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# EXAMINING THE LEGALITY OF 'AFFIRMATIVE ACTION' IN NIGERIA TODAY: ECHOES FROM SOME OTHER JURISDICTIONS*

## I. INTRODUCTION

Reference to the issue of Affirmative Action has recently gathered momentum. The concept and what is represented by it have really become famous, or shall we say, notorious mainly among feminists and other gender-based scholars of the post-Beijing Conference[1] era. Thus, ever since 1995 when that conference was held, women right scholars have with keen interest looked unto Affirmation Action as the indispensable panacea that would redress the centuries-old imbalance in several sectors at which the female-folk is placed on the disadvantaged position. According to the philosophy, thirty-percent, for a start, of all political and other positions and appointments must be reserved for women in the relevant enclave. What however is more correct is that the idea of Affirmation Action is not restricted to issues on gender dynamics. Prior to Beijing Conference, certain forms of positive discrimination have been advocated for and indeed applied to marginalized groups on the political, racial, ethnic, religious, industrial, economic, and educational perspectives, to say the least. Yet at each moment, the protagonists or the relevant policy makers had to contend with the question of legality or legitimacy of the principle. While some scholars are of the view that Affirmation Action policies are at war with the time-honoured constitutional principles that promote non-discrimination among citizens on whatever basis, others regard it as a necessary measure that will chore up the battered status and image of the disadvantaged group in order to square with the practical legal meaning of freedom from discrimination.

This paper is concerned with the critical and jurisprudential examination of the possibility of the legality of Affirmative Action in Nigeria today. The study is preceded by a comparative survey of the practice of Affirmative Action in a number of foreign jurisdictions. The essence is to demonstrate how the practice impacts on the laws of the respective jurisdictions and from there chat the course for Nigeria. Although Affirmative Action is more popular among studies in Women's right and status, this paper focuses on the notion as it refers to sundry disadvantaged groups.

## II. MEANING OF AFFIRMATIVE ACTION

There seems to be unanimity among scholars on the meaning of Affirmative Action. Opinions, however, differ on whether or not it is legitimate to apply the principle in concrete life situations given the "equal opportunity" clause enshrined in many a national constitution. Yet in spite of relevant nuances, what is meant by Affirmative Action has come under several appellations such as positive discrimination, reverse discrimination, equality of result, quota system, reservation, majority–minority districting, and so on.

The Oxford Concise Dictionary of Politics defines Affirmative Action as a "policy designed to correct past practices of discrimination against any historically disadvantaged group".[2] It implies taking proactive steps to encourage the group to participate in the socio-economic and political life of the country. Similarly, in the words of Lowi *et al*, Affirmative Action connotes a "policy or programme fashioned to redress historic injustices committed against specific groups by making special efforts to provide members of these groups with access to educational and employment opportunities".[3] This description of Affirmative Action agrees with that offered in *Wikipedia Free Encyclopedia:*

> Polices intended to promote access to education or employment aimed at a historically socio-politically non-dominant group....Motivation for affirmative action policies is to redress the effects of past and current wrongful discrimination and to encourage public institutions...to be more representative of the population.[4]

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[1] Beijing is in China.

[2] Mclean,, I. & Mcmillan, A. (eds.), *Oxford Concise Dictionary of Politics*, New York: Oxford Univ. Press Inc., 2003, p. 4.

[3] Lowi, T. J., Ginsberg, B. & Shepsle, K.A. *American Government: Power and Purpose*, 9th Edition, New York: W. W. Norton & Company, 2006, p. 149.

[4] *http://en.wikipedia.org/wiki/affirmative_action*. Accessed on 05/04/11.





Ikpeze has underscored the practicality and the urgency of the measures required by Affirmative Action by describing it as "a short – term and temporary positive measure taken to shore up and bring about equality of all by supporting and helping people who were discriminated against or disadvantaged in the past".[5] It involves the actual taking of decisive steps towards correcting unjust situations and injustices meted out to a known group. As a matter of fact, these decisive steps constitute a deliberate corrective action for adjusting previous imbalances in a given society. Citing Tom Mullen, Ikpeze adopts the idea of Affirmative Action as attempts to make progress towards substantive rather than merely formal equality or opportunity for those groups which are currently under–represented in significant positions in various societies.[6]

From the definitions above, certain words and phrases are quite salient and reoccurring, namely, short term', 'temporary', 'corrective', 'actual', 'historical', 'past discrimination', and so on. The implication is that Affirmative Action is temporary and designed for quicker and short-term effect rather than permanent and continuous. It is actual and action-oriented as opposed to mere theoretical constructs. It is equally corrective and redressive in nature and not preventive or prohibitive. Rather, it is aimed at remedying and restituting for a historically entrenched past discriminations which denied the relevant disadvantaged or non-dominant group an opportunity to get along with others. This is perhaps why Buchan Love likened Affirmative Action to an image of a running race thus:

> If a race has started between two runners, and one is shackled, simply removing the chains and allowing the runners to continue is insufficient because one runner must be moved up to an equal position. Otherwise the runner will never make it[7].

Studies show that target of Affirmative Action is multi-faceted. It can be gender – oriented by which it focuses, for instance, on improving the status of women by shunning out policies that will enhance women's position in all spheres of life. It can be race- based according to which it is aimed at mainstreaming people of a particular colour into different facets of life in which the people have been so discriminated against.[8] Affirmative Action can also be a tool for patching up for the denial of opportunities meted on other minority groups of ethnic, religious and linguistic persuasions. It is the type of discrimination prevalent in a particular society that determines its own target of affirmative Action. In America as in South Africa, the focus has been primarily race-based, and to a lesser extent gender-based. In India where the term used is 'reservation' instead of Affirmative Action, the target has been on the undoing of caste discrimination. In Nigeria, experience has shown that Affirmative Action, if adopted, should be directed to bear not only on gender-related discriminatory practices but also those based on religion and ethnicity.

Be that as it may, the issue of Affirmative Action has divided concerned scholars and policy makers into debating camps. Proponents argue that Affirmative Action is the best set of principles to eliminate unfair decision-making in view of compensating for advantages that other groups have had such as through institutional racism, institutional sexism, or other historical circumstances. They believe that other measures such as mere legislation will not result in optimal or fair decision-making since, according to Delgado,[9] past historical and current discrimination severely limited access to educational opportunities and job experiences in which women are greatly disadvantaged. The implication is that women for example, are not dully represented among those who will make the required law, for instance. Hence, people in positions of power are likely to hire those they already know or people from similar backgrounds or both,[10] and thus have their ostensible measures biased toward the same groups who are already empowered.[11]

[5] Ikpeze, O. V. C. "Legislating Women's Affirmative Action and its constitutionality in Nigeria", *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol. 2, Sept 2011, pp.176-177.

[6] *Ibid.*

[7] Cited in *Ibid.*

[8] See *Brown v. Board of Education Topeca* (1950) 347 US 629 29 S. C. 648 94 L Ed 1134. See also Articles 2 and 16 of *United Nations Declaration of Human Rights*, 1948.

[9] R. Delgado, "Merit and Affirmative Action" In *The Coming Race War? And Other Apocalyptic Tales of America after Affirmative Action and Welfare*, New York: New York University Press 1996. For this paper, see *http://academic.udayton.edu/race/04needs/affirm02.htm*. Accessed on 19/12/11.

[10] Cf. L. Guinier, "Saving Affirmative Action, and a Process for Elites to Choose Elites" In *Village Voice*, July 2 – July 8, 2003. See *http://www.vukkagevoice.com/news/0327.guinier.45235.1.html*. Accessed on 10/12/11.

Moreover, proponents are quite convinced that legislative and even judicial means are not enough to overcome long-entrenched discrimination. One reason, according to them, is that these measures frequently focus only on issues of formal litigable rights that are particularly prone to statutory and judicial resolution. Thus, while formal litigation – related strategies are inevitably resource intensive and dependent upon clear "smoking gun" evidence of overt bias or bigotry, prejudice especially if already entrenched can take on myriad subtle, yet effective, forms. Hence, private and public institutions often seem impervious to the winds of change long after court decisions or statutes formally ended discrimination.[12]

It is against the above backdrop that supporters of Affirmative Action generally advocate it either as a means to address past discriminations or to enhance racial, ethnic, gender or other diversity of some minority groups.[13] They glory in the fact that the end result, a more diversified grouping, justifies the means in spite of the Equal Protection or Opportunity Clause in the constitution.

On the other rung of the ladder, however, are those who are vehemently opposed to the application of the principle. They argue that the use of Affirmative Action is counter productive since it requires the very discrimination it seeks to eliminate and promotes prejudice by increasing resentment of those who are the beneficiaries from those who have been adversely affected by the policy.[14] Opponents of Affirmative Action also hold that since most people of the present were not part of the system that oppressed the minorities, it would be unfair for those who did not commit the crime to suffer as a result of Affirmative Action. Again, these opponents are of the view that since all people have equal rights, no individual's rights should be sacrificed to compensate for another person's being taken away. Yet, another argument against this principle is that it promotes inefficiency.[15] According to this view, Affirmative Action sometimes represses the qualified in favour of the not – so – qualified. This happens when, for example, one may be very qualified for a certain job, but may be turned down in favour of a person who is less qualified but is targeted for Affirmative Action in that job. The Affirmative Action antagonists argue that if this happens on a grand scale, the speed and efficiency which are supposed to be the hallmark of national developmental indices will thus be sacrificed. Opponents further claim that Affirmative Action, especially in relation to college or professional admissions, hurts those it intends to help. The reason offered is that it causes 'mismatching' effect by admitting minority students who are less qualified than their peers into more rigorous programmes wherein they cannot keep up.[16]

Be that as it may, different countries and policy makers in spite of the above opposing views, have at one time or the other favoured or disapproved of the application of Affirmative Action. In what immediately follows, we shall give instances of how the principle of Affirmative Action has been applied in many jurisdictions. This may, after all, be helpful in mapping out the outlines along which the principle may be implemented in relation to the woman question in Nigeria.

## III. AFFIRMATIVE ACTION: ECHOES FROM SOME OTHER JURISDICTIONS

There is no doubt that the attitude to implementation of Affirmative Action is partly a function of the legal status of the principle. In many countries which have laws where non-discrimination on the basis of sex, religion, race, opinion, etc is part of the bill of rights, Affirmative Action is seen as unlawful and thus quite controversial if implemented. Where, however, a more jurisprudential consideration is given to the *lex scripta*, the principle is normally justified on the grounds of extra-legal factors such as the spirit of the law of compensation. In this latter enclave, Affirmative Action is allowed as

[11] S. Sturm and L. Guinier, "The Future of Affirmative Action: Reclaiming the Innovative Ideal" In *California Law Review*, July, 1996. See online at *http://www.law.harvard.edu/faculty/guinier/racetalks/future_aa01.htm*. Accessed on 16/09/10.
[12] See *Affirmative Action Review*, Part 2. http://womenshistory.about.com/library/text/gov/blgov_aa_02htm. Accessed on 08/04/11.
[13] R. L. Anita, "What is the Constitutional Status of Affirmative Action?: Reading Tea Leaves". In *Affirmative Action: A Dialogue on Race, Gender, Equality and Law in America XIII*. 2 (1998). 16 Nov. 2006. *http://www.abanet.org/publiced/focus/spr98consst.html*. Accessed on 08/04/11.
[14] Cf. *http://en.wikipedia.org/wiki/affirmative_action*. Accessed on 05/04/11.
[15] *Ibid.*
[16] *Ibid.*





a temporary measure either by enactment of a relevant law or by means of executive orders judicial pronouncements. Such are the dilating attitudes that inform the application of the principle in many a jurisdiction.

Thus, in Brazil, some universities have created systems of preferred admissions (quotas) for racial minorities (blacks and natives), the poor and the disabled. There are already quotas for the disabled in the civil public services.[17] This is also the case in New Zealand where individuals of Maori or other Polynesian descent are afforded preferential access to university courses and scholarships.[18] In Canada, the Canadian Employment Equity Act requires employers in federally – regulated industries to give preferential treatment to four designated groups: women, disabled, Aboriginals, and visible minorities. Specifically, in Northwest Territories in the Canadian North, Aboriginals are given preference for jobs and education.[19]

In relation to women, the preferential treatment is obtainable in Norway where all public companies boards with more than five members must have at least 40 percent women, and which practice affects roughly 400 companies.[20] In Finland, certain university education programmes including legal and medical fields, reserve quotas for Swedish-speaking applicants. The aim of the practice is to guarantee that a sufficient number of Swedish speaking professionals are educated, thus safeguarding the linguistic rights of the Swedish – speaking Finns. Although this practice has met with severe criticisms, women in addition may get preferential treatment in recruitment for certain public sector jobs if there is a gender imbalance in the field. In the same vein, even as German constitution by virtue of article 3 thereof provides for equal rights of all people regardless of sex, race or social background, there has been in recent years a long public debate about whether or not to issue programmes that would grant women a privileged and preferential access to jobs in order to fight discrimination. Hence, as of 2007, programmes are in place which try to increase the percentage of females in state and university services.[21] In 1990, the French Ministry of Defence tried to give more easily higher ranks and driving licences to young French soldiers with North-African origin though this practice was latter cancelled after a strong protest from a young French lieutenant in the ministry.[22]

Furthermore, many countries in Asia have also seen genuine reasons why the policy of Affirmative Action should be implemented even if to a limited extent. In Japan, although it is illegal to include sex, ethnicity or other social background in criteria, yet there are informal policies to provide employment and long term welfare, not usually available to the general public, to Burakumin at municipality level.[23] In Macedonia, Albanian Minorities mainly are allocated quotas for access to state universities and public services.[24] But it is in Malaysia that the longest and most developed form of racial Affirmative Action is implemented. Harboured under the New Economic Policy sequel to the race riots of 1969, the Malaysian application of Affirmative Action sought to address the significant imbalance in the economic sphere in which the minority Chinese population had substantial control over commercial activity in the country. The opposition, however, argues that apart from giving Malays an unfair advantage over others, the practice is self – defeating as it arguably makes Malaysians less economically competitive compared to its neighbours and entrenches structural privileges not grounded on merit. Yet, the Malaysian government's own study reveals that the policy is yet to achieve its target of redistributing 30 percent of national wealth to the Malays which constitute 50 percent of the population.[25]

Be that as it may, Affirmative Action is completely outlawed in some jurisdictions. In October 2005, the constitutional court of Slovakia declared that Affirmative Action is unconstitutional. Again, the Swedish democracy, although very careful about minorities' rights and integration, does not allow Affirmative Action as it not only tends to be discriminatory

[17] Plummer, R. "Black Brazil Seeks a Better Future" In *BBC News*, Sao Paulo, 25 September 2006. See *http://news.bbc.co-zik/2/hi/americas/5357842.stm*. Accessed on 13/06/11.
[18] Cf Uk Commission for Racial Equality, "Affirmative Action around the World". *http://www.cre.gov.uk/*. Accessed on 13/06/11.
[19] GNW, *Human Resources – Affirmative Action*. See *http://www.hr.gov.nt.ca/employment/affirmativeaction/*. Accessed on 05/04/11.
[20] UK Commission for Racial Equality, *Op. Cit.*
[21] See *http://en.wikipedia.org/wiki/affirmative_action*. Accessed on 05/04/11.
[22] *Ibid.*
[23] *Ibid.*
[24] *Ibid.*
[25] Cf. *Bumiputra Policy in Malaysia. http://en/wikipedia.org/wiki/affirmative_action*. Accessed on 05/04/11.

and unfair, as the argument goes, but also makes the weak feel even worse and stigmatized.[26] Similarly in the United Kingdom, positive discrimination is regarded as unlawful and quotas / selective systems are not permitted.[27] The only singular exception to this is the provision made under the 1998 Good Friday Agreement which requires that the Police Service of Northern Ireland recruit equal number of Catholics as non Catholics. Yet, a number of people are taking the UK government to European Union Human Rights Court for breaking the Human Rights Act and the Positive Discrimination Act.[28] However that may be, this strict illegality of affirmative action is counter-balanced by a strict employment of the principle in some jurisdictions in the interest of a diversified sense of nation building. Hence in South Africa, the Employment Equity Act and the Broad Based Black Economic Empowerment Act aim to promote and achieve equality in the work place by not only advancing people from designated groups (all people of colour, while females, the disabled, and people from rural areas) but also specifically disadvancing the others.[29] More so, in Sri Lanka, the 1971 standardization policy for the universities was introduced as an Affirmative Action programme for students from areas which had poor educational facilities due to 200 years of purposeful discrimination by British colonialists. The British had in the course of these years practiced communal favouritism towards Christians and the minority Tamil communities as part of a policy of divide and conquer, which practice constitutes one of the major reasons for the Sri Lankan civil war.[30]

In the United States of America (USA), the attitude to the principle of Affirmation Action has been that of ambivalence and fluctuation. Although Affirmative Action occurs in school admission, job hiring, and government and corporate contracts, in favour of ethnic minorities, women, the disabled and veterans, the strategy has been the subject of numerous court cases,[31] and has been contested on constitutional grounds. However, California, Michigan, and Washington have presently banned all forms of Affirmative Action by government organization.[32]

[26] R. L. Anita, *Op. Cit.*

[27] Cf. *http://www.personneltoday.com/articles/2006/01/17/33430/is-there-a-case-for-positive-discrimination.html.* Accessed on 12/11/11.

[28] BBC News "Police recruitment will be 50:50", 12 September 2001. *http://news.bbc.co.uk/1/hi/northern_ireland/1540861.stm.* Accessed on 06/05/11.

[29] See. *http://en.wikipedia.org/wiki/affirmative_action.* Accessed on 05/04/11.

[30] *Ibid.*

[31] In July 1970, a federal district court enjoined the state of Alabama from continuing to discriminate against blacks in the hiring of state troopers. The court latter entered a further order requiring the hiring of one qualified black trooper or support person applicant for each white hired until 25 percent of the force was comprised of blacks. By the time the case reached the Court of Appeal in 1975, 25 black troopers and 80 black support personnel had been hired. The Supreme Court ultimately affirmed the orders. Again, in 1975, the same court found that local 28 of the sheet metal workers' international Association had discriminated against non-white workers in recruitment, training and admission to the union. Consequently, the court established a 29 percent membership goal, reflecting that percentage of minorities in the relevant labour pool. The Supreme Court affirmed the relief. Prior to 1974, Kaiser Aluminum hired only persons with prior craft experience as craft workers at its Gramercy, Louisiana plant to the effect that only 5 of 278 skilled craft workers at the plant were black. In reaction, Kaiser together with the union established its own training programmer to fill craft jobs with the proviso that 50 percent of new trainees were to be black until the percentage of black craft workers in the plant matched the percentage of blacks in the local labour pool. The Supreme Court held this programme to be lawful. In 1979, women represented only 4 percent to the entry – level officers in the San Francisco police department. By 1985, under an affirmative action plan ordered in the case in which the DOJ sued the city for discrimination, the number of women in the entry class had risen to 14.5 percent. Similarly, a federal district court review of the San Francisco fire department in 1987 led to a consent decree which increased the number of blacks in officer positions from 7 to 31, Hispanics from 12 to 55, and Asians from 0 to 10. Women were admitted as firefighters for the very first time. (For all these facts, see *http://en.wikipedia.ors.wiki/affirmative-action* ).
Furthermore, the important issue of affirmative action was addressed by the US Supreme Court in the case of *Regents of the University of California. v Bakke*, 438 US. 265 (1978). Here, Allan Bakke, a white male with no minority affiliation, brought suit against the University of California at Davis Medical School on the grounds that in denying him admission, the school had discriminated against him on the basis of his race, for that year the school had reserved 16 of 100 available slots for minority applicants. He argued that his grades and test scores had ranked him well above students accepted by the school. Although the respondent could not succeed in getting affirmative action declared unconstitutional, but the court held that the school method of rigid quota of students slots assigned on the basis of race was incompatible with the equal protection clause. Thus, the court permitted the universities, other schools, training programs, and hiring authorities to continue to take minority status into consideration but severely limited the use of quotas to situations in which previous discrimination had been shown and in which quotas were used more as a guideline for social diversity than as a mathematically defined ratio. After Bakke, the Supreme Court was tentative and permissive about effort by corporations and governments to experiment with affirmative action programmes in





Such as the above constitute the instances of how Affirmative Action is variedly applied in different jurisdictions. A cursory observation of our findings would reveal that each jurisdiction's attitude to the principle is determinable by local circumstances. In some, Affirmative Action is seen as a mere guideline for social diversity. In some others, it is strictly applied by way of rigid quota. In others yet, the principle has been rendered illegal both in public and private places. Can Affirmative Action find its way into the socio-political and economic considerations in Nigeria? If it can, will women and other marginalized groups be beneficiaries in relation to much yearned empowerment? Is Affirmative Action compatible with the present legal and constitutional framework in Nigerian? In other words, what is its legal status? Can there ever be a jurisprudential justification for its implementation *vis-a vis* the law and the discrimination question in Nigeria? Therefore, it may be *apropos* to first and foremost, inquire into the legal arrangement in Nigeria in which Affirmative Action as a principle is meant to operate.

## IV. LEGAL STATUS OF AFFIRMATIVE ACTION IN NIGERIA.

A source of much controversy surrounding the formulation and employment of Affirmative Action policy in many jurisdictions is the question of whether or not the practice will fit into the pigeon-role of the prevailing legal framework. In Nigeria, there is *prima facie* no express legislation or executive order authorizing Affirmative Action. In fact, the nation's *grundnorm* at its section 42 seems to preclude any form of preferential treatment. The section provides that;

1. A citizen of Nigeria of a particular community, ethnic group, place of origin, sex religion or political opinion shall not by reason only that he is such a person,

(a) Be subjected either expressly by, or in the practical application of, any law in force in Nigeria or any executive or administrative action of the government, to disabilities or restrictions to which citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religion or political opinion are not made subject or

(b) Be accorded either expressly by, or in the practical application of, any law in force in Nigeria or any such executive or administrative action, any privilege or advantage that is not accorded to citizens of Nigeria of other communities, ethnic groups, places of origin, sex, religions or political opinions.[33]

The above non-discriminatory provision is also made a cardinal objective of state policy by virtue of section 15 (2) of 1999 Constitution which prohibits discrimination on the bases of place of origin, sex, religion, status, ethnic group, linguistic association and ties. A cursory look at the provisions will reveal that they are quite relevant to discussions on legal status of Affirmative Action in Nigeria. While paragraph (b) of section 42(1) prohibits according privileges and advantages as against the yearnings by Affirmative Action protagonists, paragraph (a) thereof gives an added filling to the claims of the opponents of the principle who maintain that nobody should be subjected to restriction or disability. In other words, in relation to our subject matter, giving women advantages over men or restricting men in favour of women in designated areas in the name of Affirmative Action would seem to violate the provisions of section 42 (1) of 1999 Constitution. As if this is not enough, subsection 2 thereof states that "no citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstance of his birth". What this means is that one cannot be denied opportunities available to one simply because one does not belong to a particular gender since the idea of gender is, no doubt, a circumstance of one's birth. This equal opportunity principle is also well enshrined in section 17 (2) (a) of the Constitution to the effect that "every citizen shall have equality of rights, obligations and opportunities before the law".

employment (See *United Steel workers v. Weber*, 443 US. 193 (1979); *Fullilove v. Klutznick*, 100 J. ct 2758 (1980). But in 1989, the court returned to the Bakke position that any "rigid numerical quota" is suspect (*Cf Wards Cove v. Atonio*, 109 s. ct. 2115 (1989). But see also *Griggs v. Duke Power Company*, 401 U.S 24 (1971). Several other cases where affirmative actions application was the subject of litigation in the USA include: *Markin v. Wilks*, 109 s. et 2180 (1989); *Aderand Constructors, Inc. v. Pena*, 115 S. ct 2097 (1995); *Hopwood v. State of Texas*, 78 F3d, 932 (Fifth Circuit, 1996); *Gratz v. Bollinger*, 123 s. ct. 2411 (2003); *Grutter v. Bollinger*, 123 S. ct 2325 (2003).

[32] *Cf. http://en.wikipedia.org/wiki/affirmative_action.*

[33] This right to freedom from discrimination had frequently been a subject of judicial enforcement. Cf. *J.A. Adewale & Ors v. Gov. Ladeef Jakande of Lagos & Ors* (1981) 1 N. C.L.R. 262.

Again, the welfare of all persons on the principles of equality, inter alia, is a clause on the provision of the preamble to the constitution.

Be that as it may, the above observations do not say the last word. A more hermeneutical consideration would not fail to showcase some veritable claw backs that may constitute leverage for those who yearn for Affirmative Action. First and foremost, the provision of section 42 on the right to freedom from discrimination is not absolute. By *reductio ad absurdum*, the prohibition in the section becomes justified only when the alleged or intended discrimination is based only on the circumstances of the victim's birth such as gender, ethnic group, particular community, or on such other characteristic indices such as religion or political opinion. The domino effect is that aside those, there may be other reasons, legitimate as it were, why a particular person or group of persons may be subjects of advantage or privilege in relation to any executive or legislative act. Such reasons can be for the sake of diversity, compelling government interest in addressing identifiable past discriminations,[34] providing a level playing field, and so on. This is perhaps why Malemi in analyzing the provisions of section 42 holds that the right to freedom from discrimination does not deter government from implementing special programmes and measures to assist specific categories of people who are under particular disabilities, disadvantaged or less opportune communities and minorities to enable them catch up, or properly participate in the development of a modern and united county".[35] This observation by Malemi is nothing short of advocacy for Affirmative Action. Again, the fact that the provision of section 42 is not meant to be absolute is also corroborated by the content of subsection (3) thereof which states that "nothing in subsection (1) shall invalidate any law by reason only that the law imposes restrictions with respect to the appointment of any persons to any office under the state... or to an office in the service of a body corporate established directly by any law in force in Nigeria".[36] That is to say, nobody has really any fundamental right to be appointed to any office whatsoever. Appointments or restrictions may after all be determined by the provision of a relevant particular law, not excluding those on Affirmative Action.

Similarly, the Federal Character principle is yet another constitutional provision usually pointed at by Affirmative Action vanguards as supporting their claims. Hence, a community reading of the combined provisions of sections 14 (3) & (4), 15 (4) and 153 (1)( c) of 1999 constitution and sections 8 & 9 of part 1 of the third schedule thereof may be quite illustrative. While sections 14 (3) & (4) and 15 (2) of the constitution substantially provide for federal character system as a fundamental objective and directive principle of state policy, sections 8 and 9 of part 1 of third schedule provide for the administration, enforcement and implementation of the principle. It may be helpful to reproduce the content of some of the provision section 14 provides:

(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as *to reflect the federal character of Nigeria* and the need to promote national unity, and also to command national loyalty, thereby *ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups* in that government, or in any of its agencies.

(4) The composition of the Government of a state, a local government council, or any of the agencies of such Government or council, and the conduct of affairs of the Government or council or such agencies shall be carried out in such manner as *to recognize the diversity of the people within its area of authority, and the need to promote a sense of belonging and loyalty among all peoples of the federation.*

Again, section 15 (4) enjoins the state to "foster a *feeling of belonging and of involvement among the various peoples of the federation*, to the end that loyalty to the nation shall override sectional loyalties". There is no doubt that the underlined expressions in the above provisions had been interpreted along geographical and geopolitical lines. Thus, the expressions such as "sectional groups" (section 14 (3)), "diversity of peoples" (section 14 (4)), "various peoples of the federation" (section 14 (4), "sense of belonging" (section 14 (3)), "among all peoples of the federation" (section 14 (4)) had, for the purpose of application of the federal character principle, been given a mere geographical interpretation. But it need not be, for there is nothing in the expressions that excludes considerations on the basis of gender. Hence

[34] See the American case of *Adarand Constructors, Inc v. Pena*, 115 S. Ct. 2097 (1995).
[35] E. Malemi, *The Nigerian Constitutional Law*, Lagos: Princeton Publishing Co., 2006, p. 238.
[36] See for instance sections 65 – 66, 106 –107, 131, 137, 177, 182 and 289. These provisions have to do with what make for qualifications or disqualifications of people seeking to be elected into various political posts.





the 'sectionalism' embedded in the expression "sectional groups" can be a consequence of male domination in matters of political appointment. Again, "sense of belonging" should not be limited to geopolitical confines but also has to refer to the belongingness of both males and females. More, the ideas of "various peoples", "all peoples", "diversity of peoples" of the federation have to be given a broad interpretation to include peoples of both genders, for instance.

There is no gainsaying the importance of the federal character principle in a multi-cultural and heterogeneous society like Nigeria for the purpose of fostering national unity and loyalty. It is therefore to ensure proper implementation of this principle that a commission (Federal Character Commission) was established by section 153 (1) (c) of the constitution and by virtue of sections 8 and 9 of part 1 of third schedule of constitution charged with the duties of working out equitable formula for the distribution of all cadres of posts and promote, monitor and enforce compliance with the proportional sharing of designated posts at all levels of government. Although, the commission had narrowly focused their attention on whether or not states, ethnic groups or geopolitical zones are adequately represented in the designated areas, a more comprehensive coverage would certainly include issues of gender and religion which also constitute important indices in Nigerian national equation.

Be that as it may, the principle of federal character, assuming it is sincerely applied, does not even present a complete solution to the existing imbalance. At best, the principle takes care of the present situation. What of the circumstances of those who are victims of entrenched past discrimination and which effect had continued to be a claw back against their progress even in present times? It therefore follows that for a proper implementation of the equal opportunity provisions in the constitution, preferential treatment, albeit temporarily, in relevant areas should be given to the appropriate groups in order for them to meet and be able to exercise their constitutional right to equality of opportunity in national development.

In more developed jurisdiction, Affirmative Action had been applied sequel to outright and direct legislations, executive orders or judicial pronouncements. In the United States, New Deal Wagner Act of 1935 dealing with unfair labour practice actually started Affirmative Action as we know it today. The year 1964 witnessed the making of the Civil Rights Act that buttressed the practice of Affirmative Action. In 1961, President J. F. Kennedy's Executive Order 109256 established the Presidential Committee on Equal Opportunity. By 1965, President Johnson reiterated and rein- forced it by virtue of the Executive Order 11246 which created opportunity in Federal Employment, and Executive Order 10375 to include non – discrimination on the basis of gender. Although all these American efforts are normally alluded to as foundational polices that hatched the practiced of Affirmative action, they did no more than intending an ant-thesis to relevant forms of discrimination in the polity. It is actually in Australia that Affirmative Action gained ascendancy with the Equal Employment Opportunity for Women Act 1986, and the Racial Discrimination Act 1975. Again, the New Economic Policy in Malaysia is a form of an existing Affirmative Action strategy where, following the racial clashes of 1969, the policy gives preferential treatment in corporate equity, and places is higher education to the indigenous people (*Bumipatra*) who form the majority.

In Nigeria, pockets of what can be described as Affirmative Action are quite few. First is the 1972/1973 Indigenization and Nationalization Policy which sought to remedy the colonial era domination of the Nigerian economic sector by the expatriate companies. According to this policy, the Nigeria business world was divided into two schedules. While schedule 1 contained some 367 enterprises reserved exclusively to Nigerians, schedule 2 had a list of 595 enterprises that must allow for 40% equity owned by Nigerians. Later, this policy was embodied in Nigerian Enterprises Promotion Decree 1972[37] with subsequent amendments and which Decree added the third schedule. The purpose of the decree was to reserve for Nigerians those areas of economic activities which they had the capital and experience to run effectively while ensuring that in other areas, they were given an opportunity to participate in running the business where they could. According to Orojo[38] the effect of the 1972 Decree was not only to prohibit aliens from starting certain reserved new businesses, but also to compel them to sell to Nigerians all their interests in any business included in the

[37] Other major statutes that were enacted to restrict the rights of aliens to participate in business in Nigeria included the *Exchange Control Act 1962, The Immigration Act 1963, The Securities and Exchange Commission Act 1988, and the Industrial Development Coordinating Commissions Act, 1988.*
[38] J.O. Orojo, *Company Law and Practice in Nigeria*, Durban: Lexis Nexis Butterworth's, 2006, p. 4

first schedule of the Decree, and to transfer to Nigerians their interests in companies in the second Schedule in excess of 40% of the equity, or 60% in a third Schedule companies. This is purely an Affirmative Action policy in which the disadvantaged Nigerian majority was given a legislative leverage to catch up. However, with the intractable economic problems of the 1980s and 1990s, a new liberal economic policy was put in place. Thus, with a view to encouraging foreign investments, most of the restrictions on alien participation in business in Nigeria were removed.[39]

Further, the case of *Badejo v. Federal Ministry of Education and Ors*[40] was decided in a way that gave a judicial blessing to the practice of Affirmative Action. In this case, an 11 year old primary school girl instituted an action through her father (acting as her next friend) against the dependants at the High Court for denying her admission into the Federal Government College. It was her case that those who scored lower marks than her were admitted by the defendants. In the ultimate appeal to the apex court, it was held that quota system on which basis the appellant was denied admission is a quantitative restriction as to minimum or maximum for the purpose of upliftment or redress of imbalances. This practice which is the proportional share assigned to a person or group of persons is also seen as an allotment as currently employed in Joint Admissions and Matriculation Board Admissions to universities, and in the unity college admissions. By this system, it is possible and easier for one who comes from academically less advanced states to gain admission into a federal university, polytechnic or college with a lower mark than the one from the so-called academically advanced state who may not even be given admission. The rationale is for the less advanced state to catch up with others.

Thus, the above considerations represent the legal situation vis-à-vis Affirmative Action in Nigeria. It may be necessary to expressly enact laws in favour of Affirmative Action as in so many other jurisdictions. However, unless the Constitution is itself amended to that effect,[41] validity of such laws may meet with difficulty when placed *parri passu* with the *grundnorm* which provisions are not explicit with regard to Affirmative Action. As things stand now, it will take only an activist judiciary to read Affirmative Action into the constitutional provisions we analyzed above.

## V. CONCLUSION

Although the terrain of the discussion on Affirmative Action has always been dotted with controversy, the idea seems to be gaining much ground. This is no doubt consistent with the natural law demand for reparation in favour of any marginalized group. Yet the legality of it in the light of legal positivism need not be taken for granted especially where freedom from discrimination is guaranteed in the national constitution. This is exactly what obtains in Nigeria today. The constitution abhors all forms of discrimination, whether positive or negative. Hence, it is only by activist or extra-legal interpretations and considerations that Affirmative Action can be read into the constitution. Perhaps, unlike in other jurisdictions where the relevant constitution may empower the Executive to under specified conditions issue fiats that may introduce or adopt Affirmative Action in deserving cases, Nigerian jurisprudence does not give such allowance. The National Policy on Women which up till today is an executive proposal or paper work will surely need to be enacted into law by the appropriate legislature for it to gather the binding force of law. Such will also be applicable to other similar resolutions, national or international, that propose Affirmative Action of whatever clout, contour or colour. It is only in that exercise that the legality of the principle would reside.

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[39] It is to this end that the *Nigerian Investment Promotion Act, 1995 and the Foreign Exchange (Monitoring and Miscellaneous Provisions) Act 1995* were enacted. The former replaced the *Industrial Development Coordinating Commissions Act 1988*, while the latter in section 37 (2) provided that if the provisions of any other law or enactment were inconsistent with those of the Act, the provisions of the other law shall, to the extent of the inconsistency, be void. Accordingly, the restrictive provisions of the *Exchange Control Act 1962, the Exchange Control (Anti – Sabotage) Act 1984*, the *Immigration Act 1963*, the *Nigerian Enterprises Promotion Act, 1989, and* the *Industrial Development Coordinating Commission Act 1988* are no more applicable, and apart from the *Immigration Act*, all these laws have been omitted from the Laws of the Federation of Nigeria 2004. Furthermore, under the *Investment and Securities Act, 1999*, the approval of the Securities and Exchange Commission to transactions in a company in which aliens participate is no longer required.

[40] (1996) 8 NWLR, Pt 464, 15 SC.

[41] Nigeria can borrow a leaf from India wherein although the Constitution in its preamble, fundamental Rights, Fundamental Duties and Directive Principles grants gender equality, yet it empowers the State to adopt measures of positive discrimination in favour of women. Cf. paragraph 11 of Indian National Policy for the Empowerment of Women, 2006.