

INTERSECTION OF LAW AND GENDER *VIS-À-VIS* THE NON-SUBORDINATION THEORY*

Abstract

A non-subordination perspective shifts the focus of attention from whether subordinate women to men. This perspective sometimes referred to as dominance theory, sees sex differences as part of a larger conceptual system designed to legitimate the power imbalance between men and women. The aim of this paper was to look into the women's right and power in the liberal state, sexual harassment, domestic violence, pornography, sexual orientation discrimination and women in the military as part of a larger conceptual system designed to validate the power differences between men and women it will also look at the challenges in implementation of non-subordination theory and the solution to these challenges. The research methodology was doctrinal approach, using expository and analytical research design. The main sources of data collection were various legal literatures, both from the physical library and the e-library. It was observed non-subordination theory is designed to legitimate the power imbalance between men and women. It was recommended that that every case should be treated on its merit to avoid dichotomy against the women, also more local legislation should be enacted in the state Houses of Assembly, for instance, the likes of Widowhood/Widower-hood (Malpractices) Prohibition Law, 2005 of Anambra State. And that government should promote policies that can reduce the level of discrimination meted out on women and ensure equity in distribution of resources among the citizens, especially protecting the interest of women.

Key Words: *Gender, Intersection, Law, Non-Subordination, Theory*

1. Introduction

Non-subordination theory deals with a rule or practices that server to subordinate women to men. It is designed to legitimate the power imbalance between men and women. Leading feminist legal theorist Catharine Mackinnon calls this theory feminism. "Unmodified" because it analyses the situation of all women and men and abandons "gender-neutral absolutes, such as difference and sexuality and speech and the state which according to Mackinnon are characteristics of liberal feminism.¹ This paper introduces non-subordination theory by pairing John Stuart Mill's description of women's nineteenth century subjection as a solitary breach in the fundamental laws of modern civilization with Catharine Mackinnon's characterization of women's legal subordination as the ability of these with power-men-to identity their own point of view, systematically as universal point of viewlessness and also explores non-subordination theory's claim that the law defines sex and sexual difference in ways that naturalize women's relative powerlessness in this society, primarily through legal materials relating to sexual harassment, domestic violence, pornography, sexual orientation discrimination and women in the military. It also looks at the challenges in implementation of Non-subordination theory and the solution to these challenges. The theory postulates that equality analysis is insufficient to address the central inequalities faced by women sexual harassment, violence against women,

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¹ C A Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (vol 16, N.P. 1987).

poverty and control of women's sexuality. It also postulates that we must move beyond questions of sameness and difference to the construction of women's sexuality that under pins these move central inequalities. The questions are: How far is non-subordination theory contributes to the equality principles? Is it a supplement, a full replacement or something else?

2. Women's Right and Power in the Liberal State

John Stuart Mill² the reading spokesman for nineteenth century liberalism finds the subordination of women an aberrational blind spot of liberalism while Catharine Mackinnon³ on the other hand finds the subordination of women a move or less in evitable consequence of liberalism's emphasis on the individual, its claim to objectivity and its idealism. John Stuart Mill said that the principle which regulates the existing social relations between the two sexes-the legal subordination of one sex to the other is wrong in itself *and* now one of the chief hindrances to human improvement. He went further to say that it ought to be replaced by a principle of perfect equality admitting no power or privilege on the one side nor disability on the other. Catharine Mackinnon went on to say that the sex equality law has been so ineffective at getting women what they need and are lives of reasonable physical security, self-expression, individuation and minimal respect within the dominant approach. The path is termed gender neutrality legally and the single standard philosophically. To women who want equally yet find that they are different, the doctrine provides an alternate route be different from men. This equal recognition of difference is termed the special benefit rule or the special protection rule under the sameness standard; women are measured according to our correspondence with man, our equality judged by our proximity to his measure. Under the difference standard, we are measured with him, our womanhood judged by our distance from his measure. Gender neutrality is this simply the male standard, and the special protection rule is simply the female standard, but do not be deceived masculinity or maleness, is the referent for both. As applied, the sameness standard has mostly gotten men the benefit of those few things women historically had. In reality, which this approach is not long on because it is liberal idealism talking to itself, virtually every quality that distinguishes men from women is already affirmatively compensated in this society.

2.1 Domestic Violence

According to William Blackstone⁴ the husband at English common law was legally entitled to use some physical force to provide his wife with moderate correction". So too, under early American common law, a husband as master of his household could subject his wife to chastisement short of permanent physical injury⁵ of civil war, partly through chastisement. However, during the reconstruction Era a new body of common law of wives beating, in order to protect the privacy of the marriage relationship and to promote domestic harmony.⁶ By the end of the nineteenth century, wife beating was viewed as a crime but increasingly characterized as solely the practice of "lawless or unruly men of the dangerous classes", Domestic violence among the economical and racially privileged classes disappeared from public vica. Beginning in the 1960s, the women's movement sought to make private violence a public issue. Feminist created shelters to protect the health and safety of battered women and children. Activist also under took public education campaigns to call attention to male violence and state inaction. So

² *The Subjection of Women: Essay* (World Classics Edition 1912).

³ *Feminism unmodified: Discourses of life and law* 34-38, 40-41, (1987).

⁴ William Blackstone, *Commentaries on the Laws of England* 432-3 (1765).

⁵ R B Siegel, "The Rule of Love: Wife Beating as Prerogative and Privacy, 105 *Yale L. J.*21/7,2/18 (1996).

⁶ *Ibid* at 2120.

too, advocates began using legal strategies to reform how law cases of intimate abuse. As the legal landscape has changes, so has the language used to describe it. Battered women's advocates initially introduce the term "domestic violence" to replace more colloquial terms such as "wife beating" more recently, the terms "intimate violence" and intimate partner violence" serve to the abuse of elders, children, domestic partners and siblings. Descriptions of such violence also are evolving. The popular meaning of "battering" is physical assault but many researchers now argue that the quest for control and not physical violence per se, best describes an abusive relationship, and, control over necessities. Indeed, some evidence suggests that psychological abuse can be at least or more harmful to victims as physical assaults.⁷ It is estimated that one quarter to a third of women in the world have experienced physical or sexual violence screening safety. The Impact of Domestic Violence by an intimate partner or acquaintance at some point in their lifetime. Slightly over a quarter of men are estimated to have experienced such violence. Approximately, 16 percent of women and 5 percent of men have experienced stalking from which they felt very fearful, or believed that they or someone close to them would be harmed as a result. Nearly half of all homeless women and children have fled violence. Most systematic studies conclude that women are significantly more likely to be victims of intimate violence than men. One survey found that females were the victims in 72 percent of intimate murders and the victims in about 85percent of the non-lethal intimate violence.⁸ Other research suggests, that women are at least as physically aggressive a man, but less likely to inflict serious injury. According to a 2008 report from the Centre's for Disease control and prevention, is a leading cause of death for women ages 15 to 44, and the leading cause of pregnant women. Over 90 percent of female homicide victims are killed by men with whom they have had a relationship.⁹ Women are most likely to be injured in an intimate relationship in the course of trying to end it. One study found that married women who lived apart from their husbands were nearly four times more likely to report that their husbands had raped, physically assaulted and (or stalked them than women who lived-with their husbands (20 percent and 5.4 percent, respectively).¹⁰ Finally, in the last decade, domestic violence deaths have been in decline for several reasons.

- (1) The increased provision of legal services for victims of intimate partner abuse.
- (2) Improvements in women's economic status and
- (3) Demographic trends, most notably the aging of the population.¹¹ Researchers note that domestic violence programs enable many women to leave relationships before they feel that they need to use deadly force in self-protection.¹²

However, the recent economic recession may have increased risks of serious injury, both because of the heightened stress and reduced economic options associated with unemployment, and cutbacks in some government-funded support services. Thus, domestic violence can come in different forms.

⁷ M E Johnson, *Balancing Liberty, Dignity and Lethality*.

⁸ C M Rennison and S Welchans, Bureau of Justice Statistics, Special Report: Intimate Partner Domestic Violence.

⁹ J C Campbell, Prediction of Homicide of and by Battered Women in Assessing Dangerousness: Violence by Batterers and Child.

¹⁰ P Tjaden and N Thoennes, Full Report of the Prevalence Incidence and Consequences of Violence against Women, Findings from the National Violence against Women.

¹¹ Amy Farmer & Jill Tiefenthaler, Explaining the Recent Decline in Domestic violence, 21 *contemp. Econ. Pol* 158(Apr 2003).

¹² Laura Dugan, Explaining the decline in Intimate Partner Homicide: The Effects of changing Domesticity, women's status and Domestic violence Resources, 3 *Homicide stud.*187(1999).

(a) Violence within the Home Domestic violence is the most prevalent form of gender based violence. It typically occurs when a man beats his female partner. Psychological abuse always accompanies physical abuse and majority of women abused by their partners are abused many times. Physical, sexual and psychological violence against within a couple and in the family consists of battery, sexual abuse, female genital mutilation and other traditional practices harmful to women and girls, marital rape, dowry-related violence, incest, non-spousal violence. Like a son's violence against his mother and violence related to exploitation and deprivation of freedom. In spite of all the available data on gender-based violence, there is no accurate information on gender based violence in some countries. A culture of silence surrounds cases of violence against women in most countries like Nigerians, making it difficult to get a true picture of its extent. Some of the reasons why it is difficult to get an accurate account are that, most of the gender-based violence occurs in private spheres within families, inside homes and out of sight.

(b) Violence against Women within the general Community Physical, sexual and psychological violence occurring within the general community include battery, rape, sexual assault, sexual harassment and intimidation in school or work, forced treatments and abusive medication, the exploitation and commercialization of women's bodies which is related to increased poverty that is mainly as a result of unbridled economic liberalism. These types of violence occurring within the general community also include contraception imposed on women by constraints or force, forced sterilization of abortions, selective abortion of female foetus and female infanticide.¹³

(c) Violence against Women Perpetrated by the State Physical, sexual and psychological violence are too often perpetrated or tolerated by states that priorities customs or traditions over the respect of fundamental freedom. In some countries, the rise of religious fundamentalism is extremely disturbing as regards women's right to their economic autonomy and their freedom of choice. The social exclusion of women is so great that it constitutes a new form of apartheid. Women are considered second class beings of lesser value, deprived of their fundamental rights. Violence against women is also exercised as a weapon of war in situation of armed conflict. It has many forms including murder, rape, sexual slavery, hostage taking and forced pregnancy.¹⁴ Other additional violations of human rights and fundamental freedoms are trafficking in women and girls for sex trade, forced prostitution, rape, sexual abuse and sex tourism that have become the focus of international crimes.

3. Sexual Harassment

The term "sexual harassment" did not come into use until the mid-1970s and was not fully articulated as a form of discrimination based on sex until 1979. There are basically two types of sexual harassment-sexual harassment in the workplace and sexual harassment in Educational Institutions.

3.1 Sexual Harassment in the Workplace

There are basically two types of sexual harassment in the workplace (1) quid quo harassment in which the harasser requires sexual contact or favours as a condition of employment or advancement and (2) hostile environment harassment based on unwelcome conduct of a sexual nature that has the purpose or effect of unreasonably interfering with an individual's work

¹³ *Ibid.*

¹⁴ <<http://www.Ips news.Net/Africa/nota.asp>> accessed on 6/09/2024.

performance or creating an intimidating, hostile or offensive work environment. The prevalence of harassment has not changed much since researchers started collecting data in the late 1970s, despite the development of legal doctrine making it harassment have doubled over the last decade, victims only report small instances of relationships, concerns about loss of privacy and doubts that an effective response to a complaint would be forthcoming. The questions are usually in what sense is sexual harassment a form of sex discrimination? What is its primary harm? Why do harassers harass? Is it a desire for sex or control? Does the reason matter for purposes of anti-discrimination law? In *Meritor Savings Bank v. Vinson*¹⁵ in 1974, respondent Mechelle Vinson met Sidney Taylor, a vice president of what is now petitioner Meritor Savings Bank (bank) and manager of one of its branch offices with Taylor as her supervisor, respondent started as a teller, head teller and assistant branch manager. She worked at the same branch for four years, and it is undisputed that her advancement there was based on merit alone. In September 1978, respondent notified Taylor that she was taking sick leave for an indefinite period. On November 1, 1978, the bank discharged her for excessive use of that leave. Respondent brought this action against Taylor and the bank, claiming that during her four years at the bank she had "constantly been subjected to sexual harassment by Taylor, She sought injunctive relief, compensatory and punitive damages against Taylor and the bank and attorney's fees. At the 11-day bench trial, the parties presented conflicting testimony about Taylor's behavior during respondent's employment. Respondent testified that during her probationary period as a teller trainee, Taylor treated her in a fatherly way and made no sexual advances. Shortly thereafter, however, he invited her out to dinner and during *the* course of the meal suggested that they go to a hotel to have sexual relations,. At first she refused, but out of what she described as fear of losing her job she eventually agreed. According to respondent, Taylor thereafter made repeated demands upon her for sexual favours, usually at the branch, both during and after business hours, she estimated that over the next several years she had intercourse with him some 40 or 50 sometimes. In addition, respondent testified that Taylor fondled her in front of other employees, followed her into the women's restroom when she went there alone, exposed himself to her and even forcibly raped her on several occasions. These activities ceased after 1977, respondent stated when she started going with a steady boyfriend. Taylor denied respondent's allegations of sexual activity, testifying that he never fondled her, never made suggestive remarks to her, never engaged in sexual intercourse with her, and never asked her to do so. He contended instead that respondent made her allegations in response to a business-related dispute. The bank also denied respondent's allegations and asserted that any sexual harassment by Taylor was unknown to the bank and engaged in without its consent or approval. The District Court denied relief but the Court of Appeals for the District of Columbia circuit reversed and the Supreme Court affirmed. In *Harns v. Forklift Systems*¹⁶, Lac Teresa Harns worked as a manager at Forklift systems, Lac. An equipment rental company from April 1985 until October 1987. Charles Hardy was Forklift's President. The Magistrate found that, throughout Harris' time at Forklift Hardy often insulted her because of her gender and often made her the target of unwanted sexual innuendos. Hardy told Harris on several occasions, in the presence of other employees, "You are a woman, what do you know" and "We need a man as the rental manager at least once, he told her she was "a dumb ass woman"...Again in front of others, he suggested that the two of them "go to the Holiday Inn to negotiate (Harris) raise"...Hardy occasionally asked Harris and other female employees to get coins from his front

¹⁵ 4.477 U.S 57 (1986).

¹⁶ 5.510c U.S. 17 (1993).

pants pockets. He threw objects on the ground in front of Harris and other women and asked them to pick the objects up...he made sexual innuendos about Harris and other women's clothing. In Mid-August 1987, Harris complained to Hardy about his conduct hardy said he was surprised that Harris was offended, claimed he was only joking and apologized...He also promised he would stop and based on this assurance Harris stayed on the job. But in early September, Hardy began a new while Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, "what did you do, promise the guy, some sex Saturday night". On October 1, Harris collected her paycheck and quit. Harris then sued Forklift, claiming that Hardy's conduct had created an abusive work environment for her because of her gender. The United States District Court for the Middle District of Tennessee adopting the report and recommendation of the magistrate found this to be "a close case", but held that hardy's conduct did not create an abusive environment. The court found that some of Hardy's comments offended Harris, and would offend the reasonable woman"...but that they were not "so severe as to be expected to seriously affect Harris psychological wellbeing. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance. Neither do I believe that Harris was subjectively so offended that she suffered injury.... Although hardy may at times have genuinely offended Harris, I do not believe that he created a working environment so poisoned as to be intimidating or abusive to Harris. The United States Court of Appeals affirmed but the Supreme Court reversed.

3.2 Sexual Harassment in Educational Institutions

The law on sexual harassment in educational settings is less developed than the law governing harassment in the work place. There are three specific areas of harassment relating to educational institutions

- (1) School is legal liability for sexual harassment
- (2) Speech and conduct codes intended to climate offensive conduct in schools and
- (3) Faculty-student dating

(a) **School Legal Liability for Sexual Harassment** In the United States of America, Title ix of the Education Amendments of 1972 broad, prohibits sex discrimination by educational institutions that receive any federal funding Title ix has had substantial application in the sexual harassment context. The Supreme Court in the United States has interpreted Title ix to prohibit quid pro quo harassment and hostile environment harassment as form of intentional sex discrimination and to permit law suits for money damages. In *Gebser v. Lago Vista Independent School District*¹⁷, parents of a female student sued the school district after police found that their eight-grade daughter was having a sexual relationship with one of her teachers. By a 5-4 vote, the court held that schools are not liable for harassment of a student by an employee unless officials had actual notice of the specific misconduct and responded with "deliberate indifference" The school's failure in that case to have a non-discrimination policy and internal grievance procedure, which are both required by Title IX's implementing regulations, was not sufficient to render it liable for the harassment. In *Davis v. Monroe County Board of Education*¹⁸ a divided Supreme Court clarified the standards for school's liability for peer harassment. There a fifth-grade female student alleged repeated acts of harassment by one of her male classmates, including verbal and physical assaults such as attempts to touch her genital area. Despite several

¹⁷ 6.524 U.S 274(1998).

¹⁸ 7.567 U.S 629(1999).

complaints by the girl's mother to the teacher, principal and, eventually the school board, the school failed to take adequate remedial action. Even though the boy plead guilty to criminal sexual battery, the school took three months to even agree to change the girls seat so she wouldn't have to sit next to him in every class. The majority in Davis held that a school district's "deliberate indifference to known acts of harassment" by students could give rise to liability.

(b) Speech and Conduct Codes to Prevent Harassment In the United State of America, one approach to addressing sexual and racial harassment in educational institutions, "verbal conduct" or "expression" that interferes with a students' ability to benefit from the educational environment. Some proposals relate specifically to the internet and email systems.

(c) These codes have drawn fierce criticism from free speech advocates, who consider them a form of censorship and urge that the appropriate remedy for hurtful speech is not less, but move speech. By contrast, advocates of regulation argue that in a sexist racist society, "free speech" is available only to those with the power to use it, and that anti-harassment codes are critical to protect the dignity and integrity of individual who cannot effectively fight back with counter speech. In the university setting, racist and sexist speech is said to prevent some students from participating fully in the university community and from developing their psychological and intellectual potential.

(d) Faculty-Student Dating

(e) Faculty-student dating has been another subject of campus concern in the U.S.A. the limited available data suggests that such relationships are not uncommon. The conventional assumption is that broad prohibitions are unnecessary, unenforceable or unduly paternalistic.

A growing number of Institutions in the USA attempt to discourage faculty-students' relationship. Some commentators ban all amorous relationship between faculty and undergraduates or between graduate students and their supervisors. Other schools counsel against such relationships and place a heavy burden on the faculty member to establish consent if a student complains. Some constitutions prohibit faculty-student relationship where the professor has direct academic responsibility for the student if a relationship arises, the faculty member must make other arrangements for supervision of the student's work.

3.3 Pornography

"Sex sells" has always been true, but increased technological innovations have created increased opportunities for private consumption of pornography. Since the early 1980s, some feminists have joined with religious conservatives and other activists to combat pornography on several fronts. While the conservatives case against pornography focuses on the corruption of morals and erosion of "family values", the feminist rationale emphasizes the role of pornography in subordinating women through objectifying and degrading images and eroticization of abuse. One effort to combat pornography took the form of local ordinances that prohibited trafficking in pornography and provided monetary damages from the maker or seller to anyone injured by pornography.

3.4 Sexual Orientation Discrimination

The term "homosexual" emerged in the nineteenth century to describe same sex orientation. The term "gay" which has been traced to medieval Europe came into broader use in the 1960s as a reference for both individuals and a political movement. Although the term historically was gender neutral, in contemporary usage gay refers to men and lesbians often self-identify as "queer". Bisexual is used to designate individuals whose sexual orientation can be homosexual

and heterosexual. Transgender individuals are those whose sexual identity does not match the biological characteristics with which they were born. Estimates of the number of individuals who are gay, lesbian or bisexual are difficult to come by in part because sexual preferences are not always fixed, exclusive or openly acknowledged. Most studies depending on their methodology and definitions place the figures between 6 and 13 percent of men and 2 and 6 percent of women. The dominant legal view is that discrimination based on sexual orientation is not discrimination based on sex because it affects both men and women equally. Similarly, some courts and legislatures have declared that same sex couples cannot legally marry and that individuals in those relationships do not have parental rights concerning the child of their partner. However in 2004, Massachusetts became the first state in the U.S.A to legalize same sex marriage. As of 2012, nine states and the District of Columbia granted same sex couples the right to marry on the same terms as opposite sex couples. An additional seven states allowed same sex couples to enter a marriage equivalent status that uses another name such as domestic partner but provides the same rights and obligations as marriage. Most remaining states however have enacted statutory or constitutional provisions prohibiting the celebration or recognition of same-sex marriages. The questions are: What is at stake in the same-sex marriage debate? Is the best way to achieve gender equality through recognizing traditional marriage for gays and Lesbians or are there alternative models? Who should decide?

3.5 Women in the Military

Throughout history, cultural expectations and legal restrictions have severely limited female involvement in the armed forces. Until the early 1970s, women constituted less than two percent of the military and discrimination in placement and promotion was widespread. Enrollment was limited through quotas on female applicants, exclusion from combat positions, military academics and training programs and disqualification of women who became pregnant or had minor children. In the mid-1970s many of these restrictions were modified or withdrawn without judicial intervention. As a result, female participation in the armed forces substantially increased reaching 10 percent by the late 1980s, 13 percent by the turn of the twentieth century and 15 percent by 2009. Currently women serve in 93 percent of all army occupations and make up approximately 14 percent of the active army. Still, women's service in the military has remained controversial, especially with respect to combat positions.

4. Challenges in Implementation of Non-subordination Theory

(1) Problems of Overgeneralization: Applying a rule or practice to serve to subordinate women to men will create dichotomy. This is because some women even with their natural characteristics perform better than men.

(2) Low performance: Applying a rule or practices to serve to subordinate women to men could lead to low performance in a work place. This is because assuming or legitimizing the power imbalance between men and women will limit women who have power more than men to perform well.

(3) Problem of Intimidation: Applying rules designed to legitimate the power imbalance between men and women could lead to intimidation by men. This is because men would use the advantage of women's relative powerlessness in the society to intimidate them.

(4) Problem of sexual harassment pornography domestic violence, rape etc.: Applying rules designed to legitimate the power imbalance between men and women could lead to sexual harassment, pornography, domestic violence, rape etc.

(5) Problem of fear: Applying Non-subordination or dominance theory could bring fear on the part of women. This is because men do not want solely the obedience of woman, they want their sentiment. This obedience could be on fear, either fear of themselves or religious fears

(6) Every case should be treated on its merit irrespective of sex instead of applying rules or practices to subordinate women to men. This will go a long to increase the productive of the workplace and have balance equivalent opportunities.

5. Recommendations

It is recommended that every citizen must try his/her best to make sure that non-subordination theory surrounding gender based violence is aptly assimilated in within its context, in this milieu. Thus:

(a) Focused advocacy campaigns of the non-subordination theory should help tackle some of the direct causal factors responsible for the gender based violence on females. There should be public campaign to put a stop on gender based violence by organizing rural women who have no access to public opinions and who are illiterates to report all cases of domestic violence for prosecution of offenders.

(b) Health care providers should play important roles in collaboration with systems such as the legal, police, media, social and educational sectors and civil society organizations to give necessary support to the victims and to give evidence when required. Health professionals are often in a position to identify the Health consequences of any violence and to respond effectively to the health implication accordingly.

(c) Section 12(1) CFRN 1999 should be amended by the National Assembly in a way that international treaties favourable to women can apply directly, for instance, CEDAW which is an international treaty like and very paramount in addressing women's rights though ratified but not yet domesticated and as such unenforceable.

(d) More local legislation should be enacted in the state Houses of Assembly, for instance, the likes of Widowhood/Widower-hood (Malpractices) Prohibition Law, 2005 of Anambra State.

(e) Government should promote policies that can reduce the level of discrimination meted out on women and ensure equity in distribution of resources among the citizens, especially protecting the interest of women. It should be noted that good governance is what will bring a lasting solution on the long run and it depends a lot on the government to cater for the welfare of the masses.

6. Conclusion

Non-subordination theory is designed to legitimate the power imbalance between men and women, in doing this, it is submitted that every case should be treated on its merit to avoid dichotomy against the women. In so doing I strongly believe that we will have a balanced and efficient equivalent opportunities.

