feminist Theories (London:

Routledge, 2003), p.412.
[39] Susan Moller 0km, "Gender, the Public and the Private", in Anne Phillips (ed), Feminism and Politics (Oxford: Oxford University Press, 1998 [2003]), p. 117.

importance of this binary[40] relation to feminist theory is that the notion of privacy has always been bestowed upon man as the holder of rights to be free from any state (or church) intervention in the running of his household and in controlling the members of his private sphere.[41] According to Mackinnon, "the liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender-through its legitimating norms.., and substantive policies".[42]

Mackinnon also asserts that

> The state is jurisprudentially male, meaning that it adopts the standpoint of male power on the relation between law and society... [as] the state, through law, institutionalizes male power over women through institutionalizing the male point of view in law.[43]

This point is clearly illustrated in Blackstone's infamous legal interpretation of the status of married women where they were denied legal and civil rights, deemed to be incapable of political activity, and could only be represented by their husband or father.[44]Moreover, the state continues to maintain the distinction between the private and

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[40] Squires contest the notion of the binary distinction as she believes that it should be a tripartite division. Public/Private refers to state and civil society respectively, where civil society does not include domestic or personal life. Civil society is private in the sense that it is not governed by the state. The concept of personal life, however, while indeed private, is private in reference to civil society and not to the state. According to her, "civil society is cast as private when opposed to the state and public when opposed to the personal. This makes any discussion of a single public/private dichotomy either partial or confused, or both". The three spheres of social relations, therefore, are the state, civil society and the personal. Judith Squires, Gender in Political Theory (Cambridge: Polity Press, 2000), p. 25.

[41] 0kin, "Gender, the Public, and the Private", pp. 118-119.
[42]Catherine Mackinnon, "The Liberal State", in Catherine Mackinnon, Toward A Feminist Theory of the State (Cambridge, MA.: Harvard University Press, 1991), p. 162.
[43] Mackinnon, "The Liberal State", pi' 163 and 169.
[44]Blackstone's interpretation: "By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the women is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs everything …". Sir William Blackstone [online], "Commentaries on the Laws of England (1765-1769)". [cited 05 February 2008]. Available from Internet: htt//www.lonang.com'exlibris/blackstone/bla-1 15.htni. See Tern Collier's study on mid seventeenth century political activities by women in England, where women are currently seen as incapable of holding serious political identity.

the public as the legal right to privacy depends on government support45 Man's right to privacy, therefore, has justified the state's inaction (deemed to be a reflection of male interests) in the face of abuses that are perpetrated within the home, as it is not the state's place to interfere with what takes place in his private realm.[46]

2.4. "OTHER" FEMINISMS

Critiques leveled against liberal feminism (as well as the others) were based largely on their exclusionary nature. They were all charged as being inadvertently classist, racist and (hetero) sexist, assuming middle-upper class college-educated married white women to be the only affected groups.[47] While deemed a useful exercise in the study of sex discrimination against one group, it may also be seen as a "case study of narcissism, insensitivity, sentimentally, and self-indulgence".[48] It had the inevitable effect of producing feminist scholarship from the margins to refute the universalizing claims

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Politics: Past and Present". Political Studies Association, Conference Proceedings (University of Nottingham, 1999). See also Teresa brennam and Carole Pateman, "Mere Auxiliaries to the Commonwealth': Women and the Origins of Liberalism", in Anne Phillips (ed), Feminism and Politics (Oxford: Oxford University Press, 1998 [2003]), p. 109.
45Annabelle Lever, "Must Privacy and Sexual Equality Conflict? A philosophical Examination of some Legal Evidence", Social Research, 67:4 (Winter 2000), p. 1144.

46 This holds despite the fact that the state does regulate 'private' sphere issues such as marriage, divorce and child custody. See Nicola Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy", Journal of Law and Society, 20:1 (Spring 1993), p. 95. This will be explored further in a later chapter concerning the state's role as an effective agent and enforcer of legislative change in the protection of women's right.

41t is also interesting to note that while feminist discourse defines its problematic as "women", it unwittingly and ironically forgets that it should problematise the subject "man". See Jane Flax, "Postmodernism and Gender Relations in Feminist Theory", in Linda Nicholson (ed), Feminism/Postmodernism (New York: Routledge, 1990), p. 45. She states, though, "The single most important advance in feminist theory is that the existence of gender relations has been problematised". See pp. 43-44.

48Bell hooks, "black Women: Shaping Feminist Theory", in Joy James and T. Denean Sharpley-Whiting (eds), The Black Feminist Reader (Maiden: Blackwell Publishers Limited, 2000), p. 123. She refers particularly to Betty Friedan's The Feminist Mystique.

made by white feminists who spoke as if for all women,[49] reflecting the divergent historical-political circumstances of each type.[50] While the various criticisms are acknowledged, liberal feminism makes a clarion call for gender equality regardless of individual contexts and provides a useful starting point, together with feminist legal theory and feminist critical theory, to examine law as a potentially valuable, though not unproblematic, instrument to promoted gender equality.

While liberal feminists can be criticized for not questioning the male bias in rights discourse and practice, but have merely sought to extend 'male rights' to women. However, this does not invalidate a rights agenda as a tool that can be used to promote the status of women. Critical theory holds out the possibility of rescuing a universal and emancipator project for feminism. What is universal, however, is determined not by reference to a transcendental subject, as in liberalism, but is subjectively constituted through dialogue. For example, the NGO forum at Beijing can be presented as one such forum for debate and dialogue on women's rights. Here, activists question the meaning and limitation of rights and which rights are women's rights. h this way, the substantive meaning of rights has been transformed to better fit the needs of

women. Of course, NGO forums are far from 'ideal speech situations' but, nevertheless, represent a 'best practice' subject to further improvement *vis-à-vis* access and inclusion.[51]

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[49] For example Reina Lewis and Sara Mills, "Introduction", in Reina Lewis and Sara Mills (eds), Feminist *Postcolonial Theory*: A reader (Edinburgh: Edinburgh University Press, 2003), p. 4.
[50] Among these included African feminism, Asian Feminism, Black Feminism, Chicana Feminism, Latin American Feminism, Lesbian Feminism, Postcolonial Feminism, Postmodern Feminism and Post structural Feminism. For more on these and others, see generally Lorraine Code (ed), *Encyclopedia of Feminist Thought* (London: Routiedge, 2003).
[51] brooke Ackerly, "Women's Human Rights Activists as Cross Cultural Theorists", *International Feminist Journal of Politics*. 3:3 (Autumn 2001), pp. 324-325.

Critical theories claim that legal scholarship is elitist. For them, the production of knowledge "is in itself a historical process which is conditioned by the socio-political, economic and cultural context in which it is constructed".[52] Critical theories argue that the production of knowledge is integrally related to power and serves particular interests,[53] where power is associated with the male and masculinity. The power associated with the male and masculinity is underpinned by many factors one of which is the legal system. It is important therefore to develop an understanding of how the law functions to support the power of the male elite and to determine how the assessment of the law can be used to both expose its male bias and posit the gender equality sought by women as part of their fundamental rights. The notion of the relationship between knowledge and power is also a critical component of feminist legal theory.

2.5. FEMINIST LEGAL THEORY

Feminist legal theory, or feminist jurisprudence, came about in the 1980's "out of a political concern for the ways in which law may be implicated in women's subordination".[54] It may be defined very broadly as "the study of the relationship between women and the law"[55] which exposes the male bias of law.[56] West makes the point that

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[52]Jil1 Krause, "Gender Inequalities and Feminist Politics in a Global Perspective", in Eleonore Kofman and Gillian Youngs (eds), Globalization: Theory and Practice (London: Pinter, 1996), p. 226.
[53]Chris Weedon, "Post structuralism/Postmodernism", in Lorraine Code (ed), Encyclopedia of Feminist Thought (London: Routledge, 2003), p. 398.
[54]Reg Graycar, "Feminist Legal Theory", in Lorraine Code (ed), Encyclopedia of Feminist Thought (London: Routledge, 2003), p. 198.
[55]Gary Lawson, "Feminist Legal Theories", *Harvard Journal of Law and Public Policy*, 18:2 (Spring 1995).
[56]Patricia A. Cain, "Feminist Jurisprudence: Grounding the Theories", in Katharine Bartlett and Rosanne Kennedy (eds), *"Feminist Legal Theory" Readings in Law and Gender* (Boulder: Westview Press, 1991), p. 264.

> "jurisprudence is "masculine" because jurisprudence is about the relationship between human beings and the laws we actually have, and the Laws we actually have are "masculine" both in terms of their intended beneficiary and in authorship".[57]

West identifies two main projects of feminist legal theory, the first of which is the "unmasking of the patriarchy behind purportedly ungendered law and theory", or uncovering "patriarchal jurisprudence".[58] The second project entails "reconstructive jurisprudence", or feminist law reform in areas such as rape, sexual harassment, discriminatory employment practices and reproductive freedom.

Feminist legal theory is multidisciplinary in its approach and draws upon the lived experiences of women. The critical perspectives developed from the other disciplines help to offer "powerful analyses of the relationship between law and gender and new understandings of the limits of, and opportunities for, legal reform".[59] As such, "Feminist legal theory does not constitute a unified body of knowledge or a set of

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[57] Robin West, "Jurisprudence and Gender", in Katharine Bartlett and Rosanne Kennedy (eds), *"Feminist Legal Theory" Readings in Law and gender* (Boulder: Westview Press, 1991), p. 231. West writes an instructive article on how the different values that men and women identify with affect the character of law (which is inherently masculine) and its effectiveness (or lack thereto) in affording protection and security of self to individuals.

[58] Even if women were able to conquer patriarchy (on one level) and obtain equal pay for equal work, would that make them immune to the effects of patriarchy elsewhere, such as, say, male violence at home? See Mark Cowling's interesting insights on patriarchy and feminism, based on the work of Sylvia Walby who identifies sixpatriarchal social structures, in his draft paper, "Socialism, Feminism and Patriarchy : Does the Concept of Femininities Provide a Useful Link?, *Political Studies Association*, Conference Proceedings (University of Nottingham, 1999), pp. 1-24.

[59] Katharine Bartlett and Rosanne Kennedy, "lntroduction",in Katharine Bartlett and Rosanne Kennedy (eds), *"Feminist Legal Theory" Readings in Law and Gender* (Boulder: Westview Press, 1991), P. 1.

universal concerns or perspectives, but is shaped by different political agendas and institutional frameworks occurring within particular societies".[60]

A common link in the different manifestations of feminist theorizing is that of gender equality and reasons for women's subordination. Feminist legal theory, one of such manifestation, is significant because the law represents a major component of the social fabric and an underlying mechanism for attaining gender equality. Not only is the law important at the national level, but also at the international level, as international law is seen as the primary

mechanism for ensuring that State laws comply with their global pronouncements. The application of feminist legal theory, therefore, to the domestic legal regime of Trinidad and Tobago exposes the gender bias in the law while illustrating how legal principles might be employed towards the attainment of gender equality.

Critical theory provides a space for women to understand and overcome the oppression they face through their own struggles. The difficulties experienced by the international community to forge effective legal instruments that promote gender equality, where such legal instruments are negotiated to have states accept the obligations contained therein, and to introduce same in domestic legal systems, continue to resonate in debates at the international level. Even when nations accept certain international instruments that promote gender equality, such states have to be constantly reminded to meet their international legal obligations.

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[60] Sharyn L. Roach Anleu, "Critiquing the Law: Themes and Dilemmas in Anglo-American Feminist Legal Theory*", Journal f Law and Society*, 19 (Winter 1992), p.423.

It is within this combined feminist, legal and critical theoretical framework that the information presented in the rest of this dissertation will be couched. The analysis above clearly illustrates the male bias intrinsic to legal discourses generally as well as specifically as applied to women in the rights debate.

CHAPTER THREE

3.0. INTERNATIONAL LAW AND THE PROMOTION OF GENDER EQUALITY

Law is a social phenomenon. It has grown into an essential principle of social organisation in Western civilisations as a result of the historicity of those societies.[1] Law functions as the formal

machinery for creating and maintaining social order, as seen in the western world and is often perceived as an instrument to effect change. The plight of women

with respect to their fundamental rights is almost universal in nature and therefore it is hardly surprising that there are calls for the issue to be addressed at the international level. This "topdown" approach has many supporters as it is commonly felt that the near global phenomenon of gender inequality can only be resolved by a common approach implemented across state borders.

An examination of the relationship between international law and gender will provide the sis for the argument that international law on many occasions fails to contemplate a gender perspective and, when this is done, the effectiveness of the legal regime is called into question. This aside, issues of sovereignty would suggest that exclusive reliance on international law to effect change is perhaps ill-advised and would explain why women's issues in particular are not universally or fully implemented with alacrity, or even at all.

3.1. THE DEVELOPMENT OF INTERNATIONAL LAW

International law seeks to maintain order and facilitate relations between states, as well as non-state actors, in areas, inter alia, such as trade, travel and communication. International law may be defined as that body of law which is composed for its gender part of the principles and

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[1] Surya Prakash Sinha, *What is Law? The Differing Theories of Jurisprudence* (New York: Paragon House, 1989), p 218.

rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other and includes International Organisations and other non-state actors.[2] Bentham has been attributed with having coined the term "international law" in the

178Os.[3] In the absence of a single international legislative body responsible for the enactment of laws, international laws are drawn from a variety of sources. Article 38(1) of the Statute of the International Court of Justice states that the sources of international law are:

a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;

b) International custom, as evidence of a general practice accepted as law;

c) The general principles of law recognised by civilized nations;

d) Subject to the provisions of Article 59, judicial decisions and the teaching of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[4]

Other sources include United Nations General Assembly Resolutions, the international Law Commission, other United Nations bodies and "soft law" which consist of non-legally binding instruments.

It follows that, unlike domestic law, international law does not embrace such a formal organizational structure for the regulation of international affairs and it has taken on a largely

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[2] I. Shearer, *Starkey International Law* (London: Butterworth's, 1994), p.3.
[3]Malcolm Shaw*, International Law* (Cambridge University Press, 1997), p. 1.
[4] International Court of Justice [online], "Statute of the International Court of Justice". [cited 18 October 2004]. Available from the Internet: http://www.ici-cii.org/jciwww/ibasicdocuments/Basetext/istatute.htrn

"soft law" approach,[5] even more so on "softer" issues such as international trade, protection of the environment and the promotion of human rights, within which are to be found issues affecting women and children, highlighting their marginalisation and exclusion from issues deemed worthy of regulation. Given the economic, political, social and cultural differences of international society, it is difficult to secure consensus on new rules. What soft law does is to provide a type of half-measure in the law-making process on the international Level. It can be described as "law in the process of making. It is nascent, incipient, or potential law."[6] According to Birnie and Boyle, it may take the form of:

> codes of practice, recommendations, guidelines, resolutions, declarations of principles, standards, and so called 'framework' or 'umbrella' treaties which do not fit neatly into the categories of legal sources referred to in Article 38(1)(c) of the ICJ Statute,[7]

While critics may argue that the terms is inadequate and misleading, its flexibility allows for overcoming deadlocks thereby facilitating consensus among states pursuing conflicting goals.[8] The very legality of international law is constantly questioned, as it is near impossible to enforce laws in a realist anarchic framework and was dubbed a "positive morality" by John Austin.[9] This is compounded by the fact that the international law is not structured in the same manner as domestic law as it does not have a legislative body to enact laws, no judges to apply them in particular disputes and limited power to compel obedience)[10]Akashi states that from a Hobbesian theoretical perspective, because there is "no common sovereignty, nor legislative

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[5] For an exposition on the differences of "hard law" and "soft law" in international law, see W. Abbott and D. Snidal, " Hard and Soft Law in International Governance*", International Organisation*, 54:3 (Summer 2002), pp.42 I -456.
[6] Foo Kim Boon, "The Rio Declaration and its Influence on International Environmental Law", *Singapore Journal* of Legal Studies, (1992), p. 350.
[7] Patricia Birnie and Alan Boyle, *international Law and Environment* (Oxford: Clarendon Press, 1992), pp. 27-30.
[8] UJ. Harris, Cases and Materials on International Law (London: Sweet and Maxwell, 1998), p. 65.
[9] Shaw, International Law, supra at p.3.
[10] Terry Nardin, 'International Pluralism and the rule of law", Review ofTnternational Studies, 26(2000), p. 103 and shaw, *international Law, supra* atp. 3.

body,[that] exists among nations, there is no law in this sense applied to international relations".

Despite these difficulties, and the view of international law as merely "an aesthetic achievement",[12] international law continues to grow in importance in international relations. The reasons for its importance are threefolds according to Savage[13] International law has grown in practice through the creation of new agreements and conventions for the prosecution of 'war criminals'; developments in international relation have led to a renewal of interest in normative issues (such as sovereignty, statehood, human rights practices) and international law is associated with men and masculinity.[14] International law, then, was based on observable phenomena of what actually took place between states and their relations with one another. However, in its earliest formulations, international law adopted a somewhat more natural law approach which emphasized the importance of morality, justice and reason.

Modern international law, nevertheless, emerged within the philosophical framework of early Christian principles which would explain the emphasis on morality. The leading thinkers of modern international law were either theologians or Western scholars coming from civilisations dominated by Christian principles. Christianity, as contained in the teaching of Christ and his disciples, contained clear elements of male supremacy. While it is acknowledged that Christ had strong female support from followers such as Mary Magdalene, the traditionalists note that there

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[11] Kinji Akashi, "Hobbes' Relevance to the Modem Law of Nations", *Journal of the History of International Law, 2*

(2000), p. 200.
[12] Anthony Carty, "Critical International Law: Recent Ti-ends in the Theory of International Law", *European Journal of International Law*, 2(1999), p. 1.
[13]Michael Savage, "*The Justification of International Law*: Sovereignty and International Legal Theory", *Political Studies Association*, Conference Proceedings, (University of Noftingham, 1999), p. 2.
[14] Theorists of this era were concerned with men being able to control and dominate nature, which, not surprisingly, was given female characteristics.

were no female disciples. Indeed, Paul, who has been associated with the phenomenal growth of the early Christian movement, said "let your women keep silent in the churches, for they are not permitted to speak; but they are to be submissive, as the law also says".[15]

Hugo Grotius, Dutch theologian and lawyer, is hailed as the father of modern public interrnational law, although this is disputed by some, including those loyal to jurists such as Gentili.[16] His writings in the early seventeenth century on the law of nations as he understood it is very heavily reliant on his theosophical beliefs and consequently, of a highly moral nature. Grotius was committed to the pursuit of peace and felt that this was only attainable through consensus In order to achieve consensus, Grotius believed that Christian doctrine would have to be reduced to its barest minimum so as to minimize the potential for conflict.[17] Once there is nothing over which Christians could argue about, there would be consensus, which would lead to peace.

Despite Grotius' heavy leaning on theology and his belief that high levels of individual morality and reason could function to keep society regulated, (and by extension states, as states are made up of individuals), it is claimed by many writers that he removed the concept of nature

law, or divine law,[18] from theology making the idea of international law a purely positive conception.

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[15] 1 Corinthians 14:34. Emphasis added.
[16] Gesina van der Molen, *Alberico Gentili and the Development of International Law: His Life, Work and Times* (Leyden: A. W. Sijthoff Uitgeversmaatschappi, 1968), p. 197.
[17] Jeremy Thomas,"The Intertwining of Law and Theology in the Writings of Grotius*", Journal of the History of International Law 1*, (l999),pp. 63-64.
[18] Shaw, International Law, supra atpp. 20-21.

Grotius' contribution to the development of international law is best reflected in his first major work, Mare liberum, which advocated the freedom of the high seas.[19] He was writing at a time when, according to Shaw, "this theory happened to accord rather nicely with prevailing Dutch ideas as to free trade and the needs of an expanding commercial empire".[20] This immediately brings to mind Cox's famous statement that "theory is always for someone and for sonic purpose"[21] and always rooted in socio-political spatial and temporal contexts.[22] In this work, Grotius espouses the completed free use of the high seas for the benefit of mankind; he explains the relationship between natural, divine and international law; he states that natural law forms part of a higher law and that international law was subject to it; and claims that international law applied to all nations, even the nations of the East despite the fact that East Indians were "sunk in grievous sin" because they practiced idolatry.[23]

Like many juristic writers of this era, Vattel saw one of the primary functions of the law of nations as promoting peace and limiting wartime hostilities without prejudice to a nation's own real interests.[24] An 1 8th century Swiss lawyer, his work on the law of nations practically combined

aspects of both positivism and naturalism.[25] He defined the Law of Nations as "the science which teaches the rights subsisting between nations or states, and the obligations

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[19] This is also claimed to be based primarily on the work of Gentili. See van der Molen, *ATherico Gentili and the Development of International Law*
[20] Shaxv, *International Law* ,supra at p.21.
[21] Robert Cox, "Social forces, State and World Orders: beyond International Relations Theory", in Richard Little and tvlichael Smith (eds), Perspectives On World Politics: A Reader (London: Routledge, 1981), p. 444.
[22] Foucault also makes the point that "Discourse and system produce each other..". Michael Foucault, The Archaeology of Knowledge (London: Routledge, 2002), p. 85. Once the discourse is espoused and accepted as true, it becomes institutionalized and they continue to produce and reinforce each other.
[23] Thomas, "The intertwining of Law and Theology in the Writings of Grotius", pp. 97-98.
[24] Emmerich de Vattel, The Law of Nations or Principles of the Law of nature, Applied to the Conduct and Affairs of Nations and Sovereigns, translated and edited Joseph Chitty (London: Law Booksellers and Publishers, 1834), p. lv.
[25] Shaw, International Law, supra at 23.

correspondent to those rights".[26] Vattel was able to clearly delineate two integral aspects of international law. These are natural or necessary law and positive or secondary law. It may be said that natural law provides the standard for measuring the moral rightness of positive law.[27] According to Vattel,

> the necessary law of nations consists in the application of the law of nature [derived from God and conscience] to states, - which law is immutable, as being founded on the nature of things, and particularly on the nature of man....[28]

Like Grotius, Vattel believed that the "law [of nations] is not less obligatory [to states] than on individuals, since states are composed of men... „[29] Positive law comprised three features: voluntary, conventional and customary, features which have persisted in contemporary international law. According to Vattel, international law stems from the will of nations, treaty law stems from the

express consent of states and customary law from their tacit consent.[30] He also advocated for the equality of nations. Thus, "A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[31]

3.2. INTERNATIONAL LAW AND RIGHTS

Rights as a concept have existed for millennia. Interestingly, from its earliest inception, the right of the citizen, which assumed a set of universal ideals such as freedom, equality and liberty,[32] has always referred to the rights of man and not of women. The notion of citizenship emerged in the classical Greek era in the time of Aristotle. According to Aristotle, citizenship

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[26] de Vattel, *The Law of Nations*,,supra at p. 4.
[27] Nardin, *"International Pluralism and the Rule of Law"*, supra at p.93.
[28]de Vattel, *The Law of Nations, ,supra* atp. 8.
[29]Tbid, 194.
[30] do Vattel, *The Law of Nations*, pp. ixii-ixvi.
[31]de Vaffel, *The Law of Nations*, p. ixii.
[32] Davina Bhandar, "Citizenship", Lorraine Code (ed), *Encyclopedia of Feminist Theories* (London: Routledge, 2003), p. 89.

can only be bestowed on a property-owing individual very active in political life. This necessarily excluded women, children and slaves.

3.3. THE CONCEPT OF UNIVERSAL RIGHTS

As noted above, rights discourse has its foundations in natural law concepts which take on a moral rather than positivistic character. It is said that the concept of natural rights in the

seventeenth century embodies rights to life, liberty and property and is attributed to Locke. According to Locke:

> Man [is] born with a title to perfect freedom and an uncontrolled of the law of nature, equally with any other man... [and] hath by nature a power.. .to preserve his property, that is his life, liberty, and estate, against the injuries and attempts of other men…[33]

It is of course, significant to note that Locke talks of "man", as he is not using the word generically but to denote that any rights holder can only be white European property-owing males, again excluding women, children and non-whites, very similar to the Greek conception of a citizen.

Notion of rights and equality can be found in the Bible. Rights seem to be grounded in the notion of equity such that one could "take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise"[34] in the event of having been wronged. Locke reflects this sentiment when he says that:

> man has a right to be judge of and punish the breaches of that law in others, as he is persuaded the offence deserves, even with death itself, in crimes where the heinousness of the fact, in his opinion, requires it.[35]

It would also appear that despite the existence and allowance of slavery, there were notions of equality. "There is neither Jew nor Greek, slave nor free, male nor female .[36] This implies a universality that as Vincent notes, applies to the kingdom of God, not in that of

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[33]Exodus 21:23-25.
[34]Locke, "Second Treatise on Civil Government", p.71.
[35]Galatians 3:28.
[36] R.J. Vincent, *Human Rights and International Relations*(Cambridge: Cambridge University Press, 1986), p.35.

man. [37]Human rights are said to belong to all human beings simply by virtue of their humanity. 3ooth makes a very interesting argument on this definition. He argues that this is an essentialist and tautological construction.[38] According to him, we have human rights in order to make the species human and not by virtue of our humanity.[39] The issue of human rights was officially

instituted as an area of international concern following the atrocities of the Second World War when Germany had been able to commit acts of genocide against millions of its own people with little interference by other nations. This prompted the formulation of the United Nations Charter and the establishment of the United Nations Commission on Human Rights as part of the United Nations Economic and Social Council in l946.[40]

The United Nations Declaration of Human Rights was adopted on 10 December 1948 in the form of United Nations General Assembly Resolution 2174 (ITI), UN Doc A/810.[41] It was drafted by the first Director of the United Nations Human Rights Division, a Canadian, John Peters 1-lumphrey, whose main objective was to make the document universal in its application by drawing on sources from many different legal cultures.[42] According to Article 1 of the Declaration, "All human beings are born free and equal in dignity and rights... [43]Article 2 goes on to state that everyone is entitled to the rights and freedom as set out in the Declaration without fear or favour. Importantly, Article 4 states that everyone has the right to life, liberty and security of person.

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[37] Ken Booth, "Three Tyrannies", in Tim Dunne and Nicolas Wheeler (eds), Human Rights in Global Politics (Cambridge: Cambridge University Press, 1999), pp.51-52.
[38] Booth, "Three Tyrannies", p. 52.
[39] Peter Cumper, "Human Rights: History, Development and Classification", in Angela Hegarty and Siobhan Leonard (eds), Human Rights: An Agenda for the 21 Century (London: Cavendish Publishing Limited, 1999), p. 5 and footnote 29.
[40] Mary Anne Glendon, "John P. Humphrey and the Drafting of the Universal Declaration of Human Rights", Journal of the History of International Law, 2 (2000), p. 250. Humphrey's success in making the Declaration a Universally applicable document is a source of contention, particularly by non-Western cultures which, inter alia, place emphasis on group rights rather than individual rights.
[41]United Nations, "United Nations Declaration of Human Rights", in Ian Brownlie (ed), Basic Documents on Human Rights (Oxford: Oxford University Press, 1992), p. 22.
[42] Much of the conceptual groundwork for the Chai-ter's language on women's rights grew out of the pioneering efforts of the Organization of America States and its Inter-American Commission on the Status of Women. United Nations, The United Nations and the Advancement of Women 1945-1996 (New York: Department of Public Information, 1996), p.O.
[43]Jane Connors, "NGOs and the Human Rights of Women at the United Nations", in Peter Willetts (ed), "The Conscience of the World": The Influence c'f Non-Governmental Organizations in the U.N System (London: Hurst & Company, 1996), p.151.

The work of Eleanor Roosevelt as Chair of the Commission of Human Rights was pivotal not only in the formulation of the Declaration but in ensuring that the gains made on the basis of sex equality were not lost.[44] Noteworthy too, with respect to the UN Charter, is the fact that the women, again, were the driving force behind the inclusion of the sex equality principle. NGOs working under the umbrella of the Inter-American Commission on the Status of Women,[45] in particular, Latin American activists from Brazil, the Dominican Republic, and Mexico,46 insisted that the application of human rights and fundamental freedoms be "without distinction as to.. ,sex The UN Charter made the first concrete step in moving the issue of rights and human rights into the specific realm of equality of men and women. This is a key moment in history as this represented the first time that women and equality were treated in a gender neutral international legal document.

However, the issue of gender parity created a problem in dealing with the international law concept of the "subject" of international law. In as much as gender equality is a concern of human rights law, it faces the obstacle posed by the principle that obligations created by international human rights instruments are directed towards the state and it is the state that has obligations towards its nationals and foreign nationals within their territory and under their jurisdiction.[48] The enforcement and application of human rights instruments by the state is like a

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[44] Margret Galey, "Forerunners in Women's Quest for Partnership", in Anne Winslow (ed), *Women, Politics and the United Nations* (Westport, Connecticut: Greenwood Press, 1995), p.7.
[45] Chapter 1, Article 1:3, United Nations Charter, 26 June 1945, entered into force 24 October 1945.
[46] Jack Donnelly, "The Social Construction of International Human Rights", in Tim Dunne and Nicolas Wheeler (eds), Human Rights in Global Politics (Cambridge: Cambridge University Press, 1999), p. 85.
[47] Donneily, "The Social Construction of International Human Rights", p. 86.
[48] See discussions on monism and dualism where monists assert that international law automatically becomes part of domestic law while dualists assert that international law and domestic law are two discrete system of law. It would appear that dualism is more widespread in countries of the common law tradition. See for example, Alpha Connelly, "Ireland and the European Convention", in Brice Dickson (ed), Human Rights and the European Convention: The Effects of the Convention on the United Kingdom and Ireland (London: Sweet and Maxwell, 1997), pp. 196-197; Justice Michael Kirby [online], "The Growing Rapprochement between International and National Law", Essays to honour His Excellency Judge C.!. Weeraniantry, 1998. [Cited 15 January 2005]. Available from Internet:)p/ww.hcourt.gov.ajthpches/kirbyi/kirbyi_weeram.htm; Pierre-Marie Dupuy, "Dionisio Anziloti and the Law of International Responsibility of States", European Journal of International Law, 3 (1992), p.l4O; Stephen J. Toope [onlinel, "Inside and Out: The Stories of International Law and Domestic Law", (nd.) [cited 15 January 2005]. Available from Internet: http//www.lawsite.eaJ1AWJ/CE]fQn..cJflifl. See also summary of the Convener or Article 4 of the Bangalor Principles which deals with the domestic application of human rights norms in common law jurisdictions. "In most countries whose legal systems are based upon common law, international conventions are not directly enforceable in national courts unless their provisions have been incorporated by legislation into domestic law". [Cited 15 January 20051. Available from Internet: http://www.nii.caIcclawj/Bangalor%2OPrinciple4_c.

double-edged sword, as "the modern state has emerged as both the principal threat to the enjoyment of human rights and the essential institution for their effective implementation and enforcement" .[49]

In some common law countries (like Trinidad and Tobago), international law instruments are not automatically applicable in its domestic law as they must first be enacted by Parliament and there exist no real mandate to force countries to enact such legislation, in effect removing the state's obligations towards nationals it its territory and under its jurisdiction.[50]This is also the case with Nigeria.[51] As the Honourable Madame Justice Desiree Bernard, Judge of the Caribbean Court of Justice notes, convention implementation and enforceability present difficulties depending on the relationship between a state's international obligations and its domestic laws.[52] She goes on to explain that:

> "According to monist theory in international law treaties ratified by a state for the protection of the human person automatically become part of the municipal law of that state. The dualist theory, on the other hand, advocates separation of international law from municipal law, and international obligations of a state are not automatically incorporated into its municipal law which is supreme. For international treaties to be enforceable in the domestic court system of a state they have to be specifically legislated or adopted into the municipal law... In countries where a treaty or convention is not incorporated into the domestic law its enforceability depends in large measure on the integrity and commitment of the particular state in honouring its international

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[49] Desiree Bernard, "The Promotion and Enforcement of Women's Human Rights within the Judicial System of the Caribbean", p. 2. Paper prcsented at the University of the West Indies, Cave Hill, Barbados, 18 November 2005.
Also available fromlnternet: http://www.caribbeancourtofjustice.orglpapers_addresses.html.

[50] Bernard, "The Promotion and Enforcement of Women's Human Rights within the Judicial System of the Caribbean", pp.2-3. Guyana, however, provides a conditional exception to the rule as a 2003 constitutional amendment allows for automatic incorporation of human rights provisions of international legal instruments upon ratification.

[51] See Section 12 of the 1999 Constitution of the Federal Republic of Nigeria (as amended)

[52] Private international law deals with controversies between private person, natural or juridical, arising out of situations having significant relationship to more than one nation. Such issues include international judicial and administrative co-operation; conflict of laws for contracts, torts, maintenance obligations, status and protection of children, relations between spouses, wills and estates or trusts; jurisdiction and enforcement of freign judgments, Recently, the line between Public and Private International Law has became increasingly uncertain, as issues of Private International Law may also implicate ssues of Public International Law, and many tnatters of Private International Law have substantial significance for the intemational community of nations. See Rajendra Ramlogan and Natalie Persadie, Commonwealth Caribbean Business Law (London: Cavendish Publishing Limited, 2004), pp.

22-23 and accompanying notes.

> obligations and undertakings by enacting the necessary legislati0on to ensure enforceability in its municipal courts. Most of the countries within the English-speaking Caribbean and which inherited the English common law and system of government adopted the practice of the United Kingdom which followed the dualist theory; hence in our Region international treaties are not automatically incorporated into domestic law upon ratification, and separate legislation and enactment of statutes are required to ensure enforceability in the municipal courts of the state".[53]

This situation creates obvious difficulties, but nevertheless reflects what actually currently obtains in such countries, Nigeria included, and the problems inherent in relying exclusively on international law to effect change in such jurisdictions.

Many say that international law has broadened its scope to capture non-state actors and even individuals as subjects of international law. While human rights abuses that take place within a state's borders are directed towards individuals or groups based on ethnicity, religious beliefs or any other status, international law, in a legal positive sense, cannot be treated with such abuses. The reasons for this are twofold. The first is that positivist public international law holds the state as the subject of international law where "the individual was not a proper subject of international law.., public international law went to matters affecting states, while private international law[54] concerned matters between individuals".[55]

Vincent puts it quite succinctly, "Individuals and groups other than states have access to this society [the international society] only through the agency of their states; they are objects not subjects of international law".[56] This is compounded by the assurance in the United Nations Charter of non-intervention in the domestic affairs of a state.[57] Dunne and Wheeler however believe that in the post-Cold War era, the United Nations Security Council has found a way around this assurance. The United Nations Security Council has revised its definition of human rights abuses and humanitarian concerns which are now viewed "as a threat to "international

[53] A. Claire Cutler, "Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy", Review of International Studies, 27(2001), p. 140. Quoting Mark Janis
54 vincent, Human Rights and International Relations, p. 113
55 See Chapter 1, Article 2:7, United Nations Charter.
[56] Tim Dunne and Nicolas wheeler, "Introduction" 1-luman Rights and the Fifty Years' Crisis", in Tim Dunne and Nicolas Wheeler (eds), Human Rights in Global Politics (Cambridge: Cambridge University Press, 1999), p. 23.
[57] For more on the Protocol, see section 3.5.1.4 below

peace and security' thereby are legitimising coercive intervention under Chapter VII of the UN Charter".[58]

This strict interpretation notwithstanding, optional protocols to some human rights conventions do allow for sub-state agency (individuals, groups). For example, under the Convention on the Elimination of All Forms of Discrimination Against Women, an optional protocol was adopted by the General Assembly in 1999 to afford individuals as well as groups and non-governmental organisations the right to report violations by the state of the main convention directly to the Committee on the Eliminations of Discrimination Against Women.[59] This right is, of course circumscribed by the state's willingness to accede to the protocol. In the absence of accession, it poses particular problems for women as abuses meted out in the home are strictly theatrically outside of the sphere of international law due to the public/private divide and the notion of the sanctity of the family.[60]

The universal applicability of human rights discourses confronts several barriers. As Dunne and Wheeler observe, the authors of human rights documents such as the United Nations Charter and the Universal Declaration of Human Rights with a view to universal application assumed that "there was no necessary conflict between the principles of sovereignty and nonintervention and respect for human rights".[61] While there are advocates for conceding sovereignty in the name of promoting human rights, there are those who are against it. A case in point is the establishment of the International Criminal Court. The establishment of this Court has not benefited from the support of one of the most powerful nations of the world simply because it requires the concession of that which

realists hold so dear — sovereignty. In a newspaper article, a former President of the Republic of Trinidad and Tobago, who was also instrumental in the establishment of the Court, was quoted as saying that national sovereignty should give way to

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[58] Nevertheless, it provides fertile ground for activist struggle and political pressure. This is dealt with in greater detail in chapter four.
[59] Duone and Wheeler, "Tntroduction"Human Rights and the Fifly Years' Crisis", supra at p. 1.
[60] Richard Lord [online], "Humanity over sovereignty," Trinidad Express, 11 December2003. [cited 11 December 2003]. Available from the Internet: http://www.trinidadexpgcs.com/politics.aspmylink2003-l2 11 %12politics%12Humanity%20over%20sovereignty.htm&mydate+2003-1 2-11 &mypage+politics
[61] Lord, "*Humanity over sovereignty" supra.*

humanitarian issues with respect to the International Criminal Court.[62] He also stated that "sovereignty will more and more become subordinated to the importance of the individual, to our humanity"[63]. In addition to issues presented by sovereignty, the formulation of human rights documents were executed by those influenced by Western, liberal, political thought which means that any claim to universality would imply an imposition of these ideas on societies and cultures with their own conception of rights and morality.

3.4. WOMEN'S RIGHT AS HUMAN RIGHTS IN THE INTERNATIONAL COMMUNITY

As a child of the inherently patriarchal and andocentric structures of both international law and international relations, international human rights law is inevitably a profoundly gendered discourse privileging men. It has been accused of belonging to "the masculine world of rights, masquerading as "human"[64] as it completely ignores concepts of gender.

Due to the fact that man is both the creator and subject of international law and human rights discourse, issues dealing with human rights abuses to women have been largely ignored or seen to be a natural part of the status quo. The fact that political entities at both the national and international levels are dominated by men "means that issues traditionally of concern to men are seen as general human concerns; "women's concern," by contrast, are regarded as a distinct and limited category".[65]

White, western property-owing men, those responsible for creating human rights discourse, were more concerned with protecting against violations of their civil and political rights in the public sphere and as a result these concerns are privileged in human rights discourse. As noted by Charlesworth, "right are defined by the criterion of what men fear will happen to them".[66] Violations in the private sphere -the home - were not an issue "because they

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[62]Richard Lord [online], "Humanity over sovereignty,' Trinidad Express, 11 December 2003. [cited 11 December 2003]. Available from the Internet: http://www.trinidadexpress.conVyolitics.asp?niylinle2003- 12 1 1%2Fpolitics%2FHumanity%2oover%2osovereignty.htm&mydate+2003-l 2-1 1 &rnypage+politics

[63] Lord "Humanity over sovereignty"supra.

[64] Charlesworth, H. and Chinkin, C. "The boundaries of international law: A feminist analysis (Manchester: University Press, 2000), p. 67.

[65] Charlesworth and Chinkinsupra at p. 105.

[66] Charlesworth and Chinkinsupra at p. 71.

were the masters of that territory".[67] Power relations and the very political nature of the family unit are ignored for precisely this reason.

'Women's rights are human rights', a phrase that gained increasing currency since the early 1990s, should be tautological and trans-historical, but unfortunately, this is not the case. According to Charlesworth, this should be but a "distracting redundancy".[68] Unfortunately, abuses against women have become almost naturalised. As Kerr puts it, "So pervasive and systemic arc the human rights abuses against women are regarded as part of the natural order".[69] For Bell, "the ambiguity of the phrase captures the essence of the feminist claim: an assertion for inclusion in the project of human rights and a radical redefinition of what that project entails".[70]

Bunch thinks that because the dominant image of the political actor on the world stage is male that the problem for women is visibility, or lack thereof.[71] In an earlier article, she takes a more gynocentric approach and uses as a starting point the fact the women do have inalienable

human rights and sees the crux of the matter as understanding "why they were excluded before and how to gain wider implementation of these rights now".[72] Whereas Bunch sees visibility as the problem, Ashworth sees the problem as arising out of the silencing of women. "In the silencing, the fact and acts of silencing also become invisible: without a visible victim, there is no crime, and without a crime there is no perpetrator",[73] thereby perpetuating the abuses against women.

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[67]Charlotte Bunch, "Transforming Human Rights from a Feminist Perspective", in Julie Peter and Andrea Wolper (eds), Women's Rights, Human Rights: international Feminist Perspectives (London: Routledge, 1995), p. 13.
[68]Joanna KeIT, "The Context and the Goal", in Joanna Kerr (ed), Ours by Tight: Women's Right as Human Rights (London: Zed Books, 1993), p. 3.
[69]Christine bell, "Women's rights as Human Rights: Old Agenda in New Guises", in Angela Hegarty and Siobhan Leonard (eds), Human Rights: An Agenda for the 21° Century (London: Cavendish Publishing Limited, 1999), p. 139.
[70]Bunch "Transforming Human Rights from a Feminist Perspective", p. 12.
"Charlotte Bunch, "Organizing for Women's Human Rights Globally", in Joanna Kerr (ed), Ours by Tight:
[71]Women's Right as Human Rights (London: Zed Books, 1993), pp. 145-146.
[72] Georgina Ashworth, " The Silencing of Women, in Tim Dunne and Nicolas Wheeler (eds), Human Rights in Global Politics (Cambridge: Cambridge University Press, 1999), p. 261.
[73]Radhika Coomaraswamy, "To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights", in Rebecca Cook (ed), Human Rights of Women: National and International Perspectives (Philadelphia: University of Pennsylvania Press, 1994), p. 55

3.5. THE PUBLIC/PRIVATE DICHOTOMY AND WOMEN'S RIGHTS

The public/private debate which permeates international law provides fertile ground in international human rights discourse for feminist claims against state irresponsibility in incidences of abuses against women in the private sphere. Where has this distinction come from? It is said that the concept of the private sphere (versus the public sphere) is "a distinction that came.. with a colonial inheritance of personal laws".[74] Charlesworth makes the point that the imposition of this distinction "replicates the "reforms" imposed by many colonial administrators which often weakened the position of women in colonial societies".[75] Public international law is very heavily premised on this dichotomy and this is not surprising given that this subject area is a western concept, as discussed at the beginning of this chapter. The dichotomy is therefore a Western import to developing countries and carries with it heavy burdens for women particularly in countries where culture and religion are

deemed integral to the maintenance of the patriarchal structures that rely on the subordination and oppression of women for their existence.

Like human rights discourse, the public/private dichotomy is profoundly gendered and "an inherently political process that both reflects and reinforces power relations"[76] within society. The public sphere is said to encompass politics, economics, law and the workplace all of which are associated with men and their relationship with government. The private sphere on the other hand is where the family is found, and by necessary implication, where women belong. There is a "primal division of labour between the male warrior and the female child bearer" because "man's place is in the public sphere of political government and the market economy, while women's place in the private sphere of domesticity"[77] due to her supposed frailty of the body and mind. As one Iranian scholar noted, quoting an ayatollah, "The specific task of women in society is to

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[74]Charlesworth and Chinkinsupra at p. 70,
[75]Donna Sullivan, "The Public/Private Distinction in International Human Rights Law", in Julie Peter and Andrea Wolper (eds), Women's Rights, Human Rights: International Feminist Perspectives (London: Rc'utledge, 1995), p. 128.
[76]Can,el Shalev, "Women in Israel: Fighting Tradition", in Julie Peter and Andrea Wolper (eds), *Women's Rights Human Rights: International Feminist Perspectives* (London: Routledge, 1995), p. 90 and pp. 91-92.
[77]Akran Mirhosseini, "After the Revolution: Violations of Women's Human Rights in Iran", in Julie Peter and Andrea Wolper (eds), Women's Rights, *Human Rights: International Feminist Perspectives* (London: Routledge, 1995), p. 73. Emphasis added.

marry and bear children. They will be discouraged from entering legislative, judicial, or whatever careers that may require decision, as women lack the intellectual ability and discerning required for those careers".[78] Ii is this self-assumed intellectual arrogance coupled with the brute force that men may display over women that continues to oppress women and keep them dependent on men in such societies.

It is often within the home, or private realm, that women are at risk of facing the greatest physical and/or mental abuse and yet, such abuses are "not within the proper scope of national criminal justice systenis".[79] At the international level, international human rights law operates largely within the public sphere (optional protocol provisions and inherent complications aside) and the state is encouraged to protect the sanctity of the institution of the family which encompasses the family's right to privacy. This translates into the non-intervention by the state into the realm of family life, because of its allegedly sacrosanct nature, and as Sullivan rightly notes "the family is the site of many of the most egregious violations of women's physical and mental integrity, [and] any blanket deferment to the institution of the family or privacy rights within the family has disastrous consequences for women".[80]

The hypocrisy of the enshrined principle of non-intervention by the state into the affairs of the family is revealed by feminist research. Peterson and Parisi note that "the state intervenes in private sphere dynamics in part to impose centralized authority" over women's sexuality, the transfer of property and certain types of socialization, such as heterosexuality (by criminalizing homosexual behaviour).[81] While the state uses its power to intervene in the private sphere dynamics to suit male dominated state interests, it uses that same power to promote the public- private dichotomy as protecting the male from state interference.[82] Such targeted intervention

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[78]charleswonh and Chinkinsupra at p. 107
[79] Sullivan, D.,"The Public/Private Distinction in International Human Rights Law", in Julie Peter and Andrea Wolper (eds), Women's Rights, Human Rights: International Feminist Perspectives (London: Routledge, 1995), p. 127.
[80]V. Spike Peterson and Laura Parisi, "Are Women Human'? It's Not an Academic Question", in Tony Evans (ed), Human Rights Fiy Years On: A Reappraisal (Manchester: Manchester University Press, 1998), p. 140.
[81]Peterson and Parisi supra at p. 145.
[82] Zillah Eisentein, The Radical Future of Liberal Feminism (New York: Longman, 1981), p. 25.

"is a vital part of the authority and power the state receives and institutionalizes for men", thereby marginalizing and excluding women.

The fact that the international human rights law operates primarily within the public sphere, reflects the fact that the state is the subject of international law and that the transgressions of a state or its officials against individuals are the only offences that can be dealt with at this level. The actions of a private individual against another private individual are of necessity not subject to international scrutiny. The irony of the situation is that human rights activists are quick to pressure states to prevent other abuses, such as slavery and racism, which are often performed by private actors as well. Could it be that because slavery and racism are largely ungendered that they receive greater attention, as all of humanity and not just half (and the inferior half at that) is affected?

3.6. CULTURAL / RELIGIOUS RELATIVISM AND WOMEN'S RIGHTS:

As mentioned above, the division of society into two different spheres, where one sphere is completely unregulated by law, creates greater difficulties for women living in societies ostensibly defined by cultural and religious practices. "No social group has suffered greater violation of its human rights in the name of culture than women,"[83] observes one Indian writer. Culture, for women, includes on a broader level, the denial of civil, political, social, economic, sexual and reproductive rights; on a more specific level, it may include female genital mutilation, the inability to obtain a divorce, lack of choice in marriage, the imposition of a dress code, discrimination in inheritance and property law, among myriad other issues. Women in countries regulated by religious legal systems, where religion, and by necessary implication culture, becomes enshrined into law and legalises patriarchal norms, face the greatest difficulty in abolishing discriminatory practices either through their own agency or with external help. In such

[83] Arati Rao, "The Politics of Gender and Culture in International Human Rights Discourse", in Julie Peter and Andrea Wolper (cds*), Women's Rights, Human Rights: International Feminist Perspectives* (London: Routledge, 1995), p. 169.

instances demands for equality based on sex "is met with resistance on the grounds that such demands amount to interference with the right to freedom of religion".[84]

Culture relativists claim that women are the embodiment of a nation's culture and that the current human rights regime does not take this into consideration, and as a result, are not universally applicable.[85] This embodiment depends on the subordination of women and the maintenance of male elites. According to Chinkin, "Cultural and religious groups are often indentified by the role and behaviour that they *designate* to women"[86] implying that women have no choice as to what their role might be. Women in such groups are ostensibly held to be "the repository of tradition, old affection and family history",[87] which provides the justification for their continued and unquestioning oppression. The imposition of the Western notion of the public/private dichotomy only reinforced this conception as Coomaraswamy notes that "private life remained immune and was constructed and reinvented so that women's position [in society] became tied up with the cultural symbolism of the nation or ethnic group".[88] It is n this way that religion, culture and the Western import of the right to privacy have become inextricably linked and even more powerful in terms of keeping women subordinated. As Raday notes, "deference to religious and subculture norms operated to impose patriarchy on women" and is worsened when such ideals are formally institutionalized into law.[89]

Cries of cultural imperialism by non-western countries have allowed many stated parties to CEDAW to enter significant reservations on ratification, accession or succession despite the

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[84]Indira Jaising, "Violence against Women: The Indian Perspective", in Julie Peter and Andrea Wolper (eds), Won,en 's Rights, Thiman Rights: International Feminist Perspectives (London: Routledge, 1995), p. 92.
[85]There has always been a problem in "exporting feminism". See Jean Bethke Elshtain, "Exporting Feminism" Journal of International Affairs, 48:2 (Winter 1995), pp. 541-558 where she explores criticisms directed specifically against American Feminism which assumes political/cultural superiority.
[86]Christine Chinkin, "Cultural Relativism and International Law", in Courtesy Howland (ed), Religious Fundamentalisms and the Human Rights of Women (New York: Palgrave, 1999), p. 57. Emphasis added.
[87]Vickram Seth, A Suitable Bay (London: Phoenix, 1994), p. 285.
[88]Radhika Coomaraswamy, "Different but Free: Cultural Relativism and Women's Rights as Human Rights", in Courtesy I-lowland (ed) Religious Fundamentalisms and the Human Rights of Women (New York: Palgrave 1999), p. 82.
[89]Frances Raday, "Religion and Patriarchal Politics: The Israeli Experience", in Courtesy Howland (ed), Religious Fundamentalisms and the Human Rights of Women (New York: Palgrave, 1999), p. 156.

fact that these reservations have the effect of nullifying the objective of the convention and are contrary to article 28(2) which states that

> [a] reservation incompatible with the object and purpose of the present Convention shall not be permitted",[90] which is also in keeping with Article 19(c) of the Vienna Convention on the Law of Treaties that says, "A State may... formulate a reservation unless: (c) in cases not falling under sub-paragraphs (a)[91] and (b)[92], the reservation is incompatible with the object and purpose of the treaty.[93]

According to the United Nations Division for the Advancement of Women website, there are 180 states parties as of 18 March 2005. From its update on 18 December 2003 to its current update, this number went up by only four. CEDAW, not surprisingly, is known as having the highest number of reservations of any other human rights convention ever formulated95 despite the fact that it is in apparent violation of specific articles within CEDAW itself and the Vienna Convention on the Law of Treaties, which governs treaty making. The soft law approach taken in this convention allows for "consensus" (in its loosest possible meaning) where it would have otherwise been impossible despite the obvious absurdity the many reservations have resulted in and the fact that the status quo of women worldwide remains largely unchanged.

3.7. GENDER EQUALITY AND THE MALE STANDARD:

Coming out of that treaty was the obvious and pressing need for gender equality and the means by which to achieve this. Unfortunately, equality for women in the human rights discourse has come to be understood to mean the achievement of rights accorded to men with reluctance to

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[90] United Nations, "CEDAW" in Brownlie, Basic *Documents on Human Rights*, p. 181.
[91] Where the reservation is prohibited by the treaty.
[92] Where the treaty provides that only specific reservations, which do not include the reservation in question, may be made.
[93] International Law Commission [online], *Vienna Convention on the law of Treaties*. The Convention was adopted on 22 May 1969 and opened for signature on 23 May 1969 by the United Nations Conference on the Law of

Treaties. Entered into force on 27 January 1980, in accordance with Article 84(1). [Cited 23 January 2003]. Available from Internet: http://www.un.orgjlaw/ilc/texts/treaties.htm

[94]United Nations, Division for the Advancement of Women [[online], "States Parties", updated 29 March 2005. [cited 07 April 2005]. Available from Internet: http://www.un.ora/womenwatch/daw/cedaw/states.htm

[95]Bel1, "Women's right as Human Rights", pp. 147-148 and Coomaraswamy, Reinventing International Law, p. 3. Some 60 countries entered reservations that range from specific provision to broad reservations of the convention. See table3.1 and 3.2.

recognise the inherent differences between men and women. Men provide the measure by which equality is measured. The very title of CEDAW "presupposes a male standard.. .attempting to bring women into the male world through the removal of legal constraints".[96] The search for equality initially led to severe absurdities in the interpretation of the law, particularly in cases of sex discrimination and unfair dismissal due to pregnancy.

In the infamous American case, *General Electric Company v Gilbert et al,*[97] a group of women brought an action against the firm on the basis that the firm's disability plan, which paid weekly non-occupational sickness and accident benefits, precluded disabilities arising from pregnancy. In a strange turn of event, the Tower courts held that this amounted to discrimination under the Civil Rights Act, but the highest Court of Appeal, in a majority decision, reversed the decision. Justice Rehnquist, referring to a decision taken by him and his colleagues in Geduldig v Aiello,[98]stated in the decision that the plan "is facially non-discriminatory in the sense that "[t] here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not". He also went on to show that the company's plan simply divided "potential recipients into two groups — pregnant women and non-pregnant persons. While the first group is exclusively female, the second includes members of both sexes". Could the first group possibly be constituted differently? This was a case of "if men don't need it, women don't get it",[99] as one author noted rather sardonically.

Kaufman and Lindquist sought to justify this ludicrous decision by emphasizing the need for maintaining consistency in the common law tradition.[100] The Court could have equally overruled the decision and still adhered to the principles of the common law tradition and not

[96]Natalie 1-levener Kaufman and Stefanie Lindquist, "Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination against Women", in Julie Peter and Andrea Wolper (eds), *Women's Rights, human Rights; International Feminist Perspectives* (London: Routledge, 1995), p. 121.
[97]429 U.s. 125 (1976)
[98] 417 U.S. 484 (1974)
[99]Kathleen Mahhoney, "Gender and the Judiciary: Confronting Gender Bias", in Kirstine Adams and Andrew Byrnes (eds), *Gender Equality and the Judiciary*; *Using International Human Rights of Women and the Girl-child at the Human Rights of Women and the Girl-child at the National Level* (London: Commonwealth Secretariat, 1999), p. 97. Quoting Catherine Mackinnon.
[100]Kaufrnan and Lindquist, "Critiquing Gender-Neutral Treaty Language", p. 116. For more on the common law tradition, see section 5.2 below.

produce such a startlingly gendered (not to mention nonsensical) judgment, although this would have meant overruling one of their own decisions. There are those who believe that the use of gender-neutral language and having more female lawyers and judges can help improve the lot of women. While the latter may deal with issues of female under-representation in a male dominated arena, most women who undertake such professions are socialized by the legal practice to think and behave like men and while sympathetic, may not always be able to render objective decisions, or even decisions tending to be discriminated against on the basis of their female gender.

Equality should recognise the inherently differential roles and contributions of both sexes and should not seek to level the playing field as such, as again men are used as the standard by which to achieve such equality and can result in absurdities as highlighted in the case above. Instead of an androcentric approach, even a gynocentric approach, a "humanocentric" approach should be applied which neither reduces women by attempting to eliminate their difference or marginalize them because of those difference, but one which embraces such differences and treats women with similar regard as men are accorded all at once. The concept of women's right as human rights as painted

above does present a picture of gloom; however, the situation would appear to be changing with women of all professions and status taking on a much more aggressive, active and visible role in promoting the rights of women around the world.

Inherent gender bias; its soft law character and associated issues of implementation and enforcement at the national level; primary of the state as actor in the international arena; unwillingness of states to relinquish any degree of sovereignty; and cultural /religious relativist arguments comprise the main obstacles to the effectiveness of international law instruments. These difficulties notwithstanding, international legal instruments have the potential to be used as political tools with positive effect. When states sign up to a convention, this provides a site for activists on the grounds to organize and pressure states to act. Activists can now engage in "accountability politics"[101] to remind governments of their obligations and, in the face of inaction, expose the recalcitrant state and bring pressure to bear on the powers that be and even successfully force change. NGOs have been successful at the international level in having provisions dealing with the status of women and their participation included in international legal instruments and subsequently using these documents as leverage to effect change at the national level. [102] Sankey makes the point that:

> international law filters downward due in parts to the slow but steady pressure of NOOs. . .declarations have been replaced by binding conventions, monitoring their implementation has been entrusted to special committees and reporters, and individual governments suddenly find themselves being called to account for cases of torture, detention and 'disappearances'.[103]

[101]Keck and Sikkink, Activists Beyond Borders, pp, 24-25. The authors cite information politics, symbolic politics, leverage politics, and accountability politics as the means by which transactional advocacy networks effect change from within the "political spaces" in which they operate. See pp. 16-25.
[102] Carolyn Stephenson, 'Women's International Nongovernmental Organizations at the United Nations", in Anne Winslow (ed) *Women, Politics and the United Nations* (Westport, Connecticut, Greenwood Press, 1995), p. 151.
[103] John Sankey, "Conclusion", in Peter Willets (ad), "The Conscience of the World": *The Influence of Non Governmental Organisotions* in the UN *System* (London: Hurst & Company, 1996), pp. 272-273.

CHAPTER FOUR

4.0. INTERNATIONAL FRAMEWORK FOR THE REALIZATION OF GENDER EQUALITY

The potential for international law to have effect at the national level, therefore, is real and can be affected through the work of activists especially where international law seems to lack the mechanisms to do so in areas not deemed to be vital to state interests, such as the promotion of women's rights.

4.1. WOMEN'S RIGHTS AND THE UNITED NATIONS

The fight by women for equality has taken on a largely legal character[1] as it is recognised that legal reform, combined with the necessary changes to the education system (to deal with deeply entrenched patriarchal attitudes), has the ability to provide one of the greatest catalysts for social change. This fight has to be examined at the international level so as to determine the effectiveness of the "top-down" approach in remedying the repression of women's rights, a problem that has existed throughout much of human history. It should be noted that the term "legal" is used loosely as the non-binding aspect of declarations, conventions[2] and platforms for action (despite States' ostensible intention to be bound), as well individual legal system, make domestic application and enforcement rather difficult. While protocols tend to be of greater force, they too suffer from similar problems.

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[1]Although this holds true since the era of first wave feminism, it has taken a much organized and focus approach since post — 1945.
[2] Lack of enforceability tends to counteract the binding nature of conventions.

The United Nations has formulated eight conventions and two declarations that are committed specifically to promoting women's rights. These include:[3]

- The UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others[4] which calls for the punishment of those procuring others for prostitution;
- The International Labour Organization Convention on Equal Remuneration (1951) which establishes the principle and practice of equal pay for work of equal value as requested and endorsed by ECOSOC;[5]

- UN Convention on the Political Rights of Women[6] fully supported by the General Assembly as early as 1946[7] which commits Member States to allow women to vote and hold public office on terms with men;[8]
- The UN Convention on the Nationality of Married Women[9] which sought to protect the right of a married woman to retain her nationality;[10]
- The UN Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages[11] which states that marriages can only take place with the consent of both parties;[12]
- The United Nations Educational, Scientific and Cultural Organization Convention against Discrimination in Education (1960) which provides for equal educational opportunities for girls and boys;

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[3] This list is taken largely from UN Department of public Information, "Focus on Women: UN Action for Women", DPI/1796/Rev.I, May 1996.
[4]UN Treaty Series, Vol. 96, No. 1342, p.271.
[5]See "ECOSOC Resolution calling on Member States to implement the principle of equal pay for work of equal value for men and women workers, irrespective of nationality, race, language or religion", F/RES/121 (VI), 10 March 1948.
[6]Un Treaty Series, Vol. 193, No. 2613, p. 135.
[7]See "General Assembly Resolution calling on Member States to adopt measures necessary to fulfill the aims of the Charter of the United Nations in granting women the same political rights as men", A/RES/56 (1), 11 December 1946.
[8]See also "Report of the Secretary-General to the CSW on the possibility of proposing a convention on the political rights of women", Vol. 309, No.4468, p.65.
[9]See "ECOSOC resolution calling for the preparation of a convention on the nationality of a married woman", E/RES/242 (IX), 1 August 1949.
[10]Un Treaty Series, Vol. 521, No. 7525, p.231.
[11]See "ECOSOC resolutionA/RES/l 763 (XVII), 07 November 1962.
[12]See A/RES/2263 (XXII), 7 November 1967.

- The UN Declaration on the Elimination of Discrimination against Women[13] which declares women's equal status with men;[14]

- The UN Convention on the Elimination of All Forms of Discrimination against women which prohibits any distinction, exclusion or restriction made on the basis of sex that impairs or nullifies the human rights and fundamental freedoms of women on all areas;[15]
- The UN Declaration on the Elimination of Violence Against Women[16] which condemns any act causing physical, sexual or psychological harm or suffering to women for violence against women by the family, community or state;
- The UN Convention on the Rights of the Child which recognises the right of the child to fundamental human rights and special care[17]

The question here really is whether international legal instruments can have positive effects in domestic legal regimes,[18] but again this relies on commitment, priority and political will of the state concerned. To determine the effectiveness of the "top-down" approach, one convention (including its precursor and follow-ups) and two declarations are examined in some detail.

4.2. THE DECLARATION ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN

While the UN made moves towards establishing a fair amount of legislative and institutional support for the promotion of women's equal rights, the organization recognised that women were still largely unprotected by these changes

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[13]See "General Assembly resolution requesting ECOSOC and CSW to prepare a draft declaration on the elimination of discrimination against women", AJRES/1921 (XVIII), 05 December 1963.
[14]See "General Assembly resolution calling onCSW to complete the draft convention on the elimination of discrimination against women", AJRES/3521 (XXX), 15 December 1975.
[15]A/RES/48/104 20 December 1993.
[16]This convention was not part of the list but should be included.
[17] See discussion on the applicability of International Law into Domestic Law above.
[18]See United Nations, *The United Nations and the Advancement of Women* p, 79.

and discrimination continued unabated. In light of this, the General Assembly requested the drafting of a Declaration on the Elimination of Discrimination Against Women ("DEDAW") and this was unanimously approved by the General Assembly on 07 November 1967. It consisted of eleven Articles which declare that discrimination against women is unjust and incompatible with the welfare of the family and society and called on States to implement new laws to end discrimination against women so that women would be afforded fill protection under the law.[19] As a declaration, it meant that this was but a statement of intent, moral and political, and was therefore of even less contractual force than treaties which have also proved problematic in terms of enforcement at the national level.

4.3. CONVENTION ON THE ELIMINATION OF DISCRIMIN4TION AGAINST WOMEN

This UN Convention provided a comprehensive approach and an internationally binding legal instrument to eliminate discrimination against women. As a means of preparing a binding treaty that would give normative force to the provisions of the Declaration, the Commission on the Status of Women ("CSW") requested the Secretary-General to call upon UN member states to communicate their ideas on such a proposal. This instrument was to be prepared without prejudice to any future recommendations that might be made by the United Nations or its specialization agencies with respect to the preparation of legal instruments to eliminate discrimination in specific fields.[20]

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[19] See UN, Division for the Advancement of Women [online], "Short History CEDAW Convention", updated 10 February 2005. [cited 06 April 2005], Available from Internet: http://www.un.org/womenwatch/daw/cedaw/history.htm.
[20] Article 1 of UN DAW.

These initiatives led to the adoption by the General Assembly of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which was subsequently dubbed an international bill of rights for women.

Article 1 of the convention defined discrimination against women as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms on the political, economic, social, cultural, civil or any other field".[21]

While it may have been the swiftest entry into force of any human rights instrument at the time, [22] it was also the convention with the largest number of reservations entered reflecting States Parties' unwillingness to accept the full scope of obligations stated in the instrument.[23]

Noteworthy are the reasons for reservations. The most significant number of reservations, as seen in table 1 concerns articles 2, 9, 11, 15, 16 and 29 and reflect states' unwillingness to be bound by provisions that strike at the root of the convention, especially articles 2 and 16. Several countries which practice Islamic Law

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[21] 1t entered into force less than two years after it was adopted by the General Assembly. See United Nations, The United Nations and The Advancement of Women p, 42.

[22] Some 58 countries entered reservations on specific provisions of the convention.

[23] This is blatantly contrary to Articles of the convention. 14 countries have entered reservations on the basis of the convention's incompatibility with Islamic. Shari'ah (Algeria, Bahrain, Bangladesh, Egypt, Iraq, Kuwait, Libyan Arab Janihiriya, Malaysia, the Maldives, Mauritania, Morocco, Pakistan, Saudi Arabia and Syrian Arab Republic); 2 countries have entered reservations on the basis of incompatibility with their constitution Lesolbo and Tunisia [where Tunisia's constitution is based on Islamic Shari 'ah]); 2 countries have entered reservations on the basis of incompatibility with the multicultural nature of their society (India and Singapore); two countries have entered reservations on the basis of incompatibility with customs and traditions (Micronesia and Niger [where Niger's customs are

regulated by Islamic Shari'ahlj; one country has entered reservations on the basis of incompatibility with Judaic Jlalakhah(Israel); and one country has entered reservations on the basis of its finite resources with which to implement the provisions of the Convention (Mexico) which surely applies to many more countries. For more on the religious legal systems, see for Shari'ah, Michael Mumisa. Islamic Law: Theory and Interpretation (Maryland: Amana Publications, 2002) and K. Zweigert and H. Kotz, An Introduction to Comparative Law, stranslated by Tony Weir (Oxford: Oxford tJnivesity Press, 1998); for Halakhah, see Moshe Zemer, Evolving Halakhah, A Progressive Approach to Traditional Jewish Law (Vermont: Jewish Lights Publishing, l999) and Jeremy Call [onlinej, "The Halakhah and its Role in Modern Israeli Law". [cited 08 April 2005]. Available from Internet: http://www. law2.byu.edu/papers/Cali-Halakhah FINAL PDF.

have clearly stated that the convention will not be given preference over current religious practices which negate the effect of those countries; however, it is such practices which negate the effect of the convention.[24]

Other countries have also invoked multiculturalism, custom and tradition [or cultural relativism, which is ordinarily discriminatory towards women[25] as reasons for not implementing the convention, thereby justifying the continued discriminatory practices against women, representing "nothing more than disguises for the universality of male discrimination to cling to power and privilege".[26] On the other hand, however, there are countries that have entered reservations on the basis that their constitutions and/or domestic legislation is already more generous than the requirements stated by the convention and will continue to give preference to their own legislation even though Article 23 provides for such an occurrence.[27]

[24]See section 3.4.3 above on issues of cultural relati"sm and women.
[25]Ann Mayer, "Cultural particularism as a Bar to Women's rights: Reflections on the Midthe Eastern Experience", in Julie Peter and Andrea Wolper (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (London: Routledge, 1995), p. 185.
[26]See for example, France, Ireland, Liechtenstein, Luxembourg and the United Kingdom which reserve the right to give preference to domestic legislation which are more favourable to women than is provided for in the Convention.
[27]lnforination for table us derived from UN, Division for the Advancement of Women onlinej. "Declarations, Reservations and Objections to CEDAW", last updated 10 February 2005. [cited 07 April 2005], Available from Internet:http://www.un.org/womenwatch/cedaw/reservation-country.htm.

Table 1: Number of Reservations and Declarations entered per article28

Convention Article number	Number of reservation	Number of declaration
1	9	
2	15	1
5	4	3
7	5	
9	21	3
11	14	
13	9	
14	7	
15	14	3
16	32	2
29	32	3
TOTAL	162	15

The reservations incompatible with the purposes and objectives of the convention continue despite the General Assembly's appeal at the fiftieth anniversary of the Universal Declaration of Human Rights to States Parties to honour their

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[28]SeeUN, General Assembly, "Convention on the Elimination of All Forms of Discrimination Against Women", AJRES/53/1 18, 05 February 1999 and United Nations,General Assembly, "Report of the Committee on Elimination of Discrimination Against Women", A/54/38, 04 May 1999, paragraph II. See also, Committee on the Elimination of Discrimination Against Women [online], "General Recommendations", nos 4, 20 and 21, updated 10 February 2005. [cited 11 April 2005]. Available from Internet: http://wwwun.or&womenwatchlcedaw/recommendations/recomm.htm.

obligations under the convention.[29] CEDAW has also called on States Parties to remove or modify reservations, especially those made to articles 2 and 16, as this;

> would indicate a state party's determination to remove all barriers to women's flail equality and its commitment to ensuring that women are able to participate frilly in all aspects of public and private life without fear or discrimination or recrimination. States which remove reservations would be making a major contribution to achieving the objectives of both formal and de facto or substantive compliance with the convention.[30]

Despite the myriad obstacles faced in obtaining international consensus on the issue, CEDAW may be seen as a watershed in the development of an international legal instrument for the promotion, protection and recognition of women's human rights as well as for the recognition and incorporation of the specificity of the female subject, if nothing else, it has certainly contributed to raising worldwide awareness of women's issues.

4.4. THE BEIJING DECLARATION AND THE PLATFORM FOR ACTION

At the largest UN Conference ever held, the Fourth World Conference on Women, the Beijing Declaration reaffirmed its commitment to continue to promote and protect the rights of women in all spheres and to ensure that they are treated with the same respect as

men.[31] The Declaration also called for the implementation of the Platform for Action ("BPFA") and the mainstreaming of a gender perspective into all UN policy and programmes. The objectives of the conference were to review and appraise the advancement of women since 1985 with regard to the Nairobi Forward-Looking Strategies; to mobilize women and men at both the policymaking level and grass-roots

[29]UN Division for the Advancement of Women [online]. Reservations to CEDAW", updated 10 February 2005. [cited 08 April 2005]. Available from Internet: http//www.un.or/womenwatch/cedaw/reservations.htm
[30]See "Report on the Fourth World Conference on Women", A/CONF.177/20. 17 October 1995
[31]UN. "Department of Public Information, "Fourth World Conference on Women: Beijing, China, 4-15 September 1995", DPI/1324, February 1993.

level to achieve the objectives; to adopt a Platform for Action which deal with key issues identified as posing grave hindrances to the advancement of women4 and to determine the priorities for the following five years for implementation of the BPFA[32].

As a tool for the implementation of the Declaration, the BPFA is an agenda for women's empowermen[33] that identifies the following as critical areas of concern for women:[34]

- The persistent and increasing burden of poverty on women
- Inequalities, inadequacies and unequal access to education and training
- Inequalities, inadequacies and unequal access to health care and related services
- Violence against women
- The effects of armed or other kinds of conflict on women, including those living under foreign occupation
- Inequality in economic structures and policies, in all forms of productive activities and in access to resources

- Inequality between men and women in the sharing of power and decision making at all levels
- Insufficient mechanisms at all levels to promote the advancement of women
- Lack of respect for and inadequate promotion and protection of the human rights of women

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[32]UN Fourth World Conference on Women [online], "Platform for Action: Mission Statement". [cited 28 January 2004]. Available from Internet: http://www.un.org/won,enwatch/daw!beiiing/platform/plat 1 .htm#statement.
[33]UN, Fourth World Conference on Women [online], "Platform for Action: Critical Areas for Concern", [cited 28 January 2004]. Available from Internet: http://www.unorg/womenwatch/dawlbeijing/platform/platl .htm#concern
[34]UN, "Department of Public Information, "From Beijing, a Platform for Action and a clear mandate for women's progress", DPI/1749/WOM. October 1995, p. 1.

- Stereotyping of women and inequality in women's access to and participation in all communication systems, especially in the media
- Gender inequalities in the management of natural resources and in the safeguarding of the environment
- Persistent discrimination against and violation of the rights of the girl child.

This document provides the countries of the world with "a comprehensive action plan to enhance the social, economic and political empowerment of women".[35] It draws on the legacies of past UN Conferences that dealt with women's issues such as Nairobi (1985), New York (children 1990), Rio de Janeiro (environment 1992), Vienna (human rights 1993), Cairo population and development 1994 ad Copenhagen (social development 1995) and

reviews and assesses progress in implementing the Nairobi Forward-Looking Strategies for the Advancement of Women. Beijing represented a "stock-taking of the progress made in the worldwide advancement of women".[36] Unfortunately, the BPFA had to call for efforts to be made to achieve the goals drawn up at Nairobi ten years earlier.[37]

There were main problematic issues which Charlesworth correctly described as being Sisyphean.[38] Just when the feminist movement thought that important advances were made in particular areas at previous conferences, objections were taken at Beijing which could have negated the progress made before. The Holy See objected to the use of the term 'gender' as it could lead to dubious interpretations, with the potential to

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[35]HilkkaPietila and Jeanne vickers, *Making Women Matter: The Role of the United Nations* (London: Zed Books, 1994), P. 160.
[36]UN DPI, "Beijing Declaration", paragraph 22.
[37]UN DPI, "From Beijing", p. 5.
[38]See "Adoption of the Beijing's Declaration and Platform for Action", paragraph II and Charlesworth, "Women as Sherpas", p. 543.

endorse homosexuality and bestiality;[39] Islamic states were able to keep the universalist-cultural relativist issue alive by decrying the universality of women's human rights as western feminist imperialism;[40] and this was also applied by Islamic states and the Vatican to their strong opposition "to sections of the BPFA that dealt with women's autonomy in relation to sexuality and reproductive function".[41]

These difficulties notwithstanding, there were also some limited but important gains that are captured in the BPFA. Steans and Ahmady state that efforts towards gender mainstreaming have institutionalized the link between selected NGOs and women's groups and various bodies

in the UN system.[42] According to Rao, the BPFA has emphasized women's rights as human rights and believe that there is some, though minimal, acknowledgment of the difference between rights versus needs.[43] There has been, too, some recognition of violence against women as a public issue and not a private one and there have also been some advances in the issue of women's reproductive health.

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[39]Bunch and Fried, "Beijing '95", pp. 202-203.
[40]Jill Steans and VafaAhmady, "Negotiating the Politics of Gender and Rights: Some Reflections on the Status of Women's Human Rights at "Beijing Plus Ten", *Global Society*, 19:3 (July 2005), pp. 240-241.
[41]Steans and Ahmady, "Negotiating the Politics of Human Rights", p.5.
[42]See ArunaRao, "Engendering Institutional Change", Signs, 22:1 (Autumn 1996), p.21.
[43]See for example, UN, Division for advancement of Women [onlinej, "Beijing 13: Process and Beyond", Available from Internet: hp//www.un.oizIwomenwatch/daw/folIowup/bfbeyond.htn; UN, General Assembly, "Political Declaration", AJRES/S-23/2, 16 November 2000, UN, General Assembly, "Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action", A/RES/S-23/3, 16 November 2000; UN Economic and Social Council, "Declaration adopted by the Commissioner on the Status of Women as its Forty-ninthsession as orally amended E/CN.6/2005/I .1, 03 March 2005; Center for Women's Global Leadership, the NGO Committee on the Status of Women, and the Women's Environment and Development Organization [online:], "2005 CSW Review of the Beijing Platform for Action, (Beijing +10", April 2004, available from Internet: http://wwwçgççypjpen.or/un/Bcjjj.gj 0%20/NGOCS WBeijjpgj 0.html UN, Department of Public Information, "Beijing at Ten: Achieving Gender Equality, Development and Peace", Press Release, DPI/2363F, March 2005.

4.5. THE VIENNA DECLARATION:

The World Conference on Human Rights produced the Vienna Declaration and Programme of Action.[44]Section II.A.3 deals specifically with the equal status and human rights of women, emphasizing the importance of synchronizing the *de jure* and *de facto* human rights of women. The Declaration highlighted the inalienability and universality of women's human rights; the importance of gender mainstreaming;[45] and the elimination of violence and discrimination against women.[46] One author believes that Vienna represented

the commencement of the narrowing of the universalist- cultural relativist gulf which plagues the promotion of women's human rights and the beginning of the ability of the international community to achieve practical commitments and enforceable standards for protection of women's rights.[47] This may be so in light of the steps taken (on paper) at the Conference towards institutional and legal capacity building with a view to rendering the legal human rights regime of women effective.[48] Nevertheless, documents produced as a result of the conference are of no legal effect and it is left to governments to decide whether to act on the suggestions made.

4.6. COMMISSION ON THE STATUS OF WOMEN:

The development of women's issues at the level of the United Nations began as early as 1946 with a request from the United States delegation at the inaugural session of the General Assembly to governments of the world "to encourage women everywhere to take a more active part in national and international affairs".[49] This was very quickly followed by the establishment of a Commission on Human Rights and a Sub-Commission on the Status of Women by the United Nations Economic and Social Council ("ECOSOC") for the purposes of pursuing the objectives stated in Article 1, Paragraph 3 of the Charter of the United Nations.

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[44] UN, "Vienna Declaration", paragraph 37.
[45] 1JN, "Vienna Declaration", paragraph 38 and 39.
[46] See generally Manisha Desai, "Forum Vienna to Beijing: Women's Human Rights Activism and the Human Rights Community", in Peter Van Ness (ed), Debating Human Rights: Critical Essays from the Un lied States andAsia (London: Routledge, 1999) and Pp. 184-185.
[47] DorotaGiertez, "Human Rights of Women at the Fiftieth Anniversary of the United Nations", in Wolfgang Henedeket at (eds), Human Rights of Women: international Instruments and African Experiences (London: Zed Books, 2002), PP. 45-46.
[48]

The Sub-Commission was established "to make proposals about how to raise the status of women to equality with men in all fields of human enterprise"[50] thereby providing the Commission on Human Rights with special support regarding problems ,relating to women. Immediately upon its establishment, though, interest groups and 4...non-governmental organisations ("NGOs") recognised that the parent body would not have been able to give due attention to the Sub-Commission in the face of the vast amount of work facing it, including the drafting of an international bill of rights, and feared that women's issues would not be considered with the urgency required.[51] The Sub-Commission therefore requested that it be elevated to the status of commission. ECOSOC conferred upon the Sub-Commission status of fuIl commission, now known as the Commission on the Status of Women (CSW), less than one month after the request.[52] ECOSOC stated the CSW's functions as focusing on the preparation of recommendations and reports to ECOSOC on promoting women's rights in political, economic, social and education fields.

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[49]united States of America, "Open Lefter to the Women of the World", read by Eleanor Roosevelt at the first session of the General Assembly, AJPV.29, 12 February 1946.
[50]ECOSOC, "Resolution establishing the Commission on Human Rights and the Subcommission on the Status of Women", ERES/5(1), 16 February 1946.
[51]Bodilflegtrup, "Statement made by the Chair of the Subcommission on the Status of Women in ECOSOC recommending that the status of the Subcommission be raised to full Commission", E/PV.4, 28 May 1946.
[52] See Division for the Advancement of Women, Paragraph 13, "Progress Achieved in the Implementation of the Convention on the Elimination of All Form of Discrimination Against Women", CEDAW/C/1995/7, 14 November 1994.

In its first report to ECOSOC, the CSW recognised the need for legislative change to advance the status of women and stated that it intended to raise the status of women, irrespective of nationality, race, language or religion, to equality with men in all fields of human enterprise,

and to eliminate all discrimination against women in the provisions of statutory law, in legal maxims or rules, or in interpretation of customary law.[53]

It further went on to states that its aims included the equal participation of women in government and hall citizenship; hall equality for women to exercise all civil rjghts; hill opportunity for compulsory, free and full social life; and equal opportunity in empowering women to realize their full potential. In recognition of the importance of strengthening the legal framework to provide women with the means to achieve equality, ECOSOC requested CSW to examine the legal and customary disabilities that women face with regard to political, economic, social rights and educational opportunities with a view to framing proposals for action.[54]

Despite what appeared to be very positive moves towards advancing the status of women in all spheres of life, there existed a very disturbing restriction on the powers of the CSW. While the CSW, like the Commission on Human Rights, was free to receive communications from individuals, groups and NGOs, neither was given the

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[53]See "ECOSOC Resolution establishing the Commission on the Status of Women (CSW)", E/RES/2/1 1, 21 June 1946. This is one of nine functional commission set up by the UN. See UN Department of public Information [online], "Organisation Chart of the United Nations", March 2004. [cited 04 April 2005]. Available from Internet; http://wwwun.org/aboutunlchart.html.

[54]See "Report of the CSW to ECOSOC on the first session of the Commission, held at Lake Success, New York, from 10 to 21 February 1947", E/281/Rev.1, 25 February 1947, Chapter X.

power to take any action in regard to complaints concerning the status of women.[55] The CSW had neither the power to investigate specific case of discrimination nor did it have the authority to take measures to ensure compliance with United Nations standards.[56] So, what was its purpose? It was established to be the main policy-making body of the United Nations dealing with women that promoted global sensitization to women's status and encouraged governments to incorporate international conventions into their domestic laws.

The CSW faced many other problems as a body dealing specifically with women's issues. While it was suggested that the CSW be comprised of experts serving in a personal capacity so as to avoid governmental control, it was decided that its composition should be of states members and meant that it was basically an intergovernmental body representing the official policies of states rather than the concerns of interest groups.[57] At the same time, nevertheless, the CSW's members are largely women, but if they do not have necessary support of their respective governments, it can be argued for example that women's issues will not have the same force as economic development and therefore not be afforded priority, the operations of the CSW will continue to be constrained. This is further compounded by the CSW's lack of institutional weight as evidenced by the budgetary and procedural restrictions imposed on the CSW by ECOSOC.[58]

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[55]See "ECOSOC Resolution defining the function of the CSW and requesting Member States to provide the Commission with data on the legal status and treatment of women in their countries", EIRES/48(IV), 29 March 1947, ParagraphA.6.
[56]See "ECOSOC Resolution requesting the Secretary-General to provide the csw with communications received concerning the status of women", E/RES/76(V), 5 August 1947.
[57]United Nations, *The United Nations and the Advancement of Women*, p. 14.
See Laura Reanda, "*The Commission on the Status of women*", in Philip Aiston (ed), *The United Nations and Human Rights*: A Critical Appraisal (Oxford: Clarendon Press, 1995), p. 269. This chapter offers a comprehensive review of the CSW.
[58]Reanda, "The Commission on the Status of Women", supra at pp. 269-271.

The mandate of the CSW was expanded in 1987 to include the objectives of the Nairobi Forward-Looking Strategies for the Advancement of Women to deal not only with matters of equality for women, but also to include women as integral agents of change and beneficiaries in issues of development and peace.[59] At the General Assembly's request,[60] after the Fourth World Conference on Women, ECOSOC once again modified the CSW's terms of reference stating that it shall:

a) Assist the Economic and Social Council in monitoring, reviewing and appraising progress achieved and problems encountered in the implementation of the Beijing Declaration and Platform for Action at all levels, and shall advise the Council thereon;
b) Continue to ensure support for mainstreaming a gender perspective in United Nations activities and develop further its catalytic role in this regard in other areas;
c) Identify issues where United Nations system-wide coordination needs to be improved in order to assist the Council in its coordination function;
d) Identify emerging issues, trends and new approaches to issues affecting the situation of women or equality between women and men that require urgent consideration, and make substantive recommendations thereon;
e) Maintain and enhance public awareness and support for the implementation of the Platform for Action.[61]

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[59]See "ECOSOC Resolution adopting the long-term programme of the CSW to the year 2000", E/RES/1987/24, 28 May 1987.
[60]See General Assembly follow-up to the Fourth world Conference on women and full implementation of the Beijing Declaration and the Platform for Action", A/RES/50/203, 22 December

1995.
[61] ECOSOC, "Follow-up to the Fourth world Conference on Women", Resolution 1996/6,22 July 1996.

While the CSW was previously emphasizing gender-specific machinery and projects, it is now responsible for implementing the Beijing platform for Action and for mainstreaming a gender perspective into the activities of the United Nations.[62]

Despite the many obstacles faced by CSW, it has still been able to secure recognition in law of women's right in many countries, notwithstanding the *de jure/de* facto divide, and has raised the problem of discrimination against women politically, economically, socially and constitutionally.[63]

4.7. DIVISION FOR THE ADVANCEMENT OF WOMEN

The CSW has had the support of a unit within the United Nations Secretariat dealing with the status of women. The Division for the Advancement of women ("DAW") as it is now known was established in 1946. It was originally established as a Section on the Status of Women within the Human Rights Division of the United Nations Department of Social Affairs. In 1972, it was upgraded to the Branch for the Promotion of Equality of Men and Women and moved to the Centre for Social Development and Humanitarian Affairs established in the same year. It was renamed the Branch for the Advancement of Women in 1978 and was further upgraded to its current status as a Division in 1993 when it was moved to the UN headquarters in New York and is now part of the Department of Economic and social Affairs which in turn forms part of the UN Secretariat.

[62]united Nations, Commission on the Status of Women [online), "Functions". [cited 28 Janu3ry 2004]. Available from Internet; http://www.un.org/womenwatch/daw/esc/index.html#functtions.
[63]keanda, "The Commission on the Status of Women", supra at p. 301.

DAW is meant to act as a catalyst in mainstreaming gender issues and has four main branches.[64]

1. The Gender Analysis Section conducts research and develops policy options, fosters interaction between governments and civil society and provides substantive servicing for UN intergovernmental and expert bodies;
2. The Women's Rights Unit assists in breaking down the barriers between human rights and development and fosters the attainment of women's human rights as an integral part of development;
3. The Coordination and Outreach Unit raises awareness, promoted international standards and norms and sharing of best practices, and strengthening communication between the international and national policy-making processes and the women of the world; and
4. The Gender Advisory Service Unit provides governments with advisory services and technical support in the activities related to gender development.

DAW's most important role came about in 1995 when it acted as the substantive secretariat for the Fourth World Conference on Women conference in Beijing, the largest conference in the history of the United Nations, and was also responsible for preparations for the three previous World Conference on Women (Mexico 1975, Copenhagen 1980, Nairobi 1985)[65] In its mission statement, it says:

> …the Division for the Advancement of Women (DAW) advocates the improvement of the status of women of the world and the achievement of their equality with men.

Aiming to ensure the participation of women as equal partners with men in all aspects of human endeavour, the Division promotes women as equal participants and beneficiaries of sustainable development,

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[64]Extracted from Dorothea Gaudart, " Charter-Based Activities Regarding Women's Rights in the United Nations and Specialized Agencies", in Wolfgang Benedeket a! (eds), *Human Rights of Women*: *International Instruments and African Experiences* (London: Zed Books, 2007), pp. 60-61.

[65]UN Division for the Advancement of Women [online], "About DAW: Brief History". [cited 28 January 2004]. Available from Internet: httpJ/www.un vornetatch/daw/daw/index.hlni l#history

peace and security,governance and human rights. As part of its mandate, it strives to stimulate the mainstreaming of gender perspectives both within and outside the United Nations system.[66]

DAW's placement in the Department of Economic and Social Affairs was aimed at "ensuring the integration of gender issues in policy formulation and coordination, including the servicing of the intergovernmental machinery.[67] From the responsibilities of its four main branches, it is meant to foster dialogue. provide advisory services and raise awareness. It is therefore very important in the UN's decision to move away from gender specific machinery towards gender mainstreaming in all areas and continues to provide the support required by the CSW.

4.8. GENDER MAINSTREAMING AND THE UNITED NATIONS

Attention has been given to promoting women's issues over the years, albeit in a piecemeal and largely ineffective fashion. In light of this, the BPFA mandates gender mainstreaming as the main global strategy for promoting gender equality. In each of the twelve critical areas of concern in the BPFA is stated the need for the promotion of "an active and visible policy of mainstreaming a gender perspective into all policies and programmes" which takes into account the effects of such policy on women and men.

ECOSOC, in 1997, defined gender mainstreaming as:

"...the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all

levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation,

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[66]UN Division for the Advancement of Women [online], "About DAW: Mission Statement', [cited 28 January 20041. Available from Internet:http://www.un.org/womenwatch/daw/index.html#misssion

[67] UN, Secretary-General, "Report to General Assembly on implementation of the outcome of the Fourth World Conference on Women: Action for Equality, Development and Peace", A1501744, 10 November 1995, Paragraph 62.

monitoring and evaluation of policies and programmes in all political, economic and social spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality".

The International Labour Organisation summed up the definition of gender mainstreaming nicely by saying that mainstreaming is "the transformation of unequal social and institutional structures into equal and just structures for both men and women" [68]

Gender mainstreaming is meant to incorporate a gender perspective into all activities at all levels with a view to ensuring that gender equality is placed at the center of policy decisions, medium-term plans, programme budgets and institutional structures and processes,[69] instead of having separate structures for dealing with women's issues. Initial efforts to achieve gender equality by the UN focused on separate targeted activities for women, but it was later admitted that this approach did not tackle the structural constrains to gender equality and that an integrative approach would be better suited.[70] Yet, it must be understood that mainstreaming does

not replace the need for targeted, women-specific policies and programmes, but are complementary strategies, as affirmative action is still required for women's empowerment. Such targeted interventions are necessary where there are "glaring instances of persistent discrimination of women and inequality between women and men".[71]

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[68] See Paragraphs 57, 79, 105, 123, 141, 164,189,202,229,238,252, and 273 ofthe BPFA.
[69]UN, Economic and Social Council, 'Report of the Economic and Social Council for 1997: Gender Mainstreaming", A/52/3, 18 September 1997, Chapter iv, Part I, A.
[70]International LabourOrganisation [online], Gender Equality Tool".[Cited 13 April 2005). Available from Internet: http:/!www. i lo.org/public/english/bureau/gender/newsite2002/about1defin.Iitrn
[71]UN, Office of the Special Advisor on Gender Issues and Advancement of Women [online], "Gender Mainstreaming: Strategy for Promoting Gender Equality", updated August 2001. [Cited 13 April 2005].Available from Internet: http://www.un.org/womenwatch/osa2i/ndf/facheet3 .pdf.

At the national level, there is debate as to whether the establishment of a single national institution (better known as 'national machinery') for the purpose of gender mainstreaming would be more effective than having the state.[72] ln 2000, the UN General Assembly held special sessions to review the progress made and the obstacles remaining to the implementation of the BPFA.[73] Paragraph 24 recognises that "National machineries have been instituted or strengthened and recognised as the institutional base acting as "catalysts" for promoting gender equality, gender mainstreaming and monitoring of the implementation of the Platform for Action", but at the same time their effectiveness has been hindered largely by "inadequate financial and human resources and a lack of political will and commitment" which have pervasive effects on other related issues.[74]

It must also be noted that national machineries have to be sensitive to the socio-political climate of each country and therefore are generally not intersubstitutable. Incorporating a gender

perspective into the general governance of a state, however, would have the effect of naturalizing gender issues by moving them from the margin to the center, as they would not be treated by a separate, single national institution; although, national machineries just might prove to be the most feasible starting place for achieving such a goal.

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[72]UN, Office of the Special Advisor on Gender Issues and Advancement of Women [online], "The Development of the Gender Mainstreaming Strategy", updated August 2001. [Cited 13 April 2005].Available from Internet: http://www.un rJwomenwatchJosai/pdf/factsheet3 .pdf.

[73]UN, Office of the Special Advisor on Gender Issues and Advancement of Women [online], "Gender Mainstreaming",[Cited I 3,April,2005].Availablefromlnternet:http://www.wiarg/womenwatch!osani/gendejjistreaniing.htm.

[74]ShirinRai, "Institutional Mechanism for the Advancement of Women: Mainstreamii.ig Gender Democratizing the State? inShirinRai (ed), Mainstreaming Gender Democratizing the Stale? *Institutional Mechanism for the Advancement of Women* (Manchester: Manchester University Press, 2003), on national machinery for gender mainstreaming and Kathleen Studi, Gender Mainstreaming Conceptual Links to Institutional Machineries" in ShirinRai (ed), *Maintreaming Gender Democratizing the State? Institutional Mechanism for the Advancement of Women* (Manchester: Manchester University Press, 2003), on integrating a gender perspective into the general governance structure.

CHAPTER FIVE

5.0. CONCLUSION:

International law's weaknesses as a tool for the promotion of gender equality and human rights generally have been explored in this work. The struggle to incorporate women's rights into international agreements like the Beijing Conference indicated how strategic effort to use the law to promote women's rights and gender equality were constrained by political and cultural context. Post-Colonial Feminist and legal activists have since continue to struggle with the question of how to insert sexist issues into a purportedly neutral body of law where equality is conceptualized as sameness. International law imposes a regime of formal equality which guarantees facially neutral treatments to men and women

While the international treaties and conventions discussed were undoubtedly catalysts for change, it is mainly through advocacy and the efforts of human rights activists and non-governmental organizations that principles are being translated into solid legislative and policy reforms in many countries. In many countries., including Nigeria, the domiciliary responses to many of the recommendations of the international instruments have been weak, or at best passive. These countries pay lip service to provisions of international conferences and conventions. In these countries, growing cultural, social and religious pressures have weakened the necessary political and financial will to accelerate progress towards the attainment of gender equality.

To fulfill the commitment made at the several international conventions relating to gender rights, state parties must actively implement and integrate gender equality concepts in a non-discriminatory, participatory and multi-sectoral manner in official

programmes and legal documents. The potential for international law to have effect at the national level, therefore, is real and can be affected through the work of activists especially where international law seems to lack the mechanisms to do so in areas not deemed to be vital to state interests, such as the promotion of women's rights.

The UN institutional structure for advancement of women's right is affected by major obstacles that undermine its ability to foster real and meaningful change. The analysis of the UN system point to the lack of enforcement capabilities regarding state compliance with international legal obligations, such as reporting under CEDAW. The lack of enforcement capabilities coupled with budgetary and procedural restrictions create an environment conducive to ineffectiveness. This picture is hardly surprising considering that the UN governance structure is a reflection of the attitude of the majority of its member. The numerical dominance of developing countries where the greatest levels of abuse of women's rights exist contributes largely to the somewhat apparent apathetic approach of the UN.

Even where a committee of the UN, such as the Committee on the Elimination of Discrimination against Women, has a majority membership of women, the fact that around 78 percent of its members are from the developing world could account for the relative ineffectiveness of such a committee. These women members are from governance structures that are male dominated and are therefore constrained by how far they can proceed in the struggle for the enhancement of women's rights at the international level.

The struggle for women's rights is not limited to inter-governmental organizations such as the UN. As was noted above, DEDAW owed its genesis to a large extent to the advocacy activities of NGOs. BPFA which came out of CEDAW highlighted the growing significance of NGOs as agents of change in the international attitude to women's rights. The unprecedented

gathering of over 30,000 NGO representatives in the unofficial NGO Forum provided a powerful voice that resonated throughout the official meeting. The institutional efforts of NGOs reflect that "bottom-up" approach as it includes grass roots NGOs and NGO networks. The very nature of NGOs, where membership is generally exclusive of states, ensures that issues can be ventilated without the constraining influence of states.

5.1. SUMMARY OF FINDINGS:

This research work discovered some findings in the course of carrying it out and these findings are summarized below:

1. International law has not been able to remove some of the practices that exist in some countries that hinder the achievement of gender equality;
2. So many countries use the excuse of cultural/religious relativism from performing their obligations relating to gender equality under international law.
3. There is really no enforcement mechanism for dealing with serious breaches of the rights of women internationally.

5.2. RECOMMENDATIONS:

The following are the recommendations proffered in this research work:

1. Gender equality can be attained when there is a combined effort at the international level by states which must create meaningful international obligations.
2. The international community should consider the differences in cultures among states before coming out with treaties relating to gender equality.
3. International treaties relating to gender equality should be made to apply to states directly upon accession by the states without the need for domestic ratifications.
4. States should not be allowed to enter into reservations when acceding to international treaties on gender equality and promotion of women's rights.

5.3. CONTRIBUTION TO KNOWLEDGE:

This study has contributed to knowledge in the following ways:

i. The study has shown that international law is a tool for the promotion of gender equality and human rights generally.
ii. The study has provided evidence that growing cultural, social and religious pressures have weakened the necessary political and financial will to accelerate progress towards the attainment of gender equality.
iii. The study provided proof that gender equality can be attained where there is a combined effort at the international level by states.

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