

Intersection of Law and Gender Rights: The Substantive Equality Approach

Chidimma Stella Nwakoby*

Chinwe Patricia Iloka**

Chioma Ogechukwu Nwabachili***

Abstract

Theories of substantive equality seek to avoid the unequal outcomes between male and female or men and women by taking differences into account and eliminating their negative effects. However, men and women are differently situated and applying the same rules to them may produce differently, unequal outcomes. The questions are usually which differences in circumstances or characteristics between men and women are or should be significant. Secondly, what outcomes are just? Thirdly what strategies are most likely to lead to those outcomes? How different is a substantive equality approach from formal equality? And to what extent is it necessary to choose between the two? The aim of this paper was to critically examine those differences and advocate the ones that are just, the strategies that should be used to have a well-balanced opportunity. 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 that there are challenges to substantive equality approach theory and these include problems of determining which differences between men and women that are significant, problems of determining what outcomes are just, problems of determining what strategies are most likely to lead to the outcomes that are just, problem of distinguishing between substantive equality approach and formal equality approach, as well as problem of determining which to choose in a given situation. It was recommended that affirmative action should be designed to bring out the differences, outcomes, strategies, distinction between substantive and formal equality approaches and which should be used in a given situation. And that this could be done by bringing out the nature, scope and limits of any particular task to enable people know what it entails. Also, awareness program should be introduced to bring out alternative approaches that will best accommodate the problems.

Keywords: Equality, Gender, Law, Minority, Rights, Substantive, Women.

1. Introduction

When men and women are similarly situated, requiring that they be treated equally often opens up opportunities for women that were previously unavailable to them. To the extent that men and women are differently situated however, applying the same rules to them may produce different unequal outcomes. Theories of substantive equality seek to avoid those unequal outcomes by taking differences into account and eliminating their negative effects on women. Deciding which differences matter and what alternative approach will best accommodate them can involve complex judgments. One source of unequal outcomes for women is past discrimination. Women historically have been excluded from obtaining jobs equal to men in status and compensation. Examples of remedial measures intended to reverse the effects of past discrimination include affirmative action plans designed to increase female representation in traditionally male occupation and pay equity schemes designed to restructure wage scales.¹

* **Chidimma Stella Nwakoby** LL.B, B.L, LL.M, Ph.D, MCArb, Lecturer, Faculty of Law, Department of Commercial and Property Law, Chukwuemeka Odumegwu Ojukwu University Igbariam Anambra State Nigeria Mobile: +2348037955734, Email: cs.nwakoby@coou.edu.ng

** **Chinwe Patricia Iloka** LL.B, B.L, LL.M, Ph.D, Senior Lecturer, Faculty of Law, Department of Private and Public Law, Chukwuemeka Odumegwu Ojukwu University Igbariam Anambra State Nigeria Mobile: +2348035696281, Email: cp.iloka@coou.edu.ng and chypat4@gmail.com

*** **Chioma Ogechukwu Nwabachili** LL.B, B.L, LL.M, Ph.D, Reader, Faculty of Law, Department of International Law and Jurisprudence, Nnamdi Azikiwe University Awka Anambra State Nigeria, Mobile: +2348063772200, Email: co.nwabachili@unizik.edu.ng

¹ C P Iloka, "Migration, Internal Displacement, Public Disorder and the Role of Crisis Management Framework: A Focus on Women and the Minority Rights in Nigeria" (2023) (5) *International Review of Law and Jurisprudence (IRLJ)*, 45; also available at *Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=7154779261620939056&btnI=1&hl=en>> accessed 20 December 2024.

Women are biologically different as they may become pregnant; for example, pregnancy can be a disadvantage for workers in current work environments with respect to hiring, promotion and job security. Disability leave provisions specifically designed for pregnant women and flexible work schedules aim to neutralize this disadvantage. Many differences between men and women are matters of averages, rather than definitional or categorical differences. Formal equality rules level the playing field for the exceptional or non-average woman who can compete successfully for an opportunity on the same basis as the average man. Other more result-oriented approaches may be necessary however, if the goal is to ensure that women and men have functionally equivalent opportunities. In the educational context, for example, some argue that all female classrooms or sports teams are necessary to ensure equal opportunities for girls.²

In this paper, we will be looking at the remedying the effects of past discrimination on women, eliminating the disadvantages of women's differences, recognizing sex-linked average differences, substantive equality in the family, challenges in implementation of substantive equality approach in respect of gender and solutions to these problems.

2. Remedying the Effects of Past Discrimination

a) Sex Specific Public Benefits to Remedy Past Societal Discrimination

One of the circumstances that might justify different treatment for otherwise similarly situated people are past discrimination that has disadvantaged members of one group. This rationale has been at the heart of affirmative action programs for racial and ethnic minorities.

In *Kahn v Shevin*³ the Supreme Court in the United States upheld a state tax exemption that was available to widows, but not widowers on the ground that Florida was fairly attempting to compensate for disparities between the economic capabilities of men and women. It is doubtful that this case would be decided the same today but the opinion is an important historical marker for use of affirmative remedies to address gender inequalities. The questions are under what circumstances, if any, do you think the state is justified in giving economic advantages to women in order to reduce the effects of past discrimination? When, if ever, should an employer be allowed to address past societal discrimination by favouring women for jobs that they have not traditionally held?

The full facts of *Kahn v Shevin*⁴ is as follows since 1885, Florida has provided for some form of property tax exemption for widows. Appellant Kahn is a widower who lives in Florida and applied for the exemption. It was denied because the statute offers no analogous benefit for widowers. The Circuit Court for Dade County, Florida held that the Statute violated the Equal Protection of the Fourteenth Amendment which the Florida Supreme Court reversed. There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man, whether from overt discrimination process of a male dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs. There are, of course, efforts under way to remedy this situation. But firmly entrenched practices are resistant to such pressures and indeed, date compiled by the women's Bureau of

² C P Iloka and J A Eze, "Breaking the Culture of Silence on Rape: A Cry for Justice" (2022) (9) (4) *Journal of Commercial and Property Law, NAUJCP*, 43; also available at *Google Scholar* [Google Scholar](https://scholar.google.com/scholar?oi=bibs&cluster=1799067546122464513&btnI=1&hl=en) <<https://scholar.google.com/scholar?oi=bibs&cluster=1799067546122464513&btnI=1&hl=en>> accessed 3 January 2025.

³ 416 U.S 351 (1874).

⁴ *Ibid*.



the United States Department of Labour show that in 1972, a woman working full time had a median income which was only 57.9% of the median for males—a figure actually six points lower than had been achieved in 1955.

The disparity is likely to be exacerbated for the widow. While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer. There can be no doubt, therefore, that Florida's differing treatment of widows and widowers' rests upon some ground of difference having a fair and substantial relation to the object of the legislation. We deal here with state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden.

Mr. Justice Brennan with whom Mr. Justice Mbarshall joins, dissenting:

In my view, a legislative classification that distinguishes potential beneficiaries solely by reference to their gender-based status as widows or widowers, like classifications based upon race, alienage, and national origin must be subjected to close judicial scrutiny, because it focuses upon generally immutably characteristics over which individuals have little or no control and also because gender, based classifications too often have been inexcusably utilized to stereotype and stigmatize politically powerless segments of society.

I agree that, in providing special benefits for a needy segment of society long the victim of purposeful discrimination and neglect, the statute serves the compelling state interest of achieving equality for such groups. No one familiar with this country's history of pervasive sex discrimination against women can doubt the need for remedial measures to correct the resulting economic imbalances. The purpose and effect of the suspect classification are ameliorative statute neither stigmatizes no denigrate widowers within the class of beneficiaries would not further the statute's overriding interest in remedying the economic effects of past sex discrimination. While doubtless, some widowers are in financial need, no one suggests that such need results from sex discrimination as in the case of widows.

The statute nevertheless fails to satisfy the requirements of equal protection, since the state has not borne its burden of providing that its compelling interest could not be achieved by a more precisely tailored statute or by use of feasible, less drastic means. The statute is plainly over inclusive, for the \$500 property tax exemption may be obtained by a financially independent heiress as well as by an unemployed widow with dependent children. The state has offered nothing to explain why inclusion of widows of substantial economic means was necessary to advance the state's interest in ameliorating the effects of past economic discrimination against women. By merely redrafting that form to exclude widows who earn annual incomes or possess assets, in excess of specified amounts, the state could readily narrow the class of beneficiaries to those widows for whom the effects of past economic discrimination against women have been a practical reality.

Mr. Justice White, dissenting, observed:

The Florida tax exemption at issue here is available to all widows but not to widowers. The presumption is that all widows are financially needier and less trained or less ready for the job market than men. It may be that most widows have been occupied as housewife, mother and homemaker and are not immediately prepared for employment.

But there are many rich widows who need no largess from the state; many others are highly trained and have held lucrative positions long before the death of their husbands. At the same time, there are many widowers who are needy and who are in more desperate financial straits and have less access to the job market than many widows. Yet none of them qualifies for the exemption. I find the discrimination invidious and violative of the Equal Protection Clause. There is merit in giving poor widows a tax break, but gender-based classifications are suspect and require more justification than the state has offered.

It may be suggested that the state is entitled to prefer widows over widowers because their assumed need is rooted in past and present economic discrimination against women. But this is not a credible explanation, for if the state's purpose was to compensate for past discrimination against females, surely it would not have limited the exemption to women who are widows. Moreover, even if past discrimination is considered to be the criterion for current tax exemption, the state nevertheless ignores all these widowers who have felt the effects of economic discrimination, whether as a member of a racial group or as one of the many who cannot escape the circle of poverty. It seems to me that the state in this case is merely conferring an economic benefit in the form of a tax exemption and has not adequately explained why women should be treated differently from men.

Also, in *California v Webster*⁵ the Court upheld a social security provision applicable to retirements before 1972 and computed old age benefits under a formula more favourable to women than men. The benefits for both sexes were determined according to an average monthly wage earned during certain years, but women were given the opportunity of excluding three additional lower earning years than men. In a *per curiam* opinion, the Court concluded.

The more favourable treatment of the female wage earner enacted here was not as a result of "archaic and over broad generalizations" about women or of "the role typing society has long imposed' upon women such as causal assumptions that women are "the weaker sex" or are more likely to be child bearers or dependents...rather, "the only discernible purpose of the statute's more favourable treatment is the permissible one of the redressing our society's long standing disparate treatment of women "The statute operated directly to compensate women for past economic discrimination. Retirement benefits under the Act are based on past earnings. But as we have recognized: "Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid job. Thus, allowing women, who as such have been unfairly hindered from earning as much as men, to eliminate additional low-earning years from the calculation of their retirement benefits works directly to remedy some part of the effect of past discrimination.

⁵ 430 US.313, 317-18(1977).



(b) Affirmative Action in Employment

Under certain circumstances, affirmative action is used to redress a significant gender imbalance in the work place. An affirmative action plan might give preference to qualified women for a job they previously would not have obtained because of past discrimination, or because of historical patterns that channeled male and female workers into separate and unequal positions. Litigation may force employers to implement an affirmative action plan to remedy past discrimination, but employers might also wish to voluntarily integrate their workforce even in the absence of legal liability.

In *Johnson v Transportation Agency*⁶ the Supreme Court held that the agency could appropriately take into account the sex of the female employee in its promotion decision, even though past discrimination by the Agency could not be proved.

In this case, the respondent, Transportation Agency of Santa Clara County California unilaterally promulgated an Affirmative Action Plan pursuant to which the Agency passed over petitioner Paul Johnson, a male employee for promotion to road dispatcher and promoted a female employee appellant, Diane Joyce. The question for decision is whether in making the promotion, the Agency impermissibly took into account the sex of the applicants in violation of the Title VII of the Civil Rights Act of 1964, and no constitutional issue was raised. The District Court for the Northern District of California held that respondent had violated Title VII. The Court of Appeals for the Ninth Circuit reversed, and the Supreme Court affirmed.

Also, in *Grutter v Bollinger*⁷ the U.S Supreme Court upheld an affirmative action plan from the University of Michigan on the basis of the educational benefits of a diverse educational setting.

3. Eliminating the Disadvantages of Women's Differences

According to Iloka and Eze⁸ women are in perpetual fear of men's use of the penis as a weapon to subdue the womenfolk. Irrespective of domestic laws, there is sexual rascality of the female folk but on daily basis women and girls are beaten, kicked, threatened on gun point and most times killed in order to be raped. Indeed, women are perpetual fear of men's use of the penis as a weapon to subdue the womenfolk.

(a) Pregnancy

Different treatment for women might also be justified on the basis of genuine differences (i.e. not stereotypes) between men and women. The most obvious difference between women and men is their reproductive capacity. Although this difference has a "real" biological basis, it has also given rise to gender stereotypes. Women's childbearing role was one of the nineteenth and early twentieth century justifications for excluding them from positions. The question for contemporary sex discrimination law is whether different treatment based on pregnancy can reduce the disadvantages

⁶ 480 U.S. 616 (1987).

⁷ 539 U.S.306 (2003).

⁸ C P Iloka and J A Eze, "Breaking the Culture of Silence on Rape: A Cry for Justice" (2022) (9) (4) *Journal of Commercial and Property Law, NAUJCPL*, 43; also available at *Google Scholar Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=1799067546122464513&btnI=1&hl=en>> accessed 3 January 2025.

that childbearing produces without also reinforcing other practices and attitudes that disadvantages women.⁹

In *Cleveland Board of Education v Laflaur*¹⁰ the Supreme Court addressed the constitutionality of a rule requiring public school classroom teachers to take unpaid maternity leave once they reached the fourth month of pregnancy and to stay out of the classroom until their child was at least three months old. The court invalidated the policy on due process grounds. Although the state could prevent an individual woman from working if she was not fit for the job as a result of pregnancy, the court held that it could not compromise her procreative rights by conclusively presuming an inability to work.

In the same year, however, the court upheld a California law that excluded Pregnancy from an otherwise comprehensive list of disabilities covered by the state disability Insurance plan. In *Geduldig v Aiell*,¹¹ the court distinguished prior precedents involving the exclusion of women by characterizing the exclusion as one based on pregnancy and not sex.

(b) Work and family

Domesticity introduced not only a new structuring of market work and family work¹² but also a new description of men and women. The ideology of domesticity held that men naturally belong in the market because they are competitive and aggressive; women belong in the home because of their "natural" focus on relationship, children and an ethic of care. In its original context, domesticity's descriptions of men and women served to justify and reproduce its breadwinner/housewife roles by establishing norms that identified successful gender performance with character traits suitable for those roles.¹³

Domesticity remains the entrenched, almost unquestioned norm and practice. As a gender system, it has two defining characteristics. The first is its organisation of market work around the ideal of a worker who works full time and overtime and takes little or no time off for childbearing or childrearing. Though this idea worker norm does not define all jobs today, it defines the good ones: fulltime blue-collar job in the working-class context and high-level executive and professional jobs for the middle class and above. When work is structured in this way, care gives often cannot perform as ideal workers. Their inability to do so give rise to domesticity's second defining characteristics: its system of providing for caregiving by marginalizing the caregivers, thereby cutting them off from most of the social roles that offers responsibility and authority.¹⁴

Both the ideology and the practice of domesticity retain their hold: A recent survey found that fully two-third of Nigerians believes it would be best for women to stay home and care for family and children. Even more important, market work continues to be structured in such a way that

⁹ Constitution of the Federal Republic of Nigeria, 1999, section 42.

¹⁰ 414 U.S 632 (1974); also *Anekwe v Nweke* (2013) LPELR 22697 SC.

¹¹ 417 U.S.484,496-497(1974).

¹² C P Iloka, "Employment Rights of Women and the Disabled: Curbing Workplace Discrimination" (2023) (3) (1) *De Juriscope Law Journal*, available at *Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=1052668594549252264&btnI=1&hl=en>> accessed 20 December 2024.

¹³ ACHPR, section 18 (3).

¹⁴ C P Iloka, "The Jurisprudence behind International Legal Framework on the Rights of Women and Children: An Appraisal" (2022) (3) *International Journal of Law and Clinical Legal Education, IJOLACLE*, 89; also available at *Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=14908986982353941386&btnI=1&hl=en>> accessed 20 December 2024.



perpetuates the economic vulnerability of caregivers. Their vulnerability stems from the way we define the ideal worker as someone who works at least forty hours a year round.

This ideal worker norm, framed around the traditional life patterns of men, excludes most mothers. Nearly two-thirds of mothers of childbearing age are not ideal workers even in the minimal sense of working fulltime full year. One quarter of mothers of childbearing age still are homemakers. Single, as well as married mother are affected never married mothers are the group of women most likely to at home.

Moreover, fulltime work is no guarantee of avoiding economic vulnerability even mothers who work fulltime often find themselves on the “Mummy track”. In addition, fulltime workers who cannot work overtime often suffer economically because many of the best jobs now require substantial overtime. A rarely recognized, but extraordinarily important fact is that jobs requiring extensive overtime exclude virtually all mothers (93 percent).

Our economy is divided into mothers and others. Having children has a very strong negative effect on women's incomes, an effect that actually increased in the 1980s despite the fact that women have become better educated. As a result, in an era when women's wages are catching up with men's, mothers' wages lag behind. Given that nearly 90% of women become mother during their working lives, this pattern is inconsistent with gender equality.¹⁵

If mothers have failed to achieve equality in market work, equality in the family has proved equally elusive, Buying and cooking food, doing dishes and laundry, caring for children: an average Mother spend thirty-one ours a week on these task. Many commentators have noted the contradiction despite our self-image of gender equality; most women still do 80% of childcare and two-thirds of care housework.

In short, the basic elements of domesticity's organisation of market work and family work remain intact. Women still specialize in family work. Men still specialize in market work. Market work continues to be framed around the assumption that ideal workers have access to a flow of family work few mothers enjoy. Social and cultural norms still sustain and reproduce this organisation of market and family work. Domesticity did not die, it mutated. In the nineteenth century, most married women were marginalized outside of the economy. Although women have re-centered market work, most remain marginalized today.

(c) The “Not Equality”

In *Back v Hastings*,¹⁶ a school psychologist argued that she was denied tenure because school personnel had decided that, as a young mother, she would not be able to devote herself to the job. The trial court granted summary judgment to the school district but the second circuit Court of Appeal reversed. The Court allowed the case to proceed on a gender discrimination theory based on sex-stereotyped, comments about mothers without any comparative evidence about the treatment of fathers. Evidence introduced included comments that maybe her hard work was "just

¹⁵ C P Iloka, “Understanding the Concept, History and Dimensions of Domestic Violence against Women” (2022) (3) *African and Religious Law Review, ACARELAR*, 44; also available at *Google Scholar Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=15079785686980644365&btnI=1&hl=en>> accessed 28 December 2024.

¹⁶ 365 F.3d 107 (ed Cir.2004).

an act" until she received tenure and would start going home midafternoon, and that maybe it was not possible to "do this job" and be a good mother.

In another case *Lust v Scaly*¹⁷ the Plaintiff was a sales representative who lost a promotion to a man. Evidence of discrimination included her supervisor's admission that he didn't consider recommending her for promotion because she had children. He didn't think she would want to relocate her family, even though she had not told him that and, in fact, had indicated frequently how much she wanted the promotion. When the Plaintiff asked about that promotion, the supervisor also asked why her husband wasn't going to take care of her. The Plaintiff won at trial and the verdict was upheld on Appeal.

(d) Recognizing Sex-linked Average Differences

Some sex-based differences affect matters where group-based judgments remain highly relevant. For example, on average, women live longer than men, have fewer driving related accidents, have higher health care costs and stay out of the workforce for longer periods. Does our commitment to sex equality require that we ignore such average differences in, say, the setting of insurance rates? Similarly, researchers document some differences in the way girls and boys learn (again, on average). Does that justify "separate but equal" classroom treatment? Can athletic programs take account of average sex-based differences in strength, size and speed? Even if only some girls can compete on equal terms with boys, should those who can have access to boys' team? In sports where schools can only afford a girls' team, should boys have a right to compete? What does gender equality require?

According to Iloka¹⁸ domestic violence could be physical, psychological, emotional etc. and may not be just encounter but could be structural. Similar to hate crime, this type of violence against women targets a specific group with the victim's gender as a primary motive. All forms of domestic abuse have one purpose: to gain and maintain control over the victim. Iloka¹⁹ propounded that every woman is entitled to good sexual and reproductive health. This involves being free from sexually transmitted infections, gender-based violence and maternal mortality and able to access essential health services. Also gender equality is the view that men and women should receive equal treatment and should not be discriminated against based on sex.

The most frequent type of trafficking was commercial sex followed by child labour. Women and children are victims of commercial sexual exploitation, sex trafficking and domestic servitude. Efforts to prevent, identify and respond to these crimes by international and national laws are largely inadequate, under supported, inefficient, uncoordinated and unevaluated.²⁰

¹⁷ 383 F.3d 580, 583(7th cir.2004).

¹⁸ C P Iloka, "Understanding the Concept, History and Dimensions of Domestic Violence against Women" (2022) (3) *African and Religious Law Review, ACARELAR*, 44; also available at *Google Scholar* [Google Scholar](https://scholar.google.com/scholar?oi=bibs&cluster=15079785686980644365&btnI=1&hl=en) <<https://scholar.google.com/scholar?oi=bibs&cluster=15079785686980644365&btnI=1&hl=en>> accessed 28 December 2024.

⁸ C P Iloka, "Appraisal of the Legal Framework of the Sexual and Reproductive Health Rights of Women in Nigeria" (2023) (4) (1) *Chukwuemeka Odumegwu Ojukwu University Journal of Private and Public Law*, available at *Google Scholar* [Google Scholar](https://scholar.google.com/citations?view_op=view_citation&hl=en&user=st6bmz4AAAAJ&citation_for_view=st6bmz4AAAAJ:hqOjcs7Dif8C) <https://scholar.google.com/citations?view_op=view_citation&hl=en&user=st6bmz4AAAAJ&citation_for_view=st6bmz4AAAAJ:hqOjcs7Dif8C> accessed 28 December 2024.

²⁰ Chinwe Patricia Iloka, 'Legal Framework for Combating Trafficking of Women and Children in Nigeria' *DJLJ* [2023] (3) (1) 45 <<https://nigerianjournalsonline.com/index.php/DJLJ/article/view/4183/4053>> accessed on 28 December 2024.



According to Iloka²¹ the involvement of students in teaching and learning is encouraging and a welcome development. Sexual and reproductive health rights have been a taboo in the traditional African societies even in the recent past but it is now popular among African scholars and internationally acclaimed. The right to health has been an internationally recognized human right. Polygamy has an adverse effect on sexual and reproductive health rights of women especially with its characteristic multiple sexual activities.²²

In city of Los Angeles, Department of *Water & Power v Manhart*,²³ the Los Angeles Department of Water and Power required its female employees to make larger contributions to its pension fund than its male employees. For many years the Department has administered retirement disability and death benefit programs for its employees upon retirement benefit computed as a fraction of his or her salary multiplied by years of service. The monthly benefits for men and women of the same age, seniority and salary are equal. Benefits funded entirely by contributions from the employees and the Department augmented by the income earned on those contributions. No private consonance company is involved in the administration or payment of benefits.

Based on a study of mortality tables and its own experience, the Department determined that its 2,000 female employees, on the average will live few years longer than its 10,000 male employees. The cost of a pension for the average retired female is greater than for the average male retired because more monthly payments must be made to the average woman. The Department therefore required female employers to make monthly contributions to the fund which were 14.84% higher than the contributions required in comparable male employees. Because employee contributions were withheld from paychecks a female employee took home less pay than a male employee earning the same salary. The District Court found it discriminating and the United States Court of Appeals for the Ninth Circuit affirmed.

In *Cohen v Brown University*.²⁴ This is a class action lawsuit charging Brown University, its President and its athletics director (collectively “Brown”) with discrimination against women in the operation of its intercollegiate athletes’ program in violation of Title IX of the Education Amendments of 1972, and its implementing regulations. The Plaintiff class comprises all present, future and potential Brown University women students who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics funded by Brown.

This suit was initiated in response to the demotion in May 1991 of Brow's women's gymnastics and volleyball teams from university funded varsity status to donor-funded varsity status. As a consequence of these demotion, all four teams lost, not only their university funding, but most of the support and privileges that accompany University funded varsity status at Brown.

²¹C P Iloka, “Student-Centeredness in Teaching and Learning Process for Effective Performance” (2023) (4) *IJOLACLE*, 67; also available at *Google Scholar Google Scholar* <https://scholar.google.com/citations?view_op=view_citation&hl=en&user=st6bmz4AAAAJ&citation_for_view=st6bmz4AAAAJ:YOWf2qJgpHMC> accessed 28 December 2024.

²² C P Iloka, “Contemporary Issues on Reproductive and Sexual Health Vis-À-Vis the Rights of Women in Nigeria” (2022) (13) (2) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence, NAUJILJ*, 77; also available at *Google Scholar Google Scholar* <https://scholar.google.com/citations?view_op=view_citation&hl=en&user=st6bmz4AAAAJ&citation_for_view=st6bmz4AAAAJ:_FxGoFyzp5QC> accessed 3 January 2025.

²³ 435 U.S. 702 (1978).

²⁴ 101 F.3d 155 (1st cir. 1996).

Following a bench trial, the district court found Brown to be in violation of Title IX, and ordered a comprehensive plan for compliance be submitted. The court found the plan submitted was not comprehensive and did not comply with the opinion. The court rejected the plan and ordered Brown to elevate and maintain the women's team at university-funded varsity status.²⁵

4. Substantive Equality in the Family

Women's role in the home traditionally limits their opportunities in the world outside it, the family has been a principal site of women's social and economic vulnerability. Under the common law, when a woman married, her identity merged with that of her husband. He assumed an obligation to support his wife and in return, obtained total control of her property. Because wives lost their separate identity on marriage, they could not form contracts, keep their own earnings, acquire property or bring their own legal actions. Furthermore, Iloka²⁶ posits that it is observed that the international human rights instruments and their developing jurisprudence enshrines values and principles of equality, freedom, rationality and fairness and as well promotes the domestic application of international human rights norms on women and children.

Gradually, throughout the nineteenth century, legislation known generally as "Married Women's Property Acts" loosened these restrictions. However, well into the second half of the twentieth century, family law still disfavoured women. Some provided for joint ownership of community property acquired during the marriage. In the other, property acquired by husbands and wives typically was the property of the spouse who earned it - the husband in traditional household. As a result, women at divorce were often left with little or no property, even what they helped their husband acquire. At the same time, husbands typically owed their former wives continuing spousal support often termed "maintenance" or "alimony" unless the wife was determined to be at "fault" for the divorce.

In the late 1960s and 1970s, no-fault divorce statutes and equitable distribution laws were passed which allowed coverts to divide property by taking into account a range of factors having to do with the child care as well as economic contributions of both spouses. With respect to parental rights, traditionally fathers had complete authority over their children, including the right to custody in the event of the parent's divorce. In the nineteenth century, the practice was changed creating legal presumptions giving mothers custody unless they were shown to be unfit (due to adultery, drunkenness, neglect, etc.).

In the 1970s, explicit maternal presumptions were largely (although not entirely) eliminated in favour of the gender-neutral "best interests of the child" test. Modern marriage and custody law reforms have been more controversial than one might expect because they have limited traditional protection for women without eliminating the economic vulnerability that women experience disproportionately at divorce. This explores the tension between formal and substantive equality

²⁵ *Okeke v Okeke* (2017) LPELR @ page 42582 CA, where the Appellant challenged the authority of the Respondent to inherit the estate of one late Simeon Okeke who according to the Appellant was his father, despite the fact that evidence adduced showed that Simeon Okeke bearing the subsistence of his statutory marriage which yielded two daughters, marrying his mistress, appellant mother. The Court held that a custom which enable a child born and fathered by another man to claim and inherit the property of a man who died before he was conceived by his mother.

²⁶ C P Iloka, "The Jurisprudence behind International Legal Framework on the Rights of Women and Children: An Appraisal" (2022) (3) *International Journal of Law and Clinical Legal Education, IJOLACLE*, 89; also available at *Google Scholar* <<https://scholar.google.com/scholar?oi=bibs&cluster=14908986982353941386&btnI=1&hl=en>> accesses on 11 January 2025.



principles. The desire to promote equal treatment and at the same time to ensure fairness for weaker parties, typically women at divorce.

In the case of unmarried parents, at common law, the child of unmarried parents was *filius nullius*-the child of no one. In the nineteenth century, states began to recognize legal ties between unwed mothers and their children, but unwed fathers were generally denied parental rights. In the 1970s the courts held in a series of cases that unwed fathers could not be categorically stripped of legal parentage.

In *Michael v Michael*,²⁷ "This is an appeal from a judgment and decree of dissolution, which awarded respondent the majority of marital property and awarded appellant \$500.00 in attorney's fees and no maintenance. The Court held that the marital property should be equally shared and that maintenance should be utilized as a means of providing support for an economically dependent spouse until the said spouse is self-reliant.

In *Chen v Warner*,²⁸ the Circuit Court granted Chens (the mother's) motion to amend the child support portion of a divorce judgment to require Warner (the father) to pay \$4,000 per month in child support. The Circuit Court rejected the father's argument that the mother's action constituted "shirking", and declined to use the mother's earning capacity rather than her actual income in determining whether to award child support. The Court of Appeals affirmed the Circuit Court's order that the mother's decision to forgo employment outside the home to become an at-home fulltime childcare provider was reasonable and did not constitute "shirking".

5. Challenges in Implementation of Substantive Equal Approach

- (a) Problems of determining which differences between men and women that are significant: There are always a problem in determining which differences in circumstances or character between men and women that are significant as many differences between men and women are matters of averages, rather than definitional or categorically differences.
- (b) Problems of determining what outcomes are just: Theories of substantive equality seek to avoid unequal outcomes between men and women when applying the same rules to them in a given task. There is always the problem of determining what outcomes are just or not.
- (c) Problems of determining what strategies are most likely to lead to the outcomes that are just: There is the problem of determining the strategies that are most likely to lead to the outcomes that are just. For example, in the law of inheritance taking into account women's economic vulnerability and their greater impact in their children a woman who inherits the late husband's property and also the late father's property. Is the outcomes really just? The problem is usually as above which strategies will be used as above to have a just outcome.

²⁷ 791 S.W.2d 772(Mo. Ct. App 1990).

²⁸ 695 N.W.2d 758(Wis.2005); *Edet v Essien* (1932) 11 NLR @ page 47 where the court held that the rule of customary law which gives the custody of a child fathered by the husband to another man merely because the dairy paid by that other man has not been returned was repugnant to natural justice, equity and good conscience.

- (d) Problem of distinguishing between substantive equality approach and formal equality approach: Formal equality approach deals with treating like people alike in other words, applying the same rules to everyone irrespective of gender while substantive equality approach seeks to avoid these by taking differences into account and eliminating their negative effects on women. There is always the problem of determining the differences between the two.
- (e) Problem of determining which to choose in a given situation: There is always the problem of determining whether to choose the formal equality approach or the substantive approach to have a balanced opportunity.

6. Recommendations

- (a) Affirmative action should be designed to bring out the differences, outcomes, strategies, distinction between substantive and formal equality approaches and which should be used in a given situation. This could be done by bringing out the nature, scope and limits of any particular task to enable people know what it entails.
- (b) Awareness: Awareness program should be introduced to bring out alternative approaches that will best accommodate the problems.

7. Conclusion

Theories of substantive equality seek to avoid the unequal outcomes between men and women when the same rules apply to them by taking differences into account and eliminating their negative effects on women. In doing this, it is submitted that various factors should be taken into consideration to have balanced and efficient equivalent opportunities.