

TOWARDS ACHIEVING EQUALITY IN THE NIGERIAN WORKPLACE: WITH A  
FOCUS ON WOMEN, PERSONS LIVING WITH DISABILITIES AND ETHNIC  
MINORITIES.

BY

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## DEDICATION

This work is dedicated to the Almighty God who is ever faithful and to my wonderful parents, Professor and Mrs J. O. Osiki

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## Chapter One: Introduction and Background

### 1.1 Introduction

Discrimination has long been a part of recruitment and employment generally. According to Painter and Puttick, discrimination is a well-established feature of employment.<sup>1</sup> Despite this, the move towards the introduction of anti-discrimination legislation to combat this menace in the workplace is almost non-existent in Nigeria. Though Nigeria has been independent for more than four decades, there has been no significant improvement in her labour laws. Different categories of people are still being discriminated against based on sex, gender, age, physical characteristics, disability and other analogous characteristics.

The Nigerian legal regime governing recruitment and employment comprises of the Labour Act,<sup>2</sup> Employees Compensation Act,<sup>3</sup> the Constitution of the Federal Republic of Nigeria 1999 as amended,<sup>4</sup> National Industrial Court Act and Civil Service Regulation. Glaringly absent is legislation specifically governing anti-discrimination in the workplace.

Central to the issue of employment is discrimination. Discrimination in the workplace can be dealt via two sides of the same coin; the enactment of anti-discrimination provisions and affirmative action in our labour laws. These two means have been used by countries like South Africa and India to fight against the scourge of inequality in the workplace. Section 42 of the Nigeria Constitution 1999 as amended provides that no Nigerian citizen shall be discriminated against by virtue of his sex, ethnicity, religion or place of origin. Unfortunately, this provision is not applicable in the workplace.

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<sup>1</sup> RW Painter & K Puttick *Employment Rights* p118.

<sup>2</sup> CAP 198 Laws of the Federation of Nigeria 1990.

<sup>3</sup> This act repealed the Workers Compensation Act CAP 470 Laws of the Federation of Nigeria 1990. The Employees Compensation Act is now cited as CAP W6 Laws of the Federation of Nigeria, 2004.

<sup>4</sup> The 1999 Constitution as amended in 2011.

To promote equality in the workplace there are two approaches; formal and substantive.<sup>5</sup> The formal approach means that everyone is given equal opportunity in the workplace; that is every citizen competes equally for opportunities in the workplace. This is done to ensure neutrality and avoid any form of prejudice. In this instance, there are anti-discrimination provisions by virtue of which every citizen is treated equally in the workplace. The disadvantage of this lies in the fact that these anti-discrimination provisions might not adequately cater to all members of the society, especially the ones termed members of the vulnerable groups. This group includes women, persons with disability and members of an ethnic minority. As a result of the peculiar situations of members of the vulnerable groups, the substantive approach is also used to ensure equality for members of the vulnerable groups.

The Constitution of Nigeria provides a general protection against discrimination in section 42 but this provision is insufficient to deal with discrimination issues in the workplace. Currently, affirmative action is not embedded in Nigeria's Labour Act or Constitution. The closest Nigeria has to affirmative action is the Federal Character Principle which is discussed in chapter three. This thesis seeks to advocate equality in the workplace with the aid of both the formal and substantive equality approaches which in the long run will aid the economic sustainability of Nigeria.

Substantive equality is based on the apprehension that inequality is rooted in political, social and economic cleavages between groups rather than the result of unreasonable or irrational action.<sup>6</sup> Substantive equality means treating some persons more favourably than others because they are vulnerable and have been discriminated against in the past. This substantive equality could be affirmative action. Affirmative action is also known as reverse discrimination. It is when a historically marginalized group is given preferential treatment over a

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<sup>5</sup> JL Pretorius, Klinck Blur and CG Ngwena *Employment Equity Law*.

<sup>6</sup> Catherine Albertyn 'Constitutional Equality in South Africa' *Equality in the workplace: Reflections from South Africa and Beyond*. Dupper and Garbers. P 75.

historically dominant group with the aim of achieving parity or near parity between the marginalized and dominant group.

Affirmative action is used as a means of paving a level ground for everyone. Developed and developing nations like the United States of America, India and South Africa have affirmative action as part of their employment laws. This affirmative action ensures the minorities in the United States, the 'Untouchables' in India and the blacks in South Africa have 'preference' in employment as long as they are qualified.

### **1.1.1 Statement of Research Problem**

The normative framework of the Nigerian labour legislation makes no provision for a non-discriminatory recruitment policy. In addition, the Labour Act does not adequately cover the principles of equality and non-discrimination in the workplace. Accordingly, it appears that the issues of discrimination in recruitment and in the workplace are restricted to public services institutions in terms of section 42 of the Nigerian Constitution and the federal character principles. No court in Nigeria has dealt with the issue of discrimination in the workplace under this provision.

### **1.1.2 Research Questions**

The question therefore is; does the Nigerian legal regime adequately cover the principles of equality and non-discrimination in recruitment and in other the workplace policies and practices?<sup>7</sup> If the legal regime covers these principles, are the interests of the members of the vulnerable groups adequately protected? And if these interests are not protected, what should be done about it?

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<sup>7</sup> Section 1 of the South African Employment Equity Act provides for workplace practices and policies. This would serve as a guide through-out this thesis.

### **1.1.3 Objectives**

In the light of the identified problems, this study seeks to achieve three broad aims:

1. To reveal the inadequacies of the Nigerian legal regime governing employment and recruitment.
2. To advance the idea that recruitment be fair in its procedure to both potential and current employees of labour.
3. Finally propose a tentative legal framework for legislation governing workplace discrimination and ensuring equal opportunities in the workplace in Nigeria.

### **1.1.4 Methodology**

To achieve the three aforementioned broad aims a desktop based research method will be used. Primary and secondary sources will be used.

- Primary sources- case law, statutes and international treatises
- Secondary sources- books and articles

### **1.1.5 Chapter Outline**

Chapter one will introduce the study, articulate issues relevant to the study and explore the history and sources of Nigerian labour law.

Chapter two is a discussion on the concepts of equality, affirmative action and definitions of some words.

Chapter three is the critical appraisal of labour law in Nigeria. It will give a conceptual framework.

Chapter four will consider aspects of practices on recruitment and equal opportunities in the workplace using India and South Africa as a basis for comparison.

Chapter five would provide a tentative legal framework for recruitment and equal opportunity legislation in both public and private sectors in Nigeria. This chapter is the conclusion of this thesis.

It is useful to chronicle the history of Nigerian Labour Law in order to identify the gaps in the law and to explore possible way of addressing these gaps.

## **1.2 History of Nigeria Labour Law**

The port of Lagos became popular in the nineteenth century because it was one of the main centres for the Atlantic slave trade.<sup>8</sup> In 1861, Lagos became a British colony thus signaling the end of its use as a centre for slave trade. By virtue of its new status as a British colony; trade in slaves declined and there became an increase in 'legitimate' commerce. As people began to trade in wares, the ports began to export palm produce and cocoa and also import manufactured goods into Lagos. At first there was no need for full and permanent labourers but as the British gained more control their impact began to be felt in the hinterlands thus leading to a demand for skilled and unskilled labour. At this period of time, the British government was the largest employer of labour. The terrible conditions of the employment of the labourers led to the famous Lagos strike of 1897.<sup>9</sup> This strike brought to the fore for the first time in the history of Nigeria, the problems associated with the Nigerian Labour sector. The strike was not to be the end of strikes in the history of the Nigerian Labour sector as there were subsequent strikes after this.

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<sup>8</sup> Lagos currently is one of the states in Nigeria and the commercial capital of Nigeria. It was formerly the federal capital of Nigeria but on 4<sup>th</sup> February 1976, the federal military government of Nigeria promulgated decree 6 that moved the federal capital from Lagos to Abuja which is the current federal capital territory of Nigeria.

<sup>9</sup> One of the main reasons for the strike was the low wage to the workers which according to the British government was just what the employees were entitled to since they were Negroes who ranked below the yellow races based on the hierarchy of races invented by the social Darwinians. Also the government wanted to raise the productivity level of the existing labour force without putting the necessary infrastructures in place. (AG Hopkins: The Lagos Strike 1897: an exploration of the Nigerian Labour history. Past & Present, No 35 December, 1996; p 133-155).

The first labour statute of Nigeria was the Master and Servant Ordinance which was enacted in 1877<sup>10</sup> which was known as the Ordinance No 16 of the Gold Coast.<sup>11</sup> This ordinance was subsequently amended by the ordinance No. 1 of 1895.<sup>12</sup> This ordinance only applied to Lagos state but with the creation of the Southern<sup>13</sup> and Northern<sup>14</sup> Protectorate, a similar legislation was introduced in these protectorates. The most significant feature of the 1877 Ordinance was that it applied to contracts of employment of certain employees only.<sup>15</sup> This is still seen in the current labour legislation of Nigeria.<sup>16</sup>

The labour statute regulating the employment of women in Nigeria was enacted in 1912. One of the features of the statute was regulating the employment of women engaged in night work in industries. This statute was called The Employment of Women Ordinance 1912.<sup>17</sup>

The Southern and the Northern Protectorates were amalgamated in 1914. As a result of this amalgamation, a new ordinance; the Master and Servant Ordinance No 16 of 1917 was enacted for the whole country. This new ordinance repealed all the former ordinances that had applied to the Lagos Colony, Southern and Northern Protectorates. Though there was really no

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<sup>10</sup> EE Uvieghara 'Nigerian Labour Laws: The Past, Present and the Future'.

<sup>11</sup> Between 1874 and 1886 Lagos was administered as part of the Gold Coast Colony (now known as Ghana).

<sup>12</sup> This was called the master and servant ordinance of Lagos Colony.

<sup>13</sup> The master and servant proclamation No 3 of 1901 of the southern protectorate was amended in 1903 and 1904.

<sup>14</sup> The master and servant proclamation No22 of 1902 of the Northern Protectorate was amended in 1904, 1907, 1909 and 1912.

<sup>15</sup> Uvieghara op cit (fn 10).

<sup>16</sup> Labour legislation in Nigeria basically regulates the relationship between employers and employees under a contract. This was a distinct feature of Ordinance of 1877 and it's still the same under Labour Act of 1974 which is the current main legislation guiding labour relations in Nigeria.

<sup>17</sup> This ordinance applied only in the Northern Protectorate.

significant difference between Ordinance 16 of 1917 and previous enacted ordinance.

In 1929, there was a significant shift in the Nigerian labour legislation with the enactment of the Labour Ordinance of 1929. This ordinance as is the usual practice repealed all other previous ordinances including the Employment of Women Ordinance of 1912.<sup>18</sup> For the first time Nigeria had a labour legislation that dealt with the wages of labourers.<sup>19</sup> The wage provision in the Labour Ordinance of 1929 later developed in 1943 to the Labour (Wage Fixing and Registration) Ordinance No. 40 of 1943.

In 1945 another labour ordinance was enacted. This ordinance merged all the labour laws of Nigeria. It repealed all the previous legislations dealing with labour including the Labour (Wage Fixing and Registration) Ordinance No. 40 of 1943. Also around this period, statutes dealing basically with trade unions were enacted. This enacted trade union statutes finally led to the Trade Unions Act of 1973 which is still the Act that regulates trade unions in Nigeria. Apart from the principal legislation guiding Labour relations,<sup>20</sup> other subsidiary codes were introduced.<sup>21</sup>

Nigeria attained independence on the 1<sup>st</sup> of October 1960. Nigeria became a member of the International Labour Organisation on the 17<sup>th</sup> of October 1960.<sup>22</sup> After this independence there was no significant change in the

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<sup>18</sup> Uvieghara op cit (fn 10).

<sup>19</sup> This legislation granted Governors in Council the power to fix minimum wages in cases where they felt the wages of the labourers were too low. This wage issue was one of the reasons for the famous Lagos strike of 1897.

<sup>20</sup> That is the Labour Code Ordinance of 1945.

<sup>21</sup> This includes the Workmen Compensation Ordinance enacted to complement the common law right of an injured workman, there was also the Factories Act.

<sup>22</sup> Genty Kabiru Ishola 'ILO and the international labour standards setting: A case of Nigeria labour acts' available at [www.article.sciencepublishinggroup.com](http://www.article.sciencepublishinggroup.com) accessed on the 17<sup>th</sup> of September, 2013.

labour legislation of Nigeria<sup>23</sup> but with the outbreak of the Nigerian Civil War the need to the review labour legislation was reinforced.<sup>24</sup> This review culminated in what is still the principal legislation guiding labour relation, the Labour Act of 1974.<sup>25</sup> The Labour Act has not been amended despite the obvious gaps in labour relations in Nigeria.<sup>26</sup>

The knowledge of the sources of Nigerian labour law would point out the obvious gaps in our labour legislation.

### **1.3 Sources of the Nigerian Labour Law**

#### **1.3.1 Common law**

Common law and equity is the law handed down to Nigerians by the British during the period of colonialism. This has become entrenched in the Nigerians legal system. Common law comprises of the Received English law and English law extended to the whole of Nigeria. The principles of common law are basically entrenched in her case law. In the event of any gap in her labour laws, the principles of common law are considered by the courts to determine matters before them. Despite the importance of common law in the Nigerian legal system, laws enacted by the legislative arm of government in Nigeria have precedence over common law.

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<sup>23</sup> The last labour code before the independence of Nigeria was the Labour Code Act. Cap 91 1958 Laws of the Federation of Nigeria. The 1974 Labour Act repealed this code.

<sup>24</sup> The Civil war started in 1967 basically because the Igbo tribe, one of the major ethnic groups in Nigeria felt they were being marginalised. The Igbos felt that the other two major ethnic groups, Yoruba and Hausa were trying to enslave and prevent them from participating in the development of Nigeria. As a result they seceded, declaring their own state of Biafra. The Igbos finally surrendered to the Nigerian government in 1970. Chidi Amuta 'The Nigerian Civil War and the Evolution of Nigerian Literature' available at [www.jstor.org](http://www.jstor.org) accessed on the 22<sup>nd</sup> of September, 2013.

<sup>25</sup> Cap 198 Laws of the Federation of Nigeria 1990.

<sup>26</sup> Prof. Agomo in her book, *Nigerian Employment and Labour Relations Law and Practice*; commented that the Labour Act of Nigerian was decades behind labour legislations in other jurisdictions.

### 1.3.2 Legislation

a) The Constitution of Nigeria: the Nigerian Constitution was enacted in 1999 and subsequently amended in 2011. It is the grundnorm of the laws of Nigeria because all other Nigerian legislation emanate from it. Section 1 of the Constitution provides for its supremacy all over Nigeria and its binding force on all Nigerians. Chapter 4 of the Constitution contains the fundamental human rights which includes the right to non-discrimination on any ground.<sup>27</sup> This chapter deals with discrimination generally, it has no specific connection to discrimination in the workplace.

b) The Labour Act.<sup>28</sup> this is the principal labour legislation in Nigeria. It regulates labour relations between employers and employees. This Act has been described as the workers' charter because of the greater protection it provides for workers as against what was obtainable under the common law.<sup>29</sup> The Labour Act is divided into four parts. Part one deals with wages, contracts of employment and conditions of employment. Part two provides for recruiters and recruiting generally while part three covers special classes of workers and special provisions. The final part deals with supplementary issues which includes settlement of disputes, administration, records and returns. This Act is discussed in more detail in chapter three.

Other legislation include the Employees Compensation Act<sup>30</sup> which deals with the right of an injured worker to compensation in the work place; the Trade Unions Act<sup>31</sup> which is a result of the right of association a citizen has under the

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<sup>27</sup> Section 42 of the 1999 constitution as amended in 2011 provides for this right against discrimination.

<sup>28</sup> Cap 198 Laws of the Federation of Nigeria 1990.

<sup>29</sup> EE Uvieghara *Labour law in Nigeria* P 101.

<sup>30</sup> It was signed into law on the 17<sup>th</sup> of December 2010.

<sup>31</sup> Cap 437 Laws of the Federation of Nigeria 1990.

Constitution;<sup>32</sup> and the Factories Act<sup>33</sup> which provides for health and safety in the workplace.<sup>34</sup>

### **1.3.3 Judicial Decisions**

This forms an important source of law especially Nigerian labour law. Judicial decisions are decisions of court which comprises of the Supreme Court, Court of Appeal, Federal High Court, State High Court, National Industrial Court and Magistrate courts.

The National Industrial Court<sup>35</sup> has exclusive jurisdiction in civil cause and matters relating to labour relations, health and safety at the workplace, strikes etc. This court also has jurisdiction in any matter arising from any labour legislation and collective agreement in Nigeria.

### **1.3.4 Federal Character Principles**

This principle is enshrined in the Nigerian Constitution to prevent tribal or regional domination in the public sector of employment. This was introduced by the government because of the multi-cultural nature of Nigeria. This principle is to protect the interests of minority tribes in employment in the public sector. Federal character principle is discussed in more detail in chapter three.

## **1.4 Summary**

The history, development and evolution of the Nigerian labour laws were considered in this chapter. However, there is still a need for legal intervention to regulate employers' practices as regards discrimination in employment. The

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<sup>32</sup> Section 40 of the 1999 constitution as amended provides for the right to peaceful assembly and association.

<sup>33</sup> Cap. FILFN 2004.

<sup>34</sup> Agomo op cit (fn 26) opines that the philosophy behind the Factories Act represents that of another period. As the concept of rights and duties is gradually giving way to a more flexible, more encompassing mutual duty of reciprocity.

<sup>35</sup> This court was established by the Trade Disputes Act in 1976 but as now been upgraded to a superior court record under section 254(c & d) 1999 Constitution as amended(3<sup>rd</sup> alteration).

concepts of equality and affirmative action as a means of dealing with discrimination are discussed in the next chapter.

## Chapter Two: Theoretical Concepts of Equality in the Context of Vulnerable groups in Nigeria

### 2.1 Introduction

The concepts of equality, anti-discrimination and affirmative action are discussed to serve as a background to the criticism of the Nigerian legal framework discussed in chapter three. In addition, this chapter considers these concepts in the context of women, persons living with disabilities and ethnic minorities.

### 2.2 The Concepts of Equality

Equality is a fundamental assumption of a democratic society.<sup>36</sup> There exists a link between equality and discrimination. The absence of equality indicates the presence of discrimination. Underpinning the concept of equality is the emphasis on dignity.<sup>37</sup> This is also affirmed by the Universal Declaration of Human Rights.

Equality has been viewed as a treacherously simple concept, yet there exists divergent opinions as to what equality is and how it should be incorporated into the society.<sup>38</sup> Many authors have described equality as the most difficult and also the most cherished right.<sup>39</sup> This is because of the difficulty in understanding this concept. Fredman opines that the more equality is studied, the more its meaning shifts.<sup>40</sup> The traditional approach used by legal systems world-wide to achieve equality was the enactment of formal rules. However in recent times, constitutional reforms are taking place whereby the variety of

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<sup>36</sup> Accessed at [www.equalrightstrust.org](http://www.equalrightstrust.org) on the 14<sup>th</sup> of November, 2013.

<sup>37</sup> Sandra Fredman *Discrimination Law* accessed at [www.oxford.co.za](http://www.oxford.co.za) on the 19<sup>th</sup> of November, 2013.

<sup>38</sup> Holtmaat Rikki 'The Concept of Discrimination' (2004) Academy of European Law Conference Paper, accessed at [www.era.int](http://www.era.int) on the 14<sup>th</sup> of November, 2013.

<sup>39</sup> B MaLachlin 'Equality: The most Difficult Right' accessed at [www.pi.Library.yorku.ca](http://www.pi.Library.yorku.ca) on the 19<sup>th</sup> of November, 2013.

<sup>40</sup> Fredman op cit (fn 37).

human relations and specific subtle characteristics which lead to discrimination are being considered to develop a more sophisticated concept of equality.

In law, discrimination refers to the different treatment of an individual or a group of individuals on discriminatory or arbitrary grounds which results in a disadvantage. These discriminations could be direct or indirect. Instances of such discrimination in the workplace include harassment, workplace bullying, exclusion of certain individuals from general benefits on the basis of sex, religion etc. Today, most people live in a socio-cultural environment formed by past, current or emerging forms of discrimination.<sup>41</sup>

The discussion of these concepts of equality merely serves as background to the legal concept of equality. Equality in law is dealt with by means of anti-discrimination laws which can consist of both formal equality and affirmative action which is a measure of substantive equality. These are discussed below.

### **2.2.1 Formal Equality**

Formal equality as an idea can be stressed back to Aristotle and his dictum that equality meant “things that are alike should be treated alike”.<sup>42</sup> This is the most popular understanding of equality. Formal equality has an important role in the policies and laws of different international organisations and countries. For instance, it forms the conceptual basis of the term “equal opportunities” used in South Africa. This is discussed in chapter four of this thesis. Formal equality is the equal treatment of people regardless of their circumstances. The underlying logic of formal equality is that by treating everybody equally, inequality is eliminated.

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<sup>41</sup> Accessed at [www.equalrightstrust.org](http://www.equalrightstrust.org) on the 14<sup>th</sup> of November, 2013.

<sup>42</sup> Aristotle, 3 Ethica Nicomachea, 112- 117, 1131a-1131b, Ackrill JL and Urmson JO (eds.), Ross W. translation. Available at [www.equalrightstrust.org](http://www.equalrightstrust.org) accessed on the 14<sup>th</sup> of November, 2013.

The liberal conception of formal equality is that likes must be treated alike.<sup>43</sup> This is reflected in the fact that regardless of gender, religion, physical characteristics etc. all human beings will be treated alike. However, the concept of consistent treatment does not guarantee any particular outcome. As an example, there is no violation in principle if an employer treats citizens from different ethnic groups in the Nigerian workplace equally badly. Thus a claim for equal treatment can be satisfied by depriving all the parties of the same benefits. Formal equality as it relates to discrimination in the workplace is principally enshrined in the Constitution of a country and in employment legislation. Equality was traditionally achieved and direct discrimination outlawed by the enactment of anti-discrimination legislation.

Formal equality requires that access to employment opportunities be based on merit, wherein employees are qualified for the job if the criterion for that job is met by them. Formal equality has been associated with the liberation of economic practices and the development of competitive market economies.<sup>44</sup> This opposes any form of nepotism in the workplace. Thus formal equality of employment opportunity is achieved when job vacancies are well publicised in advance and anyone has reasonable opportunity to apply. These applications are then treated based on the merit of the applicants without any preferential treatment in accordance to relevant standards. For instance, formal equality in the workplace will be violated if any employee is discriminated against based on sex, religion, race, physical attributes etc.

There has been opposition to formal equality's supposed neutrality. This neutrality has been opined to be merely an illusion, as it has been questioned whether the law, legislature and the judiciary can claim to be truly neutral to all

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<sup>43</sup> Catherine Barnard and Bob Hepple 'Substantive Equality' (November 2000) *The Cambridge Law Journal* Vol 59, p 562-585.

<sup>44</sup> 'Equality of Opportunity' Stanford Encyclopaedia of Philosophy available at [www.science.uva.nl](http://www.science.uva.nl) accessed on the 15<sup>th</sup> of November, 2013.

parties.<sup>45</sup> The application of formal equality creates disparate impact for certain people. This is based on the fact that formal equality does not take into consideration the variety and diversity of the modern society. The approach of formal equality is to ignore the personal characteristics of an individual.<sup>46</sup> For example, in respect of gender discrimination, advocates of formal equality would prescribe a gender blind rather than a gender conscious approach. While there is the need for consistence in the society, the complexities and varieties of the modern society makes the application of formal equality as a basis for non-discrimination measures, overly simplistic.<sup>47</sup> Formal equality is applicable in a legal system by means of anti-discrimination law.

#### *2.2.1.1 Anti-Discrimination Law*

The issue of discrimination in the workplace can be dealt with by enacting anti-discrimination laws and having affirmative action as part of the legal frame. Anti-discrimination law deals with rights of human beings to be treated equally. This equal treatment is regardless of any difference that might exist. The Universal Declaration on Human Rights affirms the equality enjoyed by all persons. This equality is formal equality.

Anti-discrimination law is a measure used to tackle different forms of discrimination. The issue of discrimination in the workplace can be dealt with by having anti-discrimination laws. Thus the enactment of anti-discrimination law would ensure the prohibition of any form of discrimination in the workplace.

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<sup>45</sup> Owen M Fiss 'Groups and the Equal Protection Clause' (Winter, 1976) *Philosophy & Public Affairs*, Vol 5, No 2, p 107 available at [www.jstor.org](http://www.jstor.org) accessed on the 15<sup>th</sup> of November, 2013.

<sup>46</sup> Available at [www.equalrightstrust.org](http://www.equalrightstrust.org) accessed on the 14<sup>th</sup> of November, 2013.

<sup>47</sup> The limitations of the formal equality approach was acknowledged by the Committee on the Elimination of Discrimination against Women in their interpretation of the idea of non-discrimination. The committee stated that in interpreting and applying the provisions of Articles 1 to 5 and 24 State Parties under CEDAW are required to go beyond formal interpretation of equal treatment to address prevailing gender issues and stereotypes that affect women. Recommendation No. 25 on article 4, para 1, CEDAW on temporary special measures available at [www.un.org/womenwatch/daw/cedaw/30sess.htm](http://www.un.org/womenwatch/daw/cedaw/30sess.htm) accessed on the 15<sup>th</sup> of November, 2013.

Anti-discrimination laws are basically peculiar to countries. These laws deal with discrimination on a general level in the workplace. Nigeria has a general anti-discrimination provision in section 42 of her Constitution, which provides that no Nigerian would be discriminated against based on the grounds mentioned in that provision. Unfortunately, this anti-discrimination provision does not cover discrimination specifically in the workplace. The legal framework of Nigeria as it relates to anti-discrimination provisions in the workplace is discussed in more details in the next chapter.

Discrimination in the workplace has been dealt with at the international level by the adoption of various conventions by the United Nations and the International Labour Organisation. Some of such conventions are reviewed in chapter four. In addition, more countries are beginning to have anti-discrimination laws that deal with discrimination specifically in the workplace. The anti-discrimination laws of some of such countries are explored in the fourth chapter of this thesis.

#### 2.2.1.2 Equality of Opportunity

Equality of opportunity is also known as formal equality in opportunity.<sup>48</sup> Equality of opportunity provides that “alikes should be treated alike”. This form of equality focuses on closing the gaps between those with the best opportunities and those with the worst opportunities.<sup>49</sup> As a result of some of the inadequacies of formal equality, substantive equality was developed.

#### 2.2.2 Substantive Equality

Substantive equality seeks to invest social redistribution into the application of equality.<sup>50</sup> This concept of equality manifests itself in different

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<sup>48</sup> Op cit(fn 44)

<sup>49</sup> Bob Hepple ‘The Aims and Limits of Equality Laws’ *Equality in the workplace; Reflections from South Africa and Beyond* Dupper and Garbers (EDS) p 8.

<sup>50</sup> Op cit (fn 44).

jurisdictions as reverse discrimination, positive discrimination and affirmative action. The term positive discrimination is principally used in Europe while affirmative action is used in the United States of America. In India, the term compensatory discrimination is used to define the manifestation of substantive equality.<sup>51</sup> These terms have basically the same meaning. Reverse discrimination and affirmative action are discussed further in this chapter and chapter four. This concept of equality is an important contribution in combating the consequences of the worst cases of disadvantage and discrimination to different groups of individuals.

The focus on certain disadvantaged groups under the substantive concept of equality has been argued to misdirect the wider debate from more serious and arbitrary distinction that lead to disadvantage.<sup>52</sup> The effect of the use of substantive equality is called intellectual discrimination. Nagel opines that this intellectual discrimination is the greatest source of injustice because intellectual merit is not regarded as indicative of worth but rather sexual or racial discrimination determines worth.<sup>53</sup> In my opinion, the perception of Nagel as regards substantive equality is wrong. Substantive equality means treating people more favourably on the grounds of sex, religion, race etc.; targeted persons have to be qualified to occupy that position in the first instance. All substantive equality does is to give the qualified targeted person preference in the workplace.

Substantive equality is hinged on the principle that equality should take into consideration the peculiar circumstances of the persons the outcome of equality is targeted at. Therefore in treating the issue of discrimination in the Nigerian workplace, there is need for employment laws that seek to achieve equality of outcomes apart from the general formal anti-discrimination laws.

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<sup>51</sup> This is discussed further in chapter three of this thesis.

<sup>52</sup> Thomas Nagel 'Equal treatment and Compensatory Discrimination' (summer, 1973) *Philosophy & Public Affairs*, Vol 2, No 4 p 348 available at [www.jstor.org](http://www.jstor.org) accessed on the 15<sup>th</sup> of November, 2013.

<sup>53</sup> Ibid.

### 2.2.2.1 Equality of Outcomes

This is used in contrast to equality of opportunity. By virtue of the fact that not all humans are the same, it will be unfair if they are all treated alike. Thus discrimination by reason of being a member of certain vulnerable groups might under certain conditions be rational as it would lead to equal outcomes for all.<sup>54</sup> Outcomes are the result of equal opportunities. Equality of outcomes goes further than ensuring equal treatment to ensuring that the outcomes from these opportunities offered in the workplace are equal.<sup>55</sup> Affirmative action is a measure for achieving equality of outcomes.

### 2.2.2.2 Affirmative Action

Affirmative action deals with discrimination more specifically by considering the uniqueness of each category of people that have been hurt in the past by acts of discrimination. One of the key ways of dealing with discrimination is by having affirmative action as part of the employment legislation. Affirmative action is also known as reverse discrimination.<sup>56</sup> It is when a historically marginalised group is given preferential treatment over a historically dominant group with the aim of achieving parity or near parity between the marginalised and dominant group. Affirmative action equally involves treating a sub-class or a group of people differently in order to ensure that they have access to a certain proportion of goods or opportunities.<sup>57</sup> In a modern economy, affirmative action may be used as a means of paving a level ground for everyone. Developed nations and developing nations have

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<sup>54</sup> 'Equality of Opportunity' Stanford Encyclopaedia of Philosophy available at [www.science.uva.nl](http://www.science.uva.nl) accessed on the 22<sup>nd</sup> of January, 2014.

<sup>55</sup> Bob Hepple op cit (fn 49) p 9.

<sup>56</sup> David S Schwartz 'The case of a vanishing protected class: Reflections on Reverse Discrimination, Affirmative Action and Racial Balancing' (November 4, 2009). *Wisconsin Law Review*, No 2, p 657, 2000 available at SSRN: (<http://ssrn.com/abstract=1499942>) accessed on the 20<sup>th</sup> of November, 2013.

<sup>57</sup> J Faundez *Affirmative Action: International Perspectives* p 17.

some forms of affirmative action as part of their employment and recruitment policy. This is used to promote equality of opportunities in the workplace.

Affirmative action in its modern form, originated from the United States of America in the mid-1960s to 1970s.<sup>58</sup> It was in response to discrimination against Black Americans in places of employment and education. These discriminations were deeply entrenched and led to segregation of black which in the long run led to blacks being disadvantaged. Taking a cue from the action of the United states, other countries like South Africa<sup>59</sup> and India<sup>60</sup> made affirmative action a part of their employment legislation and Constitution. South Africa recognises affirmative action for women, blacks and persons living with disability. India on the other hand has affirmative action for the previous untouchables.

In Nigeria, having an employment law that strongly features affirmative action as part of its provisions would ensure ease for marginalised Nigerians. The following categories of people should be considered for affirmative action in employment.

### Women and Affirmative Action

Issues pertaining to women have in the last few decades been given priority in international discussions. The importance of women in an evolving world was captured by the former secretary general of the United Nations Kofi Anan, in his message to mark the international women's day on the 8<sup>th</sup> of March 2003 where he talked about the Millennium Development Goals.<sup>61</sup> He said "the

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<sup>58</sup> Carol Agócs, Catherine Burr , 'Employment equity, affirmative action and managing diversity: assessing the differences' (1996) International Journal of Manpower, Vol. 17 p 12.

<sup>59</sup> South Africa's affirmative action was made for the protection of the blacks who were marginalized under the apartheid system which ended when South Africa gained her independence in 1994.

<sup>60</sup> India's affirmative action was made for the protection of the 'untouchables'.

<sup>61</sup> Chioma Kalu Agomo 'The working woman in a changing world of work' An inaugural lecture delivered at the University of Lagos, Lagos, Nigeria on the 15<sup>th</sup> of December 2004.

Millennium Development Goals including the promotion of gender equality and gender empowerment-represent a new way of doing development business". One of the ways of enhancing gender equality is by ensuring that women have access to the same employment opportunities that men have. As Nigeria is a patriarchal society, women have always been marginalised. Women are viewed as second class citizens.<sup>62</sup> A look at the data from Nigeria's 2008 demographic survey shows that fifty-nine per cent of women are employed as against eighty per cent of working men.<sup>63</sup> Four per cent of these women were not working as at the time of the survey, thirty-seven per cent of these women had not worked at all in the 12 months preceding this survey. This is in contrast to two per cent of men who were not working at the time of the survey and eighteen per cent of these men not working at all in the 12 months preceding this survey.<sup>64</sup> This percentage is even worse in the Northern part of Nigeria where women are seen as chattels.<sup>65</sup> According to the 2006 census there are 68,293,683 females in Nigeria; of this number only fifty-nine per cent are employed. The age range for this survey was 15 years to 49 years.<sup>66</sup> Research has equally shown that women that are employed are concentrated in occupations like teaching, nursing

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<sup>62</sup> Charmaine Pereira 'Understanding women's experiences of citizenship in Nigeria: From advocacy to research' available at [www.codesria.org](http://www.codesria.org) accessed on the 15<sup>th</sup> of November, 2013.

<sup>63</sup> Nigeria's Demographic and health survey 2008 available at the website of National Population Commission ([www.population.gov.ng](http://www.population.gov.ng)) accessed on the 1<sup>st</sup> of July 2013. This survey was published in November 2009.

<sup>64</sup> The field work for this survey was done between June 2008 and October 2008 with the aid of the USAID and US President's Emergency Plan for AIDS Relief (PEPFAR). United Nations Population Funds Agency (UNPFA) also provided financial and technical assistance.

<sup>65</sup> Oluyemisi Bamgbose 'Customary law practices and violence against women: The position under the Nigerian legal system' available at [www.vanutu.usp.ac](http://www.vanutu.usp.ac) accessed on the 22<sup>nd</sup> of September, 2013.

<sup>66</sup> Nigeria Demographic and Health Survey 2008, P 69.

and secretaries etc.<sup>67</sup> In the above occupations, it is basically those that are high up in the rank that earn relatively well.

Affirmative action as regards women in Nigeria is predominantly seen in politics.<sup>68</sup> Since Nigeria started another democratic dispensation in 1999, women are being encouraged to participate in politics. More states in Nigeria are having women as their deputy governors. The presidential mid-term report shows that there has been an increase in women participation in governance.<sup>69</sup> According to the report there is now a 33 per cent female representation in federal appointment.<sup>70</sup> This is still not enough, as more needs to be done to bring women at parity with their male counterparts.

The Constitution of Nigeria in section 42 provides that no citizen of Nigeria should be discriminated against on the basis of sex.<sup>71</sup> This provision appears to be binding only between the government and the citizens thus leaving out the relationship between individuals.<sup>72</sup> Unfortunately, though this provision has always existed since Nigeria gained her independence; it has not really been enforced.

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<sup>67</sup> Aderemi, HO; Hassan, OM; Siyanbola, WO and Taiwo, K 'Managing Science and Technology Occupations of Women in Nigeria' (2009) *Journal of Technology Management & Innovation* [online] vol 4, no 3.

<sup>68</sup> In addition to politics generally, affirmative action is seen in the Lagos State Judiciary Service. Lagos State is the only state in Nigeria that has more female judges and magistrates than males. This step by the Lagos State Governor has made the state a standard to all other Nigerian states.

<sup>69</sup> Mid Term Report of the Transformation Agenda (May 2011-May 2013) Taking Stock and Moving Forward. Available at National Bureau of Statistics (<http://www.nigerianstat.gov.ng/>) accessed on the 4<sup>th</sup> of July 2013.

<sup>70</sup> This 33 per cent female representation consists of 13 female ministers out of 42 ministers, 4 female special advisers from 18 advisers. Thus women consist of 31 per cent of the National Executive Council and 23 per cent of the total number of advisers. These figures prove that even the affirmative action in politics needs to be improved on.

<sup>71</sup> 1999 constitution as amended in 2011.

<sup>72</sup> Adejoke Oyewunmi 'The promotion of sexual equality and non-discrimination in the workplace: A Nigerian Perspective' *International Journal of Discrimination and the Law* 1-24 available at [ww.jdi.sagepub.com](http://ww.jdi.sagepub.com) accessed on the 30<sup>th</sup> of December, 2013.

The treatment of women as second class citizens is at the core of the customs of most of the tribes of Nigeria.<sup>73</sup> A woman's place is in the home, taking care of the needs of her children and husband. Thus having a non-discrimination clause in the Constitution has not really helped changed the plight of the average Nigerian woman.

Countries like the United States have at a time in their history, had the need for specific legislation<sup>74</sup> to protect the interest of women seeking employment outside their home.<sup>75</sup> At that time a lot of states in the United States prohibited women from seeking employment outside their homes.<sup>76</sup> This legislation worked for a while until the business interests of the dominant group prevailed.<sup>77</sup> Thus leading to the introduction of contract of employment under which Nigeria equally operates now.<sup>78</sup> This freedom of contract of employment has been given to employers under the Nigerian Labour Act. Employers are free to employ whoever they wish. However, this right has been tilted towards employing men mostly as deduced from the National Demographic and health Survey data.

Employers in preferring to employ men appear to be avoiding what I call 'women associated problems'. In the scheme of things it is the women that get

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<sup>73</sup> This is obvious from most of the proverbs of many tribes in Nigeria. Example of such proverbs include 'women are capable of causing endless troubles'- Anita Pandey ; 'Woman Palava No be Small, Woman Wahala No be small: Linguistic Gendering and Patriarchal Ideology in West African Fiction' available at [www.muse.jhu.edu](http://www.muse.jhu.edu) accessed on the 16<sup>th</sup> of November, 2013.

<sup>74</sup> This Protective Legislation was passed in 1974 in Massachusetts, it served as a model for other states.

<sup>75</sup> Jeremy Atack and Fred Bateman 'Whom did protective legislation protect? Evidence from 1880' :NBER Historical Working Paper No 33 Issued in December 1991 available at (<http://www.nber.org/papers/h0033.pdf>) accessed on the 5<sup>th</sup> of July 2013.

<sup>76</sup> Agomo op cit (fn 61).

<sup>77</sup> Agomo op cit (fn 61) 178.

<sup>78</sup> Roscoe Pound 'Liberty of Contract' (May 1909) *The Yale Law Journal* Vol 18, No 7 available at (<http://www.jstor.org/stable/785551>) accessed on the 5<sup>th</sup> of July 2013. NBER Historical Working Paper No 33 Issued in December 1991 available at (<http://www.nber.org/papers/h0033.pdf>) accessed on the 5<sup>th</sup> of July 2013.

pregnant, that are homemakers and deal with ailments associated with their children. In not employing women, employers avoid all these. There are incidents of recruitment where potential employers state precisely that married or pregnant women should refrain from applying for the advertised positions.<sup>79</sup> This is just a stereotype and shows lack of support for women. Affirmative action will assist to put both sexes on the same level.

### Persons with disability and Affirmative Action

There is the general perception that you can distinguish a disabled person either by their physical attributes or by having knowledge of their medical condition which brings disability to mind.<sup>80</sup> A common view is that disability makes an individual less capable of a variety of activities.<sup>81</sup> Though it might be difficult to precisely define the term 'disability', disability is used to denote reduction or deviation from the norm.<sup>82</sup>

Disability could be physical, sensory, intellectual or mental.<sup>83</sup> Disability is not defined in the Vocational Rehabilitation and Employment (Disabled Persons) Convention but a disabled person is defined.<sup>84</sup> Article 1 (1) defines a disabled person as "*... an individual whose prospects of securing, retaining and advancing in suitable employment are substantially reduced as a result of a duly recognised physical or mental impairment*". The United Nations' Convention on

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<sup>79</sup> This is primarily seen in engineering jobs, where the job description might entail going offshore.

<sup>80</sup> Geiecker Otto & Momm Willi 'Disability: Concepts and Definitions' *Encyclopedia of Occupational Health and Safety* accessed at [www.ilo.org](http://www.ilo.org) on the 17<sup>th</sup> of September, 2013.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> 'Code of Practice on managing disability in the workplace' International Labour Organisation available at [www.ilo.org](http://www.ilo.org) accessed on the 18<sup>th</sup> of September, 2013.

<sup>84</sup> Vocational Rehabilitation and Employment (Disabled Persons) Convention (No. 159), 1983 of the International Labour Organisation.

the Rights of Persons with Disabilities, defines a person with disabilities. Article 1 provides that persons living with disabilities “*include those who have long-term physical, mental, intellectual or sensory impairments which in interactions with various barriers may hinder their full and effective participation in society on an equal basis with others*”. The use of “include” in the definition shows it is not an exhaustive definition. Prior to the adoption of this Convention, persons with disability were depicted not as subjects of legal rights but as objects of welfare, health and charity programmes.<sup>85</sup> The focus of this affirmative action is on disabled people as defined in the International Labour Organisation convention for disabled persons.

Nigerians have always viewed the unusual with suspicion.<sup>86</sup> Thus a person with disability is seen as the consequence of the sin of the person’s parents. Poverty is also usually linked to disability. Poverty can cause disability because of poor nutrition, poor sanitation and lack of access to medical facilities, unsafe living and working conditions.<sup>87</sup>

Fortunately, education is gradually changing the mind-set of people. In this light, more disabled people are getting a form of education or skills to enable them strive on their own. Nigeria has more special schools to cater to the needs of persons with disability. Though more persons with disability are getting

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<sup>85</sup> Rosemary Kayess and Phillip French ‘Out of darkness into light? Introducing the Convention on the Rights of Persons with Disabilities’ available at [www.hrlr.oxfordjournals.org](http://www.hrlr.oxfordjournals.org) accessed on the 19<sup>th</sup> of November, 2013.

<sup>86</sup> A typical example of this: Prior to the arrival of Mary Slessor in Calabar Nigeria, twins were seen as a curse and were always thrown into the evil forest. AA Asindi, M Young, I Etuk and JJ Udo ‘Brutality to twins in South-Eastern Nigeria: what is the existing situation?’ (Jul-Sep 1993) *West Africa Journal of Medicine* 12(3):148-152 available at [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov) accessed on the 6<sup>th</sup> of January, 2014).

<sup>87</sup> Daniel Mont ‘Measuring disability prevalence’ Disability & Development Team HDNSP: The World Bank. (March 2007) Available at (<http://siteresources.worldbank.org/SOCIALPROTECTION/Resources/SP-Discussion-papers/Disability-DP/0706.pdf>) accessed on the 8<sup>th</sup> of July 2013. One of the purposes of this report is to determine and assess the employment opportunities open to this category of people.

educated, there's still the corresponding need for them to get the same employment opportunities as other physically able persons.

According to the World Bank's disability Prevalence report, persons with disability represent a significant proportion of the population of the world. This report equally shows that the disability rate of developing countries of which Nigeria is one tends to be the least reported.<sup>88</sup> Nigeria has approximately 14 million people living with disability out of the country's population of approximately 140 million people.<sup>89</sup> Thus a substantial number of Nigerians have different forms of disability which shows the need for empowerment for those with disability.<sup>90</sup> In a country where 70 per cent of its population live below the US 1 dollar per day,<sup>91</sup> people with disability have been forced to resort to begging for alms to make ends meet. This has made persons with disability to be seen as a nuisance by the Nigerian society.

Legislation and affirmative action will go a long way to tackle the prejudice against physically challenged persons in their bid to obtain gainful employment. If the government starts by appointing persons with disability in a government establishment, it will send a positive signal to all employers of labour in Nigeria. This right to gainful employment by physically challenged persons was equally affirmed by the United Nations in its Convention on the rights of persons with disabilities.<sup>92</sup>

### Affirmative Action and Ethnic Minorities

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<sup>88</sup> According to this prevalence disability report, the rate of disability according the Census report of Nigeria is 0.5.

<sup>89</sup> N Smith 'The face of Disability in Nigeria: A Disability Survey in Kogi and Niger States' (May 2011) Disability, CBR & Inclusive Development, 22, p 44 Available at: <http://dcidj.org/article/view/11/27> accessed on the 08 July 2013.

<sup>90</sup> Some forms of disability include blindness, deafness, dumbness, lameness etc.

<sup>91</sup> Natalie Smith op cit ( fn 89).

<sup>92</sup> This convention was made on the 13<sup>th</sup> of December, 2006 by the Assembly of the United Nations Organisation.

Nigeria is a multi-cultural society, with more than 250 ethnic groups, unfortunately employers in Nigeria exhibit prejudice in employing people. The British through colonial conquest and incorporation merged diverse ethnic groups to form what is known as Nigeria in modern times.<sup>93</sup> Under British rule, Nigeria was divided into three administrative regions, namely; the Northern, Eastern and Western regions.<sup>94</sup> Nigeria has three major ethnic groups and hundreds of smaller ethnic minority groups.<sup>95</sup> The three administrative regions were majorly dominated by major ethnic groups, although each region still consisted of substantial numbers of ethnic minorities.<sup>96</sup> These major tribes are the Hausas from Northern Nigeria, the Igbos found in the East and the Yorubas in the western part of Nigeria. Nigeria is a federal state by virtue of section 3 of the Nigerian Constitution.<sup>97</sup> Nigeria has 36 states and 1 federal capital territory. There have been various arguments that the British colonial policy set the basis for the federation status of Nigeria.<sup>98</sup> Taking a contrary view, Suberu opined that Nigeria's federalism roots lies in her multinational, multireligious, multiregional, multicultural and multilingual characteristics.<sup>99</sup> This is backed up by the fact that Nigeria has remained a federal state despite her independence from her colonial master.

Nigeria as a federal state has had to grapple with the issue of ethnic minorities.<sup>100</sup> It was as a result of the problem of this that the Federal Character Principle was introduced in Nigeria. The Federal Character Principle was

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<sup>93</sup> Rotimi T Suberu *Federalism and Ethnic Conflict in Nigeria* P 21.

<sup>94</sup> Ibid.

<sup>95</sup> Ibid p19-46.

<sup>96</sup> Ibid.

<sup>97</sup> 1999 Constitution as amended in 2011.

<sup>98</sup> Adiele E Afigbo 'Background to Nigerian Federalism: Federal Features in Colonial State' *Publius* (1991) 21(4) p 13-29 available at <http://publius.oxfordjournals.org> accessed on the 10<sup>th</sup> of December, 2013.

<sup>99</sup> Ibid.

<sup>100</sup> AE Afigbo 'Federal Character: Its meaning and History' *Federal Character and Federalism in Nigeria*. Ekeh and Osaghae(EDS) P 2.

introduced to ensure the balance of the interests of the Northern and Southern part of Nigeria. This principle is further examined in the next chapter.

The Federal Character Commission proposed some guidelines in 1995, one of which is that interstate equality be maintained. This equality will be achieved by each state having 2.75 per cent employees in the federal public service.<sup>101</sup> Unfortunately, some states have more than the 2.75 per cent representation while other states have far less than 2.75 per cent.<sup>102</sup> This principle deals with representation on basis of states without considering the issue of ethnic diversity. There is need for affirmative action on the basis of ethnicity within different states to ensure that there is equal representation for all groups. With over 250 minority and 3 major ethnic groups there is the need for affirmative action to ensure that the minority groups are adequately represented in the workplace. This would foster national unity which is a major problem Nigeria has been battling with since her independence. An affirmative action that ensures that each potential employer adopts the federal character of Nigeria in employment would go a long way in addressing the tribalism problem Nigeria.

### **2.3 Summary**

In this chapter, the concepts of equality as a means of tackling discrimination of vulnerable groups were discussed. In addition, the absence of affirmative action in the Constitution and Labour Act of Nigeria was dealt with. Chapter three considers the labour laws of Nigeria and how effective their anti-discrimination provisions (if any) are.

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<sup>101</sup> Section 14 Federal Character Commission (Establishment) Act No 34 of 1996, Laws of the Federation of Nigeria.

<sup>102</sup> Uvieghara op cit (fn 29).

## Chapter Three: Legal Framework of Nigerian Labour Law

### 3.1 Introduction

This chapter discusses the legal framework in relation to Nigeria labour law. The gaps in these laws are identified, in addition the effect of international treaties on the legal system will be considered.

### 3.2 The Constitution

The Constitution of Nigeria is the principal law of Nigeria. The Constitution is a contract between all Nigerians; this could be inferred from the preamble of the Constitution which provides *“We the people of the Federal Republic of Nigeria, having firmly and solemnly resolved, to live in unity and harmony as one indivisible and indissoluble sovereign nation under God, dedicated to the promotion of inter-African solidarity, world peace, international co-operation and understanding and to provide for a Constitution for the purpose of promoting the good government and welfare of all persons in our country, on the principles of freedom, equality and justice, and for the purpose of consolidating the unity of our people, do hereby make, enact and give to ourselves the following Constitution”*. The Constitution is also a contract between the Nigerian government and the people of Nigeria. Chapter two of the Constitution provides for the obligations of the state to the people. This chapter is evidence of the social contract that exists between the Nigerian government and the Nigerian people.

Chapter four of the Constitution deals with fundamental human rights. Section 42 provides *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, 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, religions or political opinions are not made subject; or*

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

2) *No citizen of Nigeria shall be subjected to any disability or deprivation merely by reason of the circumstances of his birth...* Although, the term 'discrimination' is not expressly used in this section, discrimination might be inferred from the words 'restricted, deprived and subjected to any disability'. The lack of the use of the word 'discrimination' may make the interpretation of section 42 ambiguous.

According to A. Oyewunmi, the wording of section 42 suggests that it is only discrimination by any executive or administrative act of the government or the application of any law in force that is forbidden.<sup>103</sup> Thus excluding inadvertently the application of section 42 in the private sector. Furthermore, disability is not provided for as a ground upon which a Nigerian might be discriminated against. This is unfortunate and it probably contributes to why the Nigerians with Disabilities Act is highly unpopular. This will be discussed in more detail in the course of this chapter.

Section 15 is equally an anti-discrimination provision. This section provides that no Nigerian will be discriminated against on the basis of sex, place of origin, religion, status or language. Though this section uses the word 'discrimination', the aim of the section is to ensure national integration.<sup>104</sup> Thus this provision has had no impact to discrimination in the workplace. It has been argued that the Constitution itself is discriminatory generally against women;<sup>105</sup>

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<sup>103</sup> Oyewunmi op cit (fn 72).

<sup>104</sup> Section 15(2) of the 1999 Constitution.

this is seen in the masculine language of the Constitution, the inability of women to transfer citizenship and women become adults upon marriage as against the normal age provision.<sup>106</sup>

Section 42 at best is a blanket provision; there still remains the need for specific anti-discrimination provision and affirmative action in the Nigerian Constitution. According to the provisions of section 13 of the Constitution, it is the duty of all organs of the government, all authorities and persons exercising legislative, executive or judicial powers to conform to the provisions of the Constitution.

### **3.3 The Labour Act**<sup>107</sup>

This is the principal law that governs labour relations in Nigeria. This Act has been called the workers charter because of the greater protection it provides for workers as against what was obtainable under the common law.<sup>108</sup> The first legislation to deal with labour relations in Nigeria was called the master and servant Ordinance of 1877; also known as Ordinance No 16 of the Gold Coast.<sup>109</sup>

The Labour Act is divided into four parts. Part one deals with wages, contracts of employment and conditions of employment; part two regulates recruitment generally; part three covers special classes of workers and special provisions and part four deals with supplementary issues which includes settlement of disputes, administration, records and returns.

Section 23 to 25 provides for the need for recruiters to be licensed or to have an employers' permit.

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<sup>105</sup> Pereira op cit (fn 62).

<sup>106</sup> Section 29 (4)(a) and (b) of the 1999 Constitution.

<sup>107</sup> Cap 198 Laws of the Federation of Nigeria, 1990.

<sup>108</sup> Uvieghara op cit (fn 29).

<sup>109</sup> Ibid.

The recruitment provisions of the Labour Act are basically an off shoot of the colonialism that Nigeria was previously under. The Labour Act has no provisions for equal employment opportunities for all Nigerians irrespective of any diversity for example sex, ethnicity etc; neither does it deal with retention at work. The only provision in this Act that relates to women is in respect of maternity leave, there is no provision that seeks to protect the interest of women during recruitment and upon assumption of employment. Issues that make the workplace mentally and emotionally hostile to the minority are not provided for in the Act.

There is no provision in the Labour Act that protects persons living with disabilities, despite the significant proportion of such persons.<sup>110</sup> As earlier mentioned, roughly 10 per cent of the population of Nigeria live with one form of disability or the other.<sup>111</sup> This figure shows that quite a substantial number of Nigerians are persons with disability. According to the International Labour Organisation, persons with disabilities make up 15 per cent of the total population of the world making them the highest number of minorities in the world.<sup>112</sup> Thus, it is really unfortunate that Nigeria has no law dealing with the needs of persons with disabilities in relation to employment.

Disability is closely linked to poverty thereby increasing the likelihood of persons with disability being impoverished. It has become imperative that a form of legislation be enacted in Nigeria to ensure that persons with disabilities being part of the vulnerable groups are not left to the whims and caprices of the intolerant Nigerian society. In the words of the former Director-General of the International Labour Organisation, Juan Somavia speaking on the International

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<sup>110</sup> Mont op cit (fn 87).

<sup>111</sup> Smith op cit (fn 89).

<sup>112</sup> Message by Juan Somavia Director-General of the International Labour Organisation on the occasion of the International Day of Persons with Disabilities- 3 December 2011 available at [www.ilo.org](http://www.ilo.org) accessed on the 20<sup>th</sup> of August, 2013.

Day of Persons with Disabilities “*promoting opportunities for decent work for people with disabilities is intrinsic to achieving a new era of social justice*”.<sup>113</sup>

Moreover, the Labour Act does not contain any provision on discrimination based on religion, ethnicity and age. This fact makes the non-amendment of the Labour Act in more than three decades unacceptable.

The law is silent on the normative framework of employment and recruitment policies. The labour law does not define these policies neither does it provide for the procedure for the policies. This vacuum in the legislation has made employment practices to be at the whims of employers leaving out the principles of affirmative action. In addition to this, there is no anti-discrimination provision in the Labour Act. Employees only have recourse to the general fundamental human rights provisions in the Constitution which might not sufficiently protect their interests in the workplace. The need for a complete overhaul of the Labour Act of 1974 cannot be over emphasised. There has been no form of amendment in this legislation for more than three decades, despite the various progressive trends in labour relations all over the world. The law is decades behind global trends and this have made this law principally irrelevant. The nature of the emerging market of the Nigerian economy is such that affirmative action and gender equality in employment needs to be enacted in its labour laws to ensure that the rights of all categories of Nigerian citizens are protected.

### **3.4 Federal Character Principle in Nigeria**

Nigeria has between 250 to 400 ethnic groups<sup>114</sup> with six geopolitical zones, comprising of the South-south, south-eastern, south-western, north-central, north-eastern and north- western. The multi-ethnicity of Nigeria made it

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<sup>113</sup> Ibid.

<sup>114</sup> Abdul Raufu Mustapha ‘Institutionalising ethnic representation: How effective is the Federal Character Commission in Nigeria?’ CRISE Working Paper 43 June 2007. Department of International Development, University of Oxford. Available at <http://www3.qeh.ox.ac.uk/pdf/crisewps/workingpaper43.pdf> accessed on the 1st of August, 2013.

necessary for Nigeria to become a federation upon her independence.<sup>115</sup>

Nigeria therefore became a nation with different states and a federal capital territory. The idea behind federalism from my point of view is to ensure that the interests of various ethnic groups are adequately represented. This is affirmed by the structure of government in Nigeria. We have the president who is the head of state, then the various state governors who also have local government leaders under them. These local government leaders then have wards under their jurisdiction with each ward having a ward chair.

In 1954 for the first time, just before Nigeria got her independence in 1960; Nigerian nationalists at a round table discussion decided that Nigeria should adopt the federal system of government. This federal system was to be adopted in recruitment of persons to the Armed Forces, the Nigerian police and admissions of persons into institutions of learning.<sup>116</sup> This was done to ensure that development took place in all parts of the country. With the grant of Nigeria's independence, the need to ensure more equitable spread of development in the country was reinforced.<sup>117</sup> Thus, a 'quota system' was introduced and there were attempts to practice this *quota system* in one form or the other. This *quota system* was meant to ensure equity for all Nigerian citizens and to reduce the problems associated with the multi-ethnicity of Nigeria. Unfortunately there were no guidelines to ensure this. Therefore, it became increasingly necessary for a structure to ensure that the federal character of Nigeria is maximised.<sup>118</sup> This structure wasn't established immediately, it took almost 30 years for a structure to be established.

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<sup>115</sup> Section 2 (2) of the 1999 Constitution of Nigeria as amended in 2011.

<sup>116</sup> Available at <http://www.federalcharacter.gov.ng/establishment.php> accessed on the 1st of August, 2013.

<sup>117</sup> Ibid.

<sup>118</sup> Ibid. This *quota system* was reviewed in 1967 and used in filling up vacancies in federal organisations and for admission in federal schools.

In 1995 under the military rule of General Sanni Abacha, the constitutional conference that was constituted made recommendations to deal with the marginalisation of disadvantaged groups and distribution of economic wealth.<sup>119</sup> To achieve these recommendations they proposed that a commission be established. This led to the establishment of the Federal Character commission.

The Federal Character Commission was established by the Federal Character Commission (Establishment) Decree No. 34 1996.<sup>120</sup> This commission has guiding principles,<sup>121</sup> amongst which are:

- a) Equitable representation of states in national institutions, public enterprises and organisations.
- b) Only suitably qualified people are recruited to fill up positions meant for states in public organisations.
- c) Once a person is qualified he is entitled to fill up the positions meant for his individual state.
- d) Each state is to produce 2.75 per cent of the workforce in any federal organisation and the federal capital territory is to produce 1 per cent of the workforce.

The commission has among its functions the responsibility of ensuring that the guiding principles of the commission are fulfilled in recruitment. In addition, the commission must ensure the equitable distribution of all public socio-economic amenities and infrastructural facilities. Furthermore, the commission has the duty of publishing reports to show statistic on man-power in public organisations.

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<sup>119</sup> Ibid.

<sup>120</sup> Ibid.

<sup>121</sup> Ibid.

The second chapter of the Constitution of Nigeria which is entitled fundamental objectives and directive principles of state policy deals with this principle of federal character.<sup>122</sup> Section 14 provides thus

*“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 State or from a few ethnic or other sectional groups in that Government or in any of its agencies”*

This principle of federal character is to be applied in all facets of the Nigerian economy. Federal character principle as seen in practice is applicable only at the federal level, despite the provision in section 14(4) that says that state and local government should conduct their affairs in such a way as to promote the principle of federal character. Despite this provision, there is no mechanism provided for states and local government to promote the spirit of federal character, thus this has made this sub-section to be mostly redundant. According to policy brief 15, the federal character principle does not provide for mechanisms to ensure equity by states between local governments and also for local governments to ensure equity between wards.<sup>123</sup> This means that employment opportunities at the state and local government level won't reflect multi-ethnicity.

The Federal Character Commission (Establishment) Act principally deals with recruitment from the angle of ethnicity without considering other factors that might cause marginalization. Such factors include sex, religion, age and disability. The foundational principle of federal character is the equality of states

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<sup>122</sup> 1999 constitution as amended in 2011.

<sup>123</sup> 'Affirmative Action Nigeria' (February 2006) Policy Brief 15 Inter-regional inequality facility sharing ideas and policies across Africa, Asia and Latin America. Available at <http://www.odi.org.uk/> accessed on the 1<sup>st</sup> of August 2013.

as provided under the guiding principles and formulae of the Act.<sup>124</sup> This has been applied in public organisations. The last published report of the federal character commission shows that despite the federal character principle there still exist gross inequalities in the distribution of federal jobs.<sup>125</sup> According to the report<sup>126</sup> Ogun state<sup>127</sup> has 7.5 per cent representation rather than the 2.5 per cent the state is entitled to under the Act. Meanwhile, Yobe state has 0.9 per cent representation public organisation which is lower than its entitled percentage.<sup>128</sup>

The basis of the structure of recruitment of the federal character commission has been widely criticised. A. R. Mustapha is of the opinion that the guiding principles of the commission are deficient in not taking into consideration ethnicity, religion and relative merit.<sup>129</sup> He further opined that issues such as the size of the state, the number of ethnic groups in the state, the ethnic structure and educational qualifications of the members of various states were not considered. This caused situations wherein unqualified people are fostered on the public enterprise all in the bid of making up the quota. A better formula of recruitment should be put in place to ensure both equity and proportionality in recruitment. In addition, it will aid performance in the public sector as suitably qualified individuals will be employed.

The commission has the power to recruit and train staff of government agencies by virtue of the provision in section 5(f) of the Act. The word 'where desirable' is used at the end of the sentence of the provision of section 5(f). This has reduced the efficacy of the monitoring power of the commission as most

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<sup>124</sup> Part 1 of the Act provides for this.

<sup>125</sup> Uvieghara op cit (fn 29).

<sup>126</sup> Uvieghara op cit (fn 29).

<sup>127</sup> Ogun state is located in the south-western part of Nigeria.

<sup>128</sup> Yobe State is located in the north-east geopolitical zone of Nigeria.

<sup>129</sup> Agócs and Burr op cit (fn 58) p 12.

government agencies have their own board that deal with recruitment. It is usually at the government agency level that the principle of federal character is breached and the commission is limited because of the ambiguous provision of section 5(f). This is made more obvious because there is no provision in the Act for the commission to order fresh recruitment in situations where the process of recruitment has been tainted. Recently in Nigeria there were allegations that some government agencies in recruiting did not follow the federal character principle, rather it became a money making venture.<sup>130</sup> Unfortunately, the federal character commission has not been able to do anything which has made Nigerians to call for the dissolution of the commission. The powers of the commission should include the calling for fresh recruitment process in the event of the process being contrary to the principle of federal character.

Section 2 under the definition part of the Act provides that for the purpose of the federal character principle, a married woman retains her claim on her state of origin. This has in a way encouraged tribalism. This is put aptly by A.R. Mustapha who said this provision has encouraged divisive indigene or settler syndrome.<sup>131</sup> In Nigeria, when a woman marries she ceases to belong to her biological family. This provision that she retains her claim on her state of origin is a superficial provision and it hinders her chances of getting a federal job. Recently in Nigeria, a female High Court Judge was denied a position as a Court of Appeal Judge.<sup>132</sup> This was as a result of the fact that she is from Anambra State, married to a man from Abia State and she has spent most of her working life in Abia State. The Judge was initially denied elevation to the Court of Appeal because it will be in violation of the Federal Character Act if she receives the slot of Abia State. This provision of the Federal Character Act is in violation of section 42 of the Constitution.

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<sup>130</sup> Josiah Oluwole 'lawmakers and recruitment scams in MDAs' (22<sup>nd</sup> of January 2013) the Punch online newspaper Available at <http://www.punchng.com/politics/lawmakers-and-recruitment-scams-in-mdas/> accessed on the 1<sup>st</sup> of August, 2013.

<sup>131</sup> Agoos and Burr op cit (fn 129) p 12.

<sup>132</sup> Toby Soniyi 'CJN Refuses to Swear in Appeal court Justice' (6<sup>th</sup> of November 2012) ThisDay Newspaper available at [www.thisdaylive.com](http://www.thisdaylive.com) accessed on the 30<sup>th</sup> of December 2013.

This brings to play the concept of “indigeneity” and “ethnicity”.<sup>133</sup> Indigeneity is being born and bred in a particular place, which could also be your ethnic origin. Ethnicity on the other hand, is characterised by having a group of people who share the same culture, language and historical background.<sup>134</sup> In Nigeria, a citizen could be from a different ethnic group but is indigenous to a particular place. This makes the federal character principle disfavour women especially in cases of intermarriage. This provision is a likely contributory to the high rate of unemployment among Nigerian women.

The federal character commission by virtue of it being a creation of an act of the legislature is a legal entity with the ability to sue and be sued in its own name.<sup>135</sup> This means ideally the commission ought to be independent; unfortunately this independence has been curbed by the provisions of the section 1(3) that puts it under the direct supervision of the president of Nigeria. This is likely one of the factors that has brought the commission’s credibility to question because of the high tendency of the sitting president’s dictate to determine the action of the commission. The Act ought to be amended to reflect the autonomy of the commission with minimal control by the national assembly rather than the president.

There is the need for a law to be enforceable so it can achieve the objectives for which the law was enacted. There is need for stringent penalties to be introduced for violation of the provisions of this Act. The penalties provided in section 14 and 15 are too mild in comparison to the offence. A breach of this act by an individual makes the individual liable to a fine of N50, 000 or six months imprisonment or both the fine and imprisonment. While if the offence is committed by a corporate body the penalty is N100,

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<sup>133</sup> Pereira op cit (fn 62).

<sup>134</sup> PA Senior & Raj Bhopal ‘Ethnicity as a variable in epidemiological research’ (30 of July 1994) *BMJ* Vol 309 available at [www.ncbi.nlm.nih.gov](http://www.ncbi.nlm.nih.gov). accessed on the 28<sup>th</sup> of January, 2014.

<sup>135</sup> Section 1, part 1 of the Federal Character Commission (Establishment) Act, Laws of the Federation of Nigeria.1997.

000(approximately 622 USD as at January 2014). This is too little in comparison to the effect a breach of these provisions will cause on a Nigerian and in the long term, on the economy of Nigeria. These penalties make it easy for these provisions to be breached.

The Federal Character principle currently applies to government agencies or corporations where government is a majority shareholder. Nigeria is a multi-ethnic country and an emerging economy in the world; there is the need for this federal character principle to equally cover the private sector. Currently, Private Corporations are playing a major role in the economic growth of Nigeria. Under the freedom of contract of employment, an employer has the right to employ as he deems fit. A major principle under Nigerian Employment law as affirmed by the court is, the court will not impose an employee on an unwilling employer.<sup>136</sup> This has made private organisations in Nigeria to disregard the principles of equal employment opportunities as provided for under the International Labour Organisation convention.<sup>137</sup> Applying the federal character principle to a certain extent in the private sector, will promote the spirit of unity in diversity in Nigeria. Thereby enhancing economic growth.

### **3.5 Nigerians with Disabilities Act<sup>138</sup>**

This Act was initially promulgated as a decree in 1993 under the military rule but became an Act when the civil dispensation started in 1999. This Act appears to be highly unpopular as Nigerian Legal jurists have not really reckoned with it.<sup>139</sup> This is possibly because it is not found in the current laws of the federation. However as long as a military decree is not expressly repealed, it remains binding. The Supreme Court in *AG Federation v. AG Abia State*<sup>140</sup> held that the fact that a law has been omitted from the Laws of the Federation does

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<sup>136</sup> Chukwuma v. Shell Petroleum Development of Nigeria Limited (1993) NWLR (Pt. 289)512.

<sup>137</sup> Discrimination (employment & occupation) Convention 1958 NO. 111.

<sup>138</sup> Available at [www.dredf.org](http://www.dredf.org) accessed on the 23<sup>rd</sup> of September, 2013.

<sup>139</sup> Agomo op cit (fn 26) P 100.

<sup>140</sup> (2002) Federation Weekly Law Reports part 102.

not render such law obsolete or spent. Another factor that makes this law unpopular is the fact that disability is not a ground for discrimination in the Constitution. This is likely an oversight on the part of the legislative house.

This Act does not define disability but defines a disabled person. Section 3 defines a disabled person as “*a person who has received preliminary or permanent certificate of disability to have a condition which is expected to continue permanently or for a considerable length of time which can reasonably be expected to limit the person's functional ability substantially, but not limited to seeing, hearing, thinking, ambulating, climbing, descending, lifting, grasping, rising, any related function or any limitation due to weakness or significantly decreased endurance so that he cannot perform his everyday routine, living and working without significantly increased hardship and vulnerability to everyday obstacles and hazards*”. This definition is restrictive.

A certificate of disability is prerequisite for someone to be classified as a disabled person and get the benefits under this Act. According to section 4 of this Act, this certificate of disability can only be obtained if the disability is suspected in the course of medical treatment. It is the duty of health institutions to submit this certificate to the National Commission for people with Disability. This bureaucratic measure is an hindrance to persons with disability as it has placed a heavy burden upon them. This means that if a person doesn't have a certificate of disability, the person is not disabled. This definition is in itself discriminatory and contravenes the definition of disability under the Disabilities convention of the International Labour Organisation.

Section 6 provides for employment and vocational rehabilitation for disabled people. Subsection 2 and 3 of the Act provides that 10 per cent of positions in the workforce and 10 per cent of funds for training of staff should be reserved for persons with disability. This provision applies to all employers of labour including the private sector. In addition, an incentive of 15 per cent tax deduction was included for private employers. Unfortunately this is not enforced in Nigeria. Persons with disability are still being discriminated against even in

public sector jobs. This leads to the issue of lack of enforcement of the provisions of the Act.

A major challenge in the enforcement of this Act is the lack of awareness of the existence of this law by Nigerians. In the course of this research, it was discovered that organizations dealing with persons with disability are canvassing for a disability law while there is one in existence. This shows the level of ignorance. There is thus a need for this law to be popularized; this would in the long run ensure that the benefits of this law are harnessed.

The Disabilities Act provides for the establishment of a commission to ensure that the rights of persons with disabilities are enforced.<sup>141</sup> This commission is called National Commission for People with Disabilities. Unfortunately, since the promulgation of this Act till date, this commission has not been set up. It is imperative that this commission is speedily set up as the welfare of persons with disability is at stake.

### **3.6 International Treatises**

The Constitution of any country is its principal law. In it a nation's foreign policy are expressly or implicitly stated. Though these provisions might not give a detailed articulation as to the country's disposition in her international law; they give an indication as to the country's stance in specific international situations.<sup>142</sup> Thus, it is necessary to consider the provisions of the Nigerian Constitution on foreign policy.

Section 12 of the Constitution provides *“(1) No treaty between the federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly. (2) the National Assembly may make laws for the Federation or any part thereof*

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<sup>141</sup> Section 14 of the Act.

<sup>142</sup> Okeke Christian N 'International Law in the Nigerian Legal System' (1996-1997) 27 *California Western International Law Journal* 328 available at [www.heinonline.com](http://www.heinonline.com) accessed on the 20<sup>th</sup> of August 2013.

*with respect to matters not included in the exclusive legislative list for the purpose of implementing a treaty. (3) a bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation”.*<sup>143</sup> The aforementioned provision of the Constitution is one of the major obstacles that prevent the adaptation of international labour standards in Nigeria.

Consequently, no treaty can be part of Nigerian law except it is enacted into by the National House of Assembly and assented to by the President of Nigeria. The enactment of any treaty into law is by means of ratification by a majority of all the 36 states houses of assembly and the National House of Assembly. It is after this ratification that the president assents to this bill then it takes on the force of law in Nigeria.

Nigeria as a member of the International Labour Organisation signed certain conventions such as the Equal Remuneration Convention 1951 No. 100 on the 8<sup>th</sup> day of May 1974 and the Discrimination (Employment and Occupation) Convention 1958 No. 111 on the 2<sup>nd</sup> day of October 2002.<sup>144</sup> In addition, Nigeria ratified the United Nations Convention on the Elimination of all forms of Discrimination against Women on the 13<sup>th</sup> June, 1985. The optional protocol of this convention was equally ratified on 8<sup>th</sup> September, 2001.<sup>145</sup> To date, this convention has also not been domesticated. Unfortunately, conventions will have no effect until domesticated into an Act by the legislative houses in accordance to section 12 of the Constitution. The Supreme Court of Nigeria in the *Registered Trustees of National Association of Community Health Practitioners of Nigeria & 20 others v. Medical and Health Workers Union of Nigeria and others* said that an international treaty signed by the Nigerian

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<sup>143</sup> 1999 Constitution of Nigeria as amended in 2011.

<sup>144</sup> Available at [www.ilo.org](http://www.ilo.org) accessed on the 21<sup>st</sup> of August, 2013.

<sup>145</sup> *Status of Ratifications of the Principal Human Rights Treaties as of 26 November 2001*. Office of the UN High Commission for Human Rights available at [www.un.org/womenwatch/daw/cedaw/states](http://www.un.org/womenwatch/daw/cedaw/states) accessed on the 23<sup>rd</sup> of November, 2013.

government that has not been domesticated into law by the legislative houses is not binding.<sup>146</sup> This decision was in reaction to the plea of the court that the provisions of convention 87 and 89 of the International Labour Organisation be applied in the instance case.<sup>147</sup>

In 2000, the legislative house of Nigeria enacted the Equal Remuneration Convention 1951 No 100 into the National Minimum Wage Act and it was later amended in 2011. This enactment took place almost three decades after the initial signing by the government. Unfortunately, this might likely be the fate of the Discrimination Convention 1958 No. 111. Domestication of this convention would require that the Nigerian government pursues a national policy designed to promote equality of opportunity and treatment in respect of employment and occupation, which in the long run would aid in the elimination of discrimination.<sup>148</sup> In order to achieve this, the peculiarity of Nigeria must be taken into consideration in tackling discrimination in the workplace.

This convention has been signed since 2000 by the government and no effort has made to domesticate this convention into an Act of the National Assembly. In accordance to the provisions of the Constitution, this convention is of no help to Nigerian employees pending its domestication. This leaves the employee with no recourse in the event of discrimination both during recruitment and in the course of employment except as per the omnibus discrimination provision of section 42 of the Constitution. This omnibus provision however, does not adequately deal with the various forms of discrimination encountered by employees. There appears to be some light at the end of the tunnel however. This is as a result of the provision of the National Industrial Court Act.

The National Industrial Court has exclusive jurisdiction in matters of labour and industrial relations in Nigeria. Section 7(6) of the National Industrial

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<sup>146</sup> [2008] 2NWLR (Pt. 1072) 575 available at [www.nigeria-law.org](http://www.nigeria-law.org) accessed on the 21<sup>st</sup> of August 2013.

<sup>147</sup> See also *Abacha v. Fawehinmi* (2000) 6NWLR (pt 660) 288.

<sup>148</sup> Article 4 of the Discrimination Convention of the ILO.

Court Act provides that “*the court shall, in exercising its jurisdiction or any of the powers conferred upon it by this Act or any other enactment or law, have due regard to good or international best practice in labour or industrial relations and what amounts to good or international best practices in labour or industrial relations shall be a question of fact*”. It appears from this provision that a party can claim the reliefs that international best practice grant as long as the party can prove this as a fact. The provisions of the conventions of the International Labour Organisations and the United Nations are within the ambit of international best practices when it comes to the issue of labour and industrial relations. The National Industrial Court affirmed this in *Oyo State Government v. Alhaji Bashir Apap and ors.*<sup>149</sup> Thus pending domestication of international convention, succour lies in the provisions of the National Industrial Court Act for Nigerian Employees.

### **3.7 Conclusion**

The first step towards ensuring equality of employment opportunities for all Nigerians is the domesticating of the Discrimination (Employment and Opportunities) convention No 111 1958 by the legislature. This convention could form a template for an employment equality law. While waiting on the legislative house, the National Industrial Court in applying section 7(6) of its enabling Act might give succour to aggrieved Nigerians by considering comparative practices in recruitment and employment laws. Some of such practices are considered in the next chapter.

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<sup>149</sup> Suit No. NIC/36/2007 of July 18, 2008 (unreported) cited in Chioma Agomo’s *Nigerian Employment and Labour Relations Law and Practice* P 103.

## Chapter Four: International Law and Comparative Perspectives in Recruitment and Employment Laws

### 4.1 Introduction

The Nigerian Labour Act is bereft of any anti-discrimination or recruitment provision. This Act has had no form of amendment for more than four decades when it was originally enacted. This has made it increasingly imperative that we look outwards for lessons in formulation and development of adequate provisions to ensure equality in the workplace. The legal frameworks of South Africa and India will be considered, in addition to some international treaties.

The inception and development of South African employment equity legislation will be outlined in this chapter. The choice of South Africa is hinged on the fact that like Nigeria, it is an emerging economy. In addition, the Republic of South Africa as an independent democratic nation is relatively young in comparison to Nigeria that gained her independence in 1960. Despite this, South Africa has developed employment equality provisions to combat the after effects of the apartheid rule. Therefore, Nigeria should gain from this lesson.

The discussion of South Africa's law will be woven around the definition and elements of the concept of unfair discrimination. In addition, the interpretation and application of the provisions of the Equity Act will be considered. The place of affirmative action in the legal framework will be discussed.

India's history of positive discrimination goes as far back as the nineteenth century.<sup>150</sup> This was as a result of the development of organised movement in the Southern part of India to reduce the powers of the Brahmins. India is a nation that has affirmative action entrenched in its Constitution. Affirmative action in relation to the caste system (*the untouchables*) will be

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<sup>150</sup> Thomas E Weisskopf *Affirmative Action in the United States and India; a comparative perspective* P 10.

discussed in this chapter. The selection of India is as a result of its ethnic diversity which is similar to that of Nigeria. An appraisal of this caste system will be a valuable lesson for Nigeria in her bid to ensure equality for all Nigerians irrespective of their ethnicity.

#### 4.2 Best Practices in Recruitment and Employment

The term Best practices refers to methodologies, rules, concepts and theories that have attained a certain level of success in certain areas of human endeavour and as a result are deemed to be truths to be applied universally.<sup>151</sup> In the labour sector globally, the International Labour Organisation is the institution that deliberates on best practices in labour. Since 1919 when the International Labour Organisation was created as a specialised agency of the United Nations, the organisation has developed and maintained a system of international labour standards aimed at promoting employment opportunities and equity in the workplace for all citizens of the world. According to the International Labour Organisation, these international standards are to form the principal part of the international framework for ensuring global development that benefits everybody.<sup>152</sup>

The International Labour Organisation goes further to list reasons why member states need to adopt these international labour standards.<sup>153</sup> They include:

- i. A path to decent work<sup>154</sup> - this is as a result of the knowledge that labour unlike goods is not a commodity rather it is about

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<sup>151</sup> IP Robbins 'Best Practices on "Best Practices": Legal Education and Beyond' (2009) *Clinical Law Review* 16 at 269-305 available at <http://digitalcommons.wcl.american.edu> accessed on the 7<sup>th</sup> of January, 2014.

<sup>152</sup> 'Introduction to International Labour Standards' available at <http://www.ilo.org/global/standards/introduction-to-international-labour-standards> accessed on the 24<sup>th</sup> of August, 2013.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid.

human beings. Since having decent work boils down to the dignity of persons, it is important that there should be labour standards to guide this path to decent work.

- ii. An International legal framework of fair and stable globalisation<sup>155</sup> - achieving decent work requires action internationally. International Labour Organisation does its part by developing and promoting instruments that set out acceptable labour standards to enhance global development.
- iii. A level playing field<sup>156</sup> - the international standards are a uniform level ground for both governments and employments as regards labour relations thus ensuring that there is no disparity in the treatment of employees all around the world.
- iv. A means of improving economic performance<sup>157</sup> - International Labour Organisation's research has shown that compliance with the international labour standards would enhance productivity which in the long term improves economic performance.
- v. A safety net in times of economic crisis<sup>158</sup> - these standards minimize the impact of economic crisis because of structures put in place by virtue of the use of the international labour standards.
- vi. A strategy for reducing poverty<sup>159</sup> - there is link between the reduction of poverty and the use of international labour standards. Countries with good legal frameworks that govern their labour sector will likely have a low poverty margin.

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<sup>155</sup> Ibid.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid.

<sup>158</sup> Ibid.

<sup>159</sup> Ibid.

- vii. The sum of international experience and knowledge<sup>160</sup> – the international labour standards are as a result of series of discussion between governments, employers, employees and labour experts. Thus the use of these standards would ensure the harmonization of international laws.

These international standards led to the making of conventions by the International Labour Organisation which were ratified by member states. Each convention constitutes acceptable international standards on specific areas of labour relations. As previously mentioned the International Labour Organisation convention most relevant to this thesis is the Discrimination (Employment and Occupation) Convention 1958 No 111. This convention seeks to eliminate any form of discrimination in the workplace. This convention is the basis of many countries equal opportunity legislation. Some of such countries are the Republic of South Africa and India.

#### **4.3 International Treatises.**

Formal condemnation of discrimination in the workplace is universal and firm.<sup>161</sup> Despite these condemnations, discrimination remains an enduring feature in the workplace everywhere in the world. The manifestations of these discriminations may vary across and within countries from time to time.<sup>162</sup> In a bid to address and eliminate discrimination world- wide, the United Nations Organisation and the International Labour Organisation over time adopted conventions to aid a better understanding and elimination of discrimination. Some of such conventions are discussed below.

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<sup>160</sup> Ibid.

<sup>161</sup> M Tomei 'Discrimination and equality at work: A review of the concepts' *International Labour Review*, 142, p 401-418 available at [www.onlinelibrary.wiley.com](http://www.onlinelibrary.wiley.com) accessed on the 18<sup>th</sup> of November, 2013.

<sup>162</sup> Ibid.

### **4.3.1 Discrimination (Employment and Occupation) Convention 1958 No 111**

This convention was passed on the 4<sup>th</sup> of June, 1958 by the General Conference of the International Labour Organisation.<sup>163</sup> Discrimination is considered a violation of human rights which is contrary to the Universal Declaration of Human Rights. In addition, this Convention is an affirmation of the Declaration of Philadelphia wherein it was provided that all human beings without any distinction are entitled to both their material well-being and spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.<sup>164</sup>

This Convention is made up of fourteen articles and applies to all types of employment. Article 1 defines the term discrimination as any distinction, exclusion or preference which hinders equal treatment or opportunity in the workplace is discrimination.<sup>165</sup> Article 2 provides that member countries need to have a national policy designed to promote methods which enhance equality of opportunity in the workplace taking into consideration the peculiar conditions of each country. This national policy must achieve the objectives set out in Article 3. Articles 4 and 5 provides for instances when the effects of measures provided for in any national policy or other conventions of the International Labour Organisation would not be seen as discrimination. The effects of ratification and denunciation of this convention are dealt with in Articles 6, 7, 8, 9, 10 and 11. The time, method and effects of revision of the convention is discussed in Articles 12 and 13. Article 14 provides that both the English and French version of this Convention is authoritative.

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<sup>163</sup> Available at [www.ilo.org](http://www.ilo.org) accessed on the 18<sup>th</sup> of November, 2013.

<sup>164</sup> Ibid.

<sup>165</sup> Article 1 Discrimination (Employment and Occupation) Convention 1958 No 111.

Discrimination (Employment and Occupation) Convention places emphasis on outcomes.<sup>166</sup> This means that the intent of the person committing the discriminatory action does not matter, what matters is that such acts has led to a deprivation or limitation by virtue of difference in treatment. The definition of discrimination in this Convention covers both direct and indirect discrimination. Direct discrimination is when certain rules, practices and policies of an employer give preference to some individuals by virtue of their membership of certain groups.<sup>167</sup> This is different from substantive equality which though discriminatory, is not unfair discrimination. An example of direct discrimination is job vacancies advertisement that expressly discourages people above a certain age. This is commonplace in the private labour sector in Nigeria, whereby potential employers expressly prohibit applications from people above a certain age. Another form of direct discrimination is the general stereotype against the employment of women in some certain sectors of the Nigerian economy.

Indirect discrimination are practices, polices and norms which on the surface appear neutral but their resultant effect on different individuals or groups of individuals is discriminatory. For example, contract staffs who are primarily women or other members of the vulnerable groups in Nigeria are not entitled to the same benefits full time employees enjoy; this is discriminatory. Indirect discrimination might be harder to prove than direct discrimination.

This Convention is the foundation upon which anti-discrimination laws of a lot of countries are hinged.

There have however been agitations that the policies of the labour organisation are increasing the cost of employment thus reducing employment opportunities. At a conference on decent work issues and polices, it was opined by different employers and employees that the ILO needs to ensure that there are jobs before the issue of decent work and discrimination in the workplace is

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<sup>166</sup> Tomei op cit (fn 161).

<sup>167</sup> Ibid.

dealt with.<sup>168</sup> Furthermore, it was opined that innovative approaches to deal with workplace issues need to be elaborated and tested, documented and disseminated in order to build a genuine knowledge base on decent work policies.<sup>169</sup> This is especially important for developing countries.

#### **4.3.2 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)**

This Convention was adopted by the General Assembly of the United Nations in 1979. The Convention is often described as an international bill of rights for women.<sup>170</sup> This Convention consists of a preamble, six parts and 30 articles. The importance of this Convention is hinged on the fact that it brings the female half of humanity into the focus of human right concerns.<sup>171</sup> These human right concerns are as provided on the United Nations' Universal Declaration of Human Rights.

The preamble of this Convention, acknowledges the fact that extensive discrimination against women exists and this discrimination is in breach of the principles of Equality and respect for human dignity. According to the United Nations, in every region of the world, there are laws that still discriminate against women, in relation to property, the family, employment and citizenship.<sup>172</sup> Article 1 of this Convention defines discrimination against women as *“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of other marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social,*

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<sup>168</sup> Philippe Egger 'Towards a policy framework for decent work; Refocusing the ILO activities' Policy Integration Department, ILO, Geneva available at [www.onlinelibrary.wiley.com](http://www.onlinelibrary.wiley.com) accessed on the 18<sup>th</sup> of November, 2013.

<sup>169</sup> Ibid.

<sup>170</sup> Available at [www.un.org/womenwatch/cedaw](http://www.un.org/womenwatch/cedaw) accessed on the 18th of November, 2013.

<sup>171</sup> Ibid.

<sup>172</sup> 'In Pursuit of Justice' available at [www.progress.unwomen.org](http://www.progress.unwomen.org) accessed on the 18<sup>th</sup> of November, 2013.

*cultural, civil or any other field*". Thus any differentiation against women by virtue of their sex is discrimination. The Convention also makes it binding on state parties to take appropriate measures to ensure equality of women with men. This is provided for in Article 3. The agenda for equality is specified in articles 3 to 14 of the Convention. These articles deal with socio-cultural, political, economic, education and reproductive rights of a woman in a bid to eliminate any form of discrimination and enhance equality.

The implementation of the Convention is monitored by the Committee on the Elimination of Discrimination against Women (CEDAW). Articles 17 to 30 deal with the mandate of the committee to ensure the administration of this Convention by State parties. The Committee is made of twenty-three experts who are nominated by countries and elected by the States parties. State parties are bound to submit a national report to the committee every four years indicating their progress in the journey to eliminate discrimination against women. Unfortunately, this has not been enforced in Nigeria. Wherein after signing this convention as a State party, Nigeria government has not made any effort to domesticate this convention. Thereby denying Nigerian women of the benefits of this Convention. The specific provisions of this Convention would have enhanced the plight of the Nigerian women because in the event of any form of differentiation on the basis of her sex, justice would be found by the application of this Convention by Nigerian Courts.

#### **4.3.3 Convention on the Rights of Persons with Disabilities**

This convention was adopted in 2006. As previously mentioned, persons with disabilities are the world's largest minority, comprising of about 10 per cent of the world's population.<sup>173</sup> Eighty per cent of persons living with disabilities reside in developing countries-including Nigeria. By also being the most populous black nation in the world, this makes it important that this convention be ratified in Nigeria.

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<sup>173</sup> Available at [www.un.org/disabilities/convention/facts](http://www.un.org/disabilities/convention/facts) accessed on the 19<sup>th</sup> of November, 2013.

The purpose of this Convention as stated in Article 1 is to protect and promote all human rights and fundamental freedoms of all persons with disabilities.<sup>174</sup> Article 4 provides that countries that are parties to this Convention develop and carry out policies, laws and administrative measures to enhance the rights of persons with disabilities. All forms of discrimination against persons living with disabilities are prohibited under Article 5. There is the general perception that persons with disabilities are useless. It is thus essential that ratifying countries combat stereotypes and prejudices against persons living with disabilities by promoting awareness of their capabilities in accordance to the provision of Article 8. The convention in Articles 6 and 7 provide for equal rights for women, girls and children living with disabilities. Articles 26 and 27 provide for the equal rights of persons living with disabilities to work and gain a living. Generally the 50 articles of this Convention seek to promote the rights of persons living with disabilities in all sphere of human endeavour. This Convention equally has an optional protocol attached to it.

The Convention was ratified by Nigeria on the 24<sup>th</sup> of September, 2010. The basic problems with this Convention in Nigeria are lack of popularity and enforcement. It is imperative that this Convention be popularised by the government and non-governmental organisation to aid enforcement in Nigeria.

The legal framework of discrimination laws of South Africa and India will now be considered

#### **4.4 Equal Employment Opportunity in South Africa.**

South Africa got her independence in 1994 after years of apartheid rule. One of the major problems faced by them upon independence was the issue of inequality suffered by the black people during the apartheid period. As a result, the democratic government that came into power upon independence decided to enact a legislation that would put an end to discrimination and ensure equality in the workplace for all South Africans. The government went about this duty by

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<sup>174</sup> Persons with disabilities also include people with mental impairments.

introducing affirmative action and the Employment Equity Act 55 in 1998. The Employment Equity Act shall hereafter be referred to as the “EEA”.

The former president of South Africa, Nelson Mandela at the ANC Affirmative Action conference in Port Elizabeth held in October 1991 in asserting the need for affirmative action in South Africa said *“the primary aims of affirmative action must be to redress the imbalances created by apartheid. We are not asking for hand-outs for anyone nor are we saying that just as a white skin was a passport to privilege in the past, so should the black skin be the basis for privilege in the future, nor is it our aim to do away with qualifications. What we are against is not the upholding of standards as such but the sustaining of the barriers to the attainment of standards; the special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of disqualified persons but to see to it that those who have been denied access to qualifications in the past can become qualified now, and that those who have been qualified all along but overlooked because of past discrimination are at last given their due. The first point to be made is that affirmative action must be rooted in principles of justice and equality”*.<sup>175</sup> This affirmative action was meant to bridge the gap between the whites and the blacks in South Africa. There was an urgent need for a measure to bridge this gap as South Africa had the most unequal income distribution in the world,<sup>176</sup> with black South Africans and especially black women at the bottom. This unequal income distribution contributed to social unrest and poverty amongst the black people. This affirmative action laid the foundation upon which employment equality was laid.

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<sup>175</sup> Ockert Dupper, Bhoola & Garbers *Understanding the Employment Equity Act P 2*.

<sup>176</sup> Breakwater Monitor ‘*Monitoring Employment Equity in South Africa*’ University of Cape Town, Graduate School of business, 1996. Available at <http://scholar.lib.vt.edu> accessed on the 1<sup>st</sup> of September, 2013.

Equal opportunity within the legal framework of South Africa is dealt with in two ways; the formal and substantive approach.<sup>177</sup> The formal approach is of the traditional mind-set that all men are equal and should be treated equally. This approach is neutral and avoids preference in its treatment of South Africans in labour relations. This approach is in accordance to section 9 of South Africa's Constitution which encompasses both formal and substantive equality. George Orwell's quote "all animals are equal but some animals are more equal than others" aptly captures the idea behind the substantive approach of equality.<sup>178</sup> This approach considers the peculiarities of individual groups in ensuring equality. This is because some groups might become all the more disadvantaged if they are treated equally with everyone. The court in *R v. Turpin* said "*The guarantee of equality before the law is designed to advance the value that all persons be subject to the equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others*".<sup>179</sup> Thus in South Africa this substantive approach is achieved by means of affirmative action. Affirmative action is applicable in South Africa to black South Africans, women and persons with disability. These two approaches are discussed in more details below.

Section 9 of South Africa's Constitution provides for equality of all South Africans.<sup>180</sup> This provision guarantees the fundamental human right to equality of all South Africans. This equality right includes the full and equal enjoyment of all rights and freedoms. In addition legislative measures may be taken to protect or advance persons or categories of persons who have been disadvantaged by

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<sup>177</sup> Pretorius, Blur and Ngwena op cit (fn 5).

<sup>178</sup> George Orwell *Animal Farm*. Accessed at [www.goodreads.com](http://www.goodreads.com) on the 20<sup>th</sup> of November, 2013.

<sup>179</sup> File Nos.: 20509, 20510.1988: June 16; 1989: May 4 available at [www.scc.lexum.org](http://www.scc.lexum.org) on the 15<sup>th</sup> of November.

<sup>180</sup> No 108 of 1996.

unfair discrimination<sup>181</sup>. The EEA was thus enacted to give effect to the equality provisions of the Constitution of South Africa.

South Africa ratified the Discrimination (employment and Occupation) Convention 1958 No 111 of the International Labour Organisation in 1997 and the EEA was enacted in 1998. The purpose of the EEA was provided for in section 2. It states that achieving equity in the workplace is the purpose of the EEA. The primary means of achieving this purpose is<sup>182</sup>:

- Elimination of unfair discrimination.
- Using affirmative action to redress the disadvantage in employment experienced by a designated group. The basis for the use of this affirmative action is to ensure equitable representation of all citizens in all occupations and levels in the workforce.

The EEA is divided into six chapters. The first chapter deals with its definition, purpose, interpretation and application. Chapter two provides for the prohibition of unfair discrimination. The third chapter is on affirmative action. Chapter four provides for the commission for employment equity. Chapter five deals with monitoring, enforcement of the EEA and legal proceedings. The final chapter which is the sixth chapter contains general provisions.

This Act applies to all categories of employees except independent contractors<sup>183</sup> and employers.<sup>184</sup> Chapter 3 of the EEA which provides for affirmative action only applies to designated employers and people from designated groups. These designated groups are black South Africans,<sup>185</sup>

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<sup>181</sup> Section 9(3) of the Constitution of South African.

<sup>182</sup> Section 2 (a & b) of the EEA.

<sup>183</sup> Section 6.

<sup>184</sup> Section 4.

<sup>185</sup> Black South Africans is a generic term that includes Africans, Indians and coloured people.

women and persons living with disability.<sup>186</sup> This follows the path laid down by the Labour Relations Act. In interpreting the provisions of this Act, section 3 provides that it must be interpreted in compliance with the Constitution, the International Labour Organisation Convention no. 111 that deals with discrimination; in such a way as to give effect to the purpose of the EEA as set out in section 2 and taking into account any relevant employment law.

The foundation for the prohibition of discrimination in the South African workplace is section 6 of the EEA which provides thus “no *person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, status, conscience, belief, political opinion, culture, language and birth*”. A close look at this provision brings to light the fact that it is only unfair discrimination that is prohibited. The use of affirmative action is not unfair discrimination neither is a preference that is an inherent requirement of a job discrimination. The International Labour Organisation Convention no 111 on discrimination did not differentiate between unfair discrimination and discrimination. The basis for such distinction in the EEA is possibly as result of the strong presence of affirmative action in the South African employment laws.

Discrimination as mentioned in the previous chapter could either be direct or indirect.<sup>187</sup> Direct discrimination is when an employee is discriminated against based on personal, physical or social characteristics which are prohibited by law. As example direct discrimination could discrimination based on gender, sex, marital status etc. An employer who discriminates against women because of the perception that women are unreliable employees based on the way society views them, likely because of their role as home makers exhibits direct discrimination. This is a stereotype and it is direct discrimination.<sup>188</sup> This was

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<sup>186</sup> Section 1.

<sup>187</sup> [www.scc.lexum.org](http://www.scc.lexum.org).

<sup>188</sup> Dupper op cit (fn 175) p 41.

affirmed by the court in *IMATU & Another v. City of Cape Town (2005) 26 ILJ 1401 (LC)*.<sup>189</sup> Generally direct discrimination is easily recognisable as it is linked to the grounds for unfair discrimination listed in section 6 of the EEA.

Indirect discrimination are policies and practices that on the face of it do not fall under the grounds listed in section 6 but their effect on individuals or a particular group of people is discriminatory. In essence indirect discrimination is a situation whereby the equal treatment of 'unequal' individuals or categories of person will have an adverse effect on the weaker person. In *Leonard Dingler Employee Representative Council v. Leonard Dingler (Pty) Ltd & Others*,<sup>190</sup> the Labour Court found that the employer was guilty of unfair indirect discrimination. The employer had different retirement benefits for weekly and monthly salary earners. Weekly salary earners were blacks while monthly salary earners were mostly whites. Weekly earners complained that the employer's contribution to their retirement fund was smaller than that of the monthly earners; in addition, they were not given the freedom to choose the fund they wanted to belong to. The court held that the blacks were indirectly discriminated against based on their race.

Employment policies and practices were defined by section 1 of the EEA to include:

- a) *Recruitment procedures, advertising and selection criteria;*
- b) *Appointments and the appointment process;*
- c) *Job classification and grading;*
- d) *Remuneration, employment benefits and terms and conditions of employment;*
- e) *Job assignments;*
- f) *the working environments and facilities;*
- g) *training and developing;*

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<sup>189</sup> Available at [www.imsa.org.za](http://www.imsa.org.za) accessed on the 1<sup>st</sup> of September, 2013.

<sup>190</sup> (1998) 19 ILJ 858 (LC). Available at Juta Law Online accessed on the 2<sup>nd</sup> of September, 2013.

- h) Performance evaluation systems;*
- i) Promotion;*
- j) Transfer;*
- k) Demotion;*
- l) Disciplinary measures other than dismissal: and*
- m) Dismissal.*

The legislature made the definition of employment policy inexhaustive to ensure that any employees discriminated against are not left without recourse even if the employment policy that is been complained of does not fall within this provision. Dismissal is also added to the definition of employment policies or practices under section 1. But section 10 the EEA provides that disputes that arise out of dismissal should be dealt with in terms of chapter VIII of the Labour Relations Act.<sup>191</sup> Section 187(1) (e) provides that dismissal related to pregnancy is unfair. This was affirmed by the court in *Wallace v. Du Toit*,<sup>192</sup> whereby the applicant who was an au pair fell pregnant and was dismissed. The court said it could not accept that not being pregnant or being a parent was an inherent requirement of an au pair's job. Thus the dismissal amounts to unfair discrimination.

The onus of proving that the dismissal was fair lies with the employer. Under section 187 (2) the employer has two defences against unfair dismissal. Section 187 (2) provides;

- (a) A dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job;*
- (b) A dismissal based on age is fair if the employee has reached the normal or agreed retirement age for persons employed in that capacity.*

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<sup>191</sup> No. 66 of 1995.

<sup>192</sup> Labour Court: C334/2005. Available at [www.ccma.org.za](http://www.ccma.org.za) accessed on the 3<sup>rd</sup> of September.

The court in *Janda v. First National Bank* opined that the onus to prove that the dismissal was fair rests on the employer throughout the trial.<sup>193</sup> This based on the provisions in section 11 of the EEA.

Dignity lies at the heart of the determination of what constitutes unfairness. In *Harksen v. Lane*,<sup>194</sup> the court said that to determine unfair discrimination “... *it is necessary to look not only at the group who has been disadvantaged but at the nature of the power in terms of which the discrimination was effected and, also at the nature of the interests which have been affected by the discrimination*”. Together the Constitution<sup>195</sup> and the EEA<sup>196</sup> lists nineteen grounds of discrimination. These grounds are;

- a) *Gender*
- b) *Race*
- c) *Sex*
- d) *Pregnancy*
- e) *Marital status*
- f) *Family responsibility*
- g) *Ethnic or social origin*
- h) *Colour*
- i) *Sexual orientation*
- j) *Age*
- k) *Disability*
- l) *Religion*
- m) *HIV status*

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<sup>193</sup> Labour Court: JS511/04. Available at [www.ccma.org.za](http://www.ccma.org.za) accessed on the 3<sup>rd</sup> of September.

<sup>194</sup> (CCT9/97) [1997] ZACC 12; 1997 (11) BCLR 1489; 1998 (1) SA 300 (7 October 1997). Available at [www.saflii.org.za](http://www.saflii.org.za) accessed on the 3<sup>rd</sup> of September, 2013.

<sup>195</sup> Section 9(3).

<sup>196</sup> Section 6(1).

- n) *Conscience*
- o) *Belief*
- p) *Political opinion*
- q) *Culture*
- r) *Language and*
- s) *Birth*

These aforementioned grounds have been called the listed grounds of unfair discrimination.<sup>197</sup> These listed grounds enables an applicant to simply identify a ground of unfair discrimination to base his claim on. In addition, this list makes it easy for the courts to apply the principles of equality to unfair discrimination cases. Furthermore, of all the aforesated grounds, section 1 of the EEA only defines family responsibility, disability and pregnancy. This leaves the interpretation of all the grounds to the court's discretion.

The International Labour Organisation in its report stated that new forms of discrimination are emerging daily.<sup>198</sup> In what appears to be anticipatory, the EEA uses the word "including" which shows that the listed grounds are not exhaustive rather there is room for other grounds of unfair discrimination. In this instance, discrimination or unfairness is not presumed; rather the onus lies on the complainant to prove that the act complained of is unfair discrimination. In *Harksen v. Lane*,<sup>199</sup> the court held that if the discrimination complained of does not fall within the listed ground, the complainant has the onus to prove that such discrimination has occurred. The court said the party must show that the ground is "*based on attributes and characteristics which have the potential to impair the*

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<sup>197</sup> Dupper op cit (fn 175) P 60.

<sup>198</sup> 'Equality at work: tackling the challenges'. Global Report under the follow-up to the International Labour Organisation Declaration on Fundamental Principles and Rights at work. International Labour Conference. 96<sup>th</sup> Session 2007. Available at [www.ilo.org](http://www.ilo.org) accessed on the 21<sup>st</sup> of August 2013.

<sup>199</sup> (CCT9/97)[1997] ZACC 12;(11) BCLR 1489; 1998(1) SA 300( 7 October 1997) available at [www.saflii.org.za](http://www.saflii.org.za) accessed on the 15<sup>th</sup> of November, 2013.

*fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner”.*<sup>200</sup>

Affirmative action under the laws of South Africa is seen as the process of achieving the equality of all South African citizens in the long run. Affirmative action was introduced as a measure against the effect of apartheid. This became necessary as the disparity between the blacks and non-blacks was significant. Section 9 of the Constitution of South Africa provides for equality of all citizens. Affirmative action is a means of restitution for black people. However it has been argued that this affirmative action provision ought to have a sunset clause.<sup>201</sup> This means that there ought to be a specific time frame wherein which the affirmative action is enforceable especially as regards the blacks.

Chapter three of the EEA deals with affirmative action. This chapter applies to only designated employers, this means that this chapter is not generally applicable. Designated employer means<sup>-202</sup>

- a) *An employer who employs 50 or more employees*
- b) *An employer who employs fewer than 50 employees but whose turnover in any given year exceeds the limits laid down in schedule 4 of the EEA*
- c) *Municipality as referred to in chapter 7 of the Constitution*
- d) *An organ of state as defined under section 239 of the Constitution, but excluding local spheres of government, the National defence force, the National Intelligence and the South African Secret Service; and*
- e) *An employer bound by collective agreement in terms of section 23 or 31 of the Labour Relations Act which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.*

The members of these groups are the beneficiaries of affirmative action in South Africa. Though the issue of the identification of beneficiaries of affirmative

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<sup>200</sup> Ibid.

<sup>201</sup> Dupper op cit (fn 175) p 131.

action in the South African workplace was left vague by the Constitution, the EEA identifies black people, women and persons living with disability as potential beneficiaries of affirmative action in the workplace.<sup>203</sup> By virtue of section 1 of the EEA, black people consists of Africans, Coloureds and Indians. The question of the criteria to determine beneficiaries of affirmative action in the workplace has been widely debated in South Africa.<sup>204</sup>

According to Bentley & Habib, race is usually used as a criterion over gender and disability, and African over coloured and Indian.<sup>205</sup> In a plethora of cases from the courts, race plays a major role to determine beneficiaries of affirmative action.<sup>206</sup> In *Naidoo v. Minister of Safety and Security*, race and sex was used to determine the beneficiary status of the applicant.<sup>207</sup> The court further held that the EEA did not provide for disparate treatment of members of a designated group on the basis of the disadvantage suffered in the past within and between the designated groups, nor does the Act recognise the notion of multiple disadvantages. Affirmative action was introduced as a measure to correct past discrimination suffered by members of the designated group. Unfortunately as held by the court in *Naidoo's* case, the EEA deals with the discrimination suffered by members of the designated group broadly without considering the subgroups within this broad group who might have suffered multiple disadvantages.

The issue of the identification of the beneficiaries of affirmative action in South Africa is complicated. This is as a result of the fact that there exist subsets

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<sup>203</sup> Ockert Dupper 'The Beneficiaries of Affirmative Action' *Equality in the Workplace; Reflections from South Africa* Dupper and Garbers(EDS) p 302.

<sup>204</sup> Ibid.

<sup>205</sup> Bentley & Habib 'Racial Redress, National Identity and Citizenship in Post-apartheid South Africa' *Racial Redress and Citizenship in South Africa*(HSRC 2008).

<sup>206</sup> See *Naidoo v. Minister of Safety and Security* 2013(3) SA 486, *Munsamy v. Minister of Safety and Security* 2013 7 BLLR 695(LC).

<sup>207</sup> 2013(3) SA 486

within the members of the designated groups who have suffered varied degrees of discrimination in the past. As an example, women are members of the designated group under the EEA. A white woman and a black woman of the older generation suffered varied degrees of discrimination. The white woman was probably only discriminated against on the basis of her sex while the black woman was discriminated against on the basis of her sex and race. Treating them alike would lead to more disparity. Thus it is imperative that the issue of classification and criteria to determine beneficiaries be clarified by both the government and the courts.

Categorization can be used as a means to determine beneficiaries of affirmative action. Categorization is the external classification of people into groups based on certain characteristics.<sup>208</sup> These characteristics could be sex, race, forms of disabilities etc. The advantages of categorization lies in the fact that it's a relatively simple approach, this approach can be easily monitored and finally this approach is based on the fact that group based wrong can only be dealt with under means of group based remedy.<sup>209</sup> Thus categorization can be a means of dealing with the identification of beneficiaries of affirmative action in South Africa. In addition, other jurisdictions like Europe and the United States can be looked to for guidance in dealing with the issue of beneficiaries.

In order to enforce affirmative action, affirmative action's measures are provided for in section 15. These measures mean employment policies and practices aimed at ensuring equal employment opportunities and equitable representations of qualified people from the designated groups in all occupations and occupational levels in the workplace. Affirmative action is not seeking to foist unqualified people on the employment thus the use of the words

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<sup>208</sup> Richard Jenkins 'Categorization: Identity, Social Process and Epistemology' (2000) *Current Sociology* 4 at 20 available at [www.csi.sagepub.com](http://www.csi.sagepub.com) accessed on the 24<sup>th</sup> of February, 2014.

<sup>209</sup> M McGREGOR *The Application of Affirmative Action in Employment Law with Specific Reference to the Beneficiaries: A Comparative Study* PHD (UNISA) 2005 3-5.

“*suitably qualified people*”. To ensure that the affirmative action measures are applied appropriately the Act provides for an Employment Equity Plan.<sup>210</sup>

The Commission for Employment Equity is provided for under section 28 of the EEA, unlike other similar commissions; this commission only acts in an advisory role to the minister of labour. The commission does not have enforcement or investigative powers. The commission which comprises of nine members who are stakeholders in the labour sector holds public hearings and issues out report.

The enforcement powers of the EEA lies in the Labour Court and Department of labour inspections<sup>211</sup>. The court can make any appropriate order as it deems fit in the circumstance. These powers of the court are wide and make it easy for the court to decide each case subjectively.

South Africa’s legal system provides for anti-discrimination in her Constitution and the Employment Equity Act provides specifically for anti-discrimination in the workplace. This shows that constitutional guarantees against discrimination might not be sufficient; there is need for further statutory protection against discrimination in the workplace.

#### **4.5 Affirmative Action in India**

The Caste system though basically found in India is equally known to some parts of Asia and Africa.<sup>212</sup> This system forms the social basis of affirmative action in India.<sup>213</sup> The caste system is believed to have been a part of

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<sup>210</sup>Section 20.

<sup>211</sup> Section 50.

<sup>212</sup> In Nigeria, among the people of the eastern part of Nigeria; there exist a caste system known as the “Osu Caste”. The members of this caste were the lowest member of the Eastern society and they were not allowed to mingle in any way with other members of the society.

<sup>213</sup> Ashwini Deshpande ‘Affirmative Action in India and the United States’ Equity & Development World Development Report 2006 Background Papers.

the Indian social system for as long as over 2500 years ago.<sup>214</sup> The caste system has been through different changes from the ancient “varna” system to the contemporary “jati” system.<sup>215</sup>

India was the first country to use affirmative action and quotas in the world to achieve equal representation of caste in government jobs.<sup>216</sup> The history of affirmative action in India can be traced back to the nineteenth century when movements were organised to reduce the powers of the Brahmins.<sup>217</sup> Though the Brahmins constituted a minority, they occupied all the positions reserved by the British for the Indians. These movements constituted a pressure group for the inclusion of other tribes in the reservations of employment by the British. By the early to mid-21<sup>st</sup> century the idea of “untouchables” had become part of the consciousness of the Indians. Then began the call for legal measures to end the discriminations suffered by other tribal groups. The term “untouchables” came as a result of the avoidance of all forms of social interactions with the tribes at the lowest level of the caste system.<sup>218</sup> As a result of their position at the bottom of the ladder the untouchables were not only the poorest of Indians but they were also at the receiving end of discrimination, oppression and violence.

In 1850 under the British rule, the Caste Disabilities Removal Act of 1850 was enacted.<sup>219</sup> This legislation abolished all the rights affecting persons converting to another religion or caste. The provisions of this Act have been

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<sup>214</sup> Ibid.

<sup>215</sup> Ibid.

<sup>216</sup> Kamala Sankaran ‘Discrimination in the workplace’ available at [www.southasia.ox.ac.uk](http://www.southasia.ox.ac.uk) accessed on the 25<sup>th</sup> of September, 2013.

<sup>217</sup> Weisskopf op cit (fn150) p 10.

<sup>218</sup> Deshpande op cit (fn 213).

<sup>219</sup> Also Act XXI of 1850.

affirmed by the courts in India. In *Mohan Lal v. Smt. Shanti Devi and others*,<sup>220</sup> the court held that the underlying idea of section 1 of the Caste Disabilities Act is “*exclusion from any religion or caste should not inflict on any person forfeiture of rights or property or impair or affect his right of inheritance*”. This Act still remains in force in India.

India attained her independence from the British in 1947. The issue of positive discrimination was part of the discussion in the course of the draft of the Indian Constitution. The 1950 Constitution had for the first time in the history of independent India, constitutional basis for positive discrimination in favour of the backward groups. Thus over the years positive discrimination in relation to the “untouchables” has become firmly entrenched the Indian Legal Framework. Affirmative action was introduced to compensate the “untouchables” for centuries of discrimination. Thus affirmative action in India became known as “compensatory discrimination”.<sup>221</sup>

Equality and liberty are two words that are mentioned in the preamble and body of the Constitution of India. Equality could be negative or positive: equality could be achieved by removing inequality.<sup>222</sup> This is seen in the abolishing of “untouchables” under the Constitution of India to show the equality in status of Indians.<sup>223</sup>

Given the diversity of India as a country, its constitution made provisions for the equality of all Indians.<sup>224</sup> Article 14 of the Constitution provides “**Equality before law.**—*The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India*”. Article 15 goes

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<sup>220</sup> Reported in AIR1964ALL21, case no: Second Civil Appeal No. 558 of 1956. Available at [www.Legalcrystal.com](http://www.Legalcrystal.com) accessed on the 3<sup>rd</sup> of September.

<sup>221</sup> Weisskopf op cit (fn 150) p 10.

<sup>222</sup> GP Verma *Caste Reservation in India* p 3.

<sup>223</sup> Article 17 of the Indian Constitution.

<sup>224</sup> This diversity is based on caste, religion, language, cultural and ethnic differences.

further to state some grounds of discrimination that are not lawful. It provides thus “**Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.**—(1) *The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.*

(2) *No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—...*”. The above articles of the Indian Constitution bring to light the multi-layered conception of equality in India’s legal system.<sup>225</sup>

Non-discrimination and equality has been one of the ways by which India in spite of her diversity has been able to provide equal opportunity to public facilities and employment. Article 16 provides thus “**Equality of opportunity in matters of public employment.**—(1) *there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.*

(2) *No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.*

(3) *Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment”.*

The provisions of Article 16 unequivocally assure all Indians of their equal access to employment. No Indian will be discriminated against on any of the grounds of discrimination listed in Article 14. Verma is of the opinion that Article

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<sup>225</sup> Kamala Sankaran ‘Towards Inclusion and Diversity: India’s Experience with Affirmative action’ *Equality in the workplace: Reflections from South Africa and Beyond*. Dupper and Garbers. P 286.

16 only guarantees equal access to employment not to employment itself.<sup>226</sup> This principle of equality has some reservations under the Constitution.

Article 16(4) provides: *“Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State. (4A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State”*. In Indian jurisprudence, the words “special provisions” and “reservations” are used in place of the word “affirmative action.”<sup>227</sup> For these provisions to apply two conditions must be fulfilled:

- I. The class of citizens must be backward socially and educationally
- II. This class must not be adequately represented under the state.

It appears from the wordings of Article 14(4) and (4A) that both conditions must be fulfilled.

The Indian Constitution did not define term “backward class of citizen”. This could be problematic in terms of the application of affirmative action. This lack of definition led to bitter exchanges between parties that participated in the drafting of the 1950 Constitution. Verma feels the use of the words “caste” and “backward class of citizen” is confusing.<sup>228</sup> But citizens who are not part of the caste named in the schedule of the Constitution might be able to claim the privileges associated with being backward, thus making the application of affirmative action much wider in India. The criterion for the application of

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<sup>226</sup>Verma op cit (fn 222) p 10.

<sup>227</sup>Sankaran op cit (fn 225) p 287.

<sup>228</sup> Verma op cit (fn222).

affirmative action by virtue of backwardness is determined in the country as a whole by the use of empirical studies.<sup>229</sup>

The backward class of citizens include the comprised schedule of caste as found in the Constitution, scheduled tribes and other backward classes.<sup>230</sup> Marc suggested that income, education and permit for residence be used to determine backwardness.<sup>231</sup> The government is bound to make reservations for citizens in the category and they include women. As women are viewed as chattels in India, making them some of the poorest in the society with exposure to discrimination and violence.<sup>232</sup> Affirmative action is equally applied to women and children.

Affirmative action is available only for jobs in the state and public sector enterprises where the government owns the major shares. This means that affirmative action is not relevant in the private sector where a significant portion of Indians work.<sup>233</sup> Therefore the demand for the participation of the private sector in the use of affirmative action is steadily gaining ground in India.<sup>234</sup> The basis of affirmative action in India is to compensate those that have been discriminated against for years, hence the term “compensatory discrimination”.<sup>235</sup> Affirmative action measures are seen as the way to ensure

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<sup>229</sup> Sankaran op cit (fn 217).

<sup>230</sup> Sankaran op cit (fn 225) p 287.

<sup>231</sup> Aruna Papp ‘Why women in India are Chattels?’ *C2C Journal*. Available at [www.c2cjournal.ca](http://www.c2cjournal.ca) accessed on the 4<sup>th</sup> of September, 2013.

<sup>232</sup> Marc Galanter ‘Competing Equalities: Law and Backward Classes in India’ P 3. Available at [www.marcglanter.net](http://www.marcglanter.net) accessed on the 4<sup>th</sup> of November, 2013.

<sup>233</sup> ‘Economic Survey 2010-2011 Statistical Appendix’ available at [www.indiabudget.nic.in](http://www.indiabudget.nic.in) accessed on the 23<sup>rd</sup> of January, 2014.

<sup>234</sup> Sankaran op cit (fn 225) p 287.

<sup>235</sup> Papp op cit (fn 231) p 1.

that people that were formally discriminated against now have the opportunity of employment thus making them more economically useful.

The application of affirmative action in India is not without its problems. There has been the problem of the identification of the beneficiaries of this measure. Despite there being a lot of Backward Class Commissions,<sup>236</sup> methodology and data gathered by these commissions have been controversial. Another problem is the issue of what criteria should be used to determine “backwards” should the word “caste” be used to determine this? Kamala Sankaran feels that “caste” should be the starting point.<sup>237</sup> The time frame of affirmative action and its effectiveness to reduce inequalities has not really come up for discussion in the courts in Indian, thus making it difficult to assess the effectiveness of these measures.

#### **4.6 Conclusion**

A discussion of anti-discrimination laws and affirmative action measures in South Africa and India was necessary. It indicates the effect of the history of a nation on her legal system. This significantly affects the way the legislature enacts law and how the judiciary interprets the law. This discussion has brought to the fore, the manner in which developing countries with peculiar history have dealt with discrimination. However, it is important to ensure that in the bid of compensating a marginalised group for past discrimination; discrimination is not perpetuated on the dominant group such that the tables would be turned some few years later.

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<sup>236</sup> There have been different commissions like the Kalelkar Backward Commission which was the first backward commission to be established, Mandal's Backward Commission, The All-India Seminar on Backward Commission to the current National Commission for Backward Classes which is a statutory body created by an Act of Parliament. Available at [www.ncbc.nic](http://www.ncbc.nic) accessed on the 4<sup>th</sup> September, 2013.

<sup>237</sup> Sankaran op cit (fn 225) p 293.

## **Chapter Five: Recommendations and Conclusion**

### **5.1 Introduction**

The first and second chapters of this thesis discussed discrimination, the concepts of equality and affirmative action. The third chapter identified and criticised the legal and regulatory framework of labour relations in Nigeria. In addition to this, the gaps in these statutes were pointed out in relation to discrimination in employment. Chapter four evaluated comparative law and international standards as it relates to equal opportunity and discrimination the workplace. Some international Conventions and the legal framework of South Africa and India were considered as a guide. As a result of the findings in the aforementioned chapters, it is imperative that some recommendations be made towards the enactment of an equal opportunity Act in Nigeria.

### **5.2 Recommendations**

The use of both formal and substantive forms of equality will aid in the achievement of equality for all employees in the workplace. Formal equality ensures that everybody is treated equally without any form of discrimination. Substantive equality is more concerned about the achievement of equal outcomes. This implies that those that have suffered a form of discrimination in the past which puts them at a disadvantage in the workplace would be treated more favourably as balance to ensure equality for all. My recommendations takes into consideration both formal and substantive equality.

#### **5.2.1 Introduction of an Equal Opportunity Employment Legislation**

The provision of section 42 of the Constitution which provides for the right of every Nigerian against discrimination is insufficient to deal with the various forms of discrimination experienced by Nigerians in the workplace. This assertion has been reiterated throughout this thesis. Prevention and protection against discrimination in the workplace can only be achieved by the introduction of formal and substantive equality principles. It was said that *“the constitutional enactment is a shield, but the victim of discrimination needs a sword as well.*

*The sword is legislation that forbids discrimination*".<sup>238</sup> This legislation must be a separate statute that prohibits discrimination in the workplace. The anti-discrimination provision in the Constitution is insufficient for this. What is needed is an extensive anti-discrimination statute that ensures equal opportunity for all Nigerians and affirmative action for members of the vulnerable groups.

This proposed statute would regulate the workplace and all forms of discrimination therein. This would send a positive signal to all categories of employees that the government is interested in ensuring that their right to dignity of person is not breached. The proposed statute should include a definition of discrimination which encompasses employment practices and policies. In addition, the definition should be vague enough to give room for new forms of discrimination that might emerge in the workplace. The South African Employment Equity Act could serve as a guide for this.

The UN has opined that the higher the rate of inequality between women and men, the more a country experiences unequal distribution of human development which in the long term impacts on the economy of the country.<sup>239</sup> According to the World Bank, women make up 49.36 of the population of Nigeria.<sup>240</sup> This figure shows the importance of ensuring gender equality. Nigeria needs to pursue a gender sensitive law, support women legal organisation and use quotas to boost the representation of women in key areas of the labour sector. In addition, there should be a yearly compilation of data once the above conditions are put in place to monitor the progress of Nigeria towards achieving gender equality in the workplace.

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<sup>238</sup> WS Tarnopolsky 'The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada' (1968) 46 Can. Bar Rev. 565 cited in DJ Bellamy, JH Pammett and DC Rowat *The Provincial Political Systems: Comparative Essays*. Available at [www.books.google.co.za](http://www.books.google.co.za) accessed on the 20<sup>th</sup> of September, 2013.

<sup>239</sup> Available from [www.un.org/womenwatch/directory/statistics](http://www.un.org/womenwatch/directory/statistics) accessed on the 19th of November, 2013.

<sup>240</sup> Available from <http://data.worldbank.org/indicators> accessed on the 21<sup>st</sup> of November, 2013.

Nigeria should take a cue from South Africa by making part of her legal framework, formal and substantive approach in dealing with discrimination in the workplace. The basis for the formal approach is aptly captured by Article 1 of the Declaration of Human Right. It provides inter alia that all men are born free and equal in dignity and rights. This means that in terms of access to employment all Nigerians, as long as they are qualified will be given the same opportunity. Nobody will be discriminated against on any ground like gender, age, disability, ethnicity, political affiliations, religious views, sexual orientation and any other ground that might be used. In this formal approach, grounds of discrimination as will be enacted in employment laws would protect employees against unfair discrimination. This would in no way foist any employee on an unwillingly employer, rather it would ensure that the process of employment is fair to all. Thus in the long run removing the nepotism that exists in the workplace.<sup>241</sup>

### **5.2.2 Amendment of the Federal Character Commission Act**

The federal character principle which is the closest Nigeria has to affirmative action needs to be improved. Presently, this principle only regulates federal government jobs using ethnicity as a criterion. Though ethnicity is used, it is the three major ethnic groups in Nigeria that basically benefit from this principle.<sup>242</sup> This leaves out the remaining over 200 ethnic groups. The Federal Character Commission Act should be amended to reflect affirmative action towards minority tribes. Preference towards minority ethnic groups should be according to a quota system which should reflect the multi-ethnic characteristic of Nigeria. This quota system should be aimed at achieving realistic targets. The determination of these targets can be developed by means of empirical studies.

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<sup>241</sup> Olatunji Eniola Sule and Elizabeth I Ugoji 'Impact of Personal Recruitment on Organisational Development: A Survey of Selected Nigerian Workplace' *International Journal of Business Administration* Vol 4, No 2; 2013. Available at [www.sciedu.ca/ijba](http://www.sciedu.ca/ijba) accessed on 20th September, 2013.

<sup>242</sup>The ethnic groups are Igbo, Yoruba and Hausa.

India as an example uses empirical studies to determine those entitled to affirmative action.

Furthermore, this principle should not be restricted to just federal government jobs, as this leaves out state government, local government and the private sector. This principle should be applied to a certain extent in the private sector. The private sector includes any self-employed person or any employer of labour that is not part of the government or any public enterprise.<sup>243</sup> This includes all financial institutions, business organizations, firms and companies not owned by the government. The current economic policies of the Nigerian government have had positive impact on the accelerated growth of the private sector.<sup>244</sup> Despite this, the Labour Act has not been amended to commensurate with the progress of the private sector which is fast becoming the major employer of labour. It is thus imperative that the principle of federal character be amended to include private employers in its application.

### **5.2.3 Provision of Affirmative Action for members of the Vulnerable Groups**

The Constitution of Nigeria does not provide for affirmative action properly so called. The formal approach in dealing with discrimination, though it ensures equality does not take into consideration the peculiarities of the different categories of people, hence substantive approach. Therefore, affirmative action is one of the medium by which substantive equality is achieved.<sup>245</sup> This approach arose out of the perceived need that treating members of the vulnerable groups equally with other members of the society might not ensure equality for them. The first chapter of this thesis, dealt with data which shows the extent of the

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<sup>243</sup> AO Oyeranti 'Conceptual and theoretical Issues in Private sector-led.' cited in Monday Osemeke 'Problems and Prospects of Private Sector Organizations in Nigeria' (April 2011) *International Journal of Business and Management* Vol 6, No 4; available at [www.ccsenet.org/ijbm](http://www.ccsenet.org/ijbm) accessed on the 21<sup>st</sup> of September, 2013.

<sup>244</sup> These policies includes the establishment of the Nigerian Investment Promotion Commission and the National Economic Empowerment and Development Strategy (NEEDS).

<sup>245</sup> Ibid 9.2.1.

disparity between women and the disabled on one hand and men on the other hand. Thus for equality to be achieved, women and persons with disability as well as members of ethnic minorities would need to be treated differently. Affirmative action does not encourage incompetence rather it ensures that suitably qualified members of the vulnerable groups are treated preferentially in the course of employment. Affirmative action is hinged on the fact that mere enactment of equality legislation might not be sufficient to eliminate the effect of the discrimination shown to a historically marginalised group, hence the need for affirmative action to truly enhance equality of opportunity in employment.<sup>246</sup> Based on statistical evidence as shown in chapter two, there is the need for affirmative action to be introduced for women and persons with disability for there to be true equal opportunity. This is because the use of only formal equality measures would still be discriminatory as the basis for this concept of equality is that likes are treated alike.

One of the major arguments against affirmative action as applied in South Africa is the fact that the provision of affirmative action as a sunset clause ought to have a time limit for its application. Unfortunately, this is not provided for under the Employment Equity Act of South Africa. In Nigeria, a time frame should be applied to the application of affirmative action as this would enable the government to determine to what extent equality has been achieved and when affirmative action as applied to a particular group of people can be put to an end.

Another major challenge faced by South Africa and India is the issue of beneficiaries of affirmative action. The identity of beneficiaries in both countries is not properly clarified. Though Nigeria does not have this problem currently, the application of affirmative action in her workplace will certainly birth the question of who should be beneficiaries. There is the need to properly lay guidelines to determine beneficiaries such that the equality of all persons will be

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<sup>246</sup> Ibid 9.2.1.

protected. This issue of beneficiaries is a compliance matter for further research and reflection.

#### **5.2.4 Domestication of Relevant International Conventions**

The Discrimination (employment and opportunities) Convention and other relevant international treaties which Nigeria is a party to should be domesticated into the national law of Nigeria. The courts of law in Nigeria will not apply an international convention, unless the parties in that matter can prove that the convention has been domesticated.<sup>247</sup> This is a huge obstacle to the enforcement of international labour standards in Nigeria, as employees remain at the mercy of the employers who are free to do as they please. Hence, this convention needs to be speedily domesticated in Nigeria, so that Nigerian can partake of the benefits thereof. The process of domestication of treaties is provided in section 12 of the 1999 Constitution. The first step in this process is for the National Assembly to pass such treaties into law. This is achieved by the ratification of the treaty by the majority of the House of Assembly and the Senate. Once the majority ratifies the bill, it is then sent to the President for his assent; thereafter the law is enacted and becomes binding. Thus the National Assembly needs to speedily ratify international treaties that Nigeria is a party to, to enable Nigerians get the benefits of such treaties.

In addition, the compulsory domestication of all international treaties in Nigeria to have the force of law is too restrictive. Section 12 of the Constitution which provides for this domestication requirement should be amended to give room for exceptions wherein international treaties could be binding without being domesticated. Treaties that deal with fundamental human rights should fall under this exception. By having this exception, Nigerians would not have to wait for the slow process of the passage of the treaty into law by the National Assembly.

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<sup>247</sup> Registered Trustee V. Community Health Practitioners op cit (fn 146).

### **5.2.5 Strengthening of Enforcement Mechanisms**

The issue of enforcement of affirmative action and anti-discrimination legislation is of paramount importance. Currently Nigeria has a Human Rights Commission that deals with all matters relating to the protection of human rights as guaranteed by the Constitution and all other relevant international treaties.<sup>248</sup> Saddling this commission with the responsibility of ensuring equity in employment might be too burdensome. This makes it imperative that a specific commission to monitor, investigate and enforce all issues relating to discrimination in the workplace be established. Similar to other commissions in Nigeria, as an example: the Economic and Financial Crimes Commission which has the power to investigate all allegations of financial fraud, so should this commission that would ensure compliance of employment equality issues have the power to investigate any discrimination case.<sup>249</sup> The commission could also act in an advisory capacity to the Minister of labour and productivity. In carrying out this advisory function, just like the South African Commission for Employment Equity: the members of the commission will be mandated to carry out various forms of research on best practices in employment equality to ensure that the employment laws are amenable to deal with different categories of discrimination in the workplace. The commission's structure should be patterned after the tripartite structure of the International Labour Organisation. This would ensure that the interests of the government, employers and employees are adequately represented. In order to ensure accessibility to all employees, the commission could have branches all around the country.

### **5.2.6 Jurisdiction of Court**

Section 254A of the Constitution provides for the establishment of the National Industrial Court. This court has jurisdiction over all matters that relates

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<sup>248</sup> They are the African Charter, the United Nations Charter and the Universal Declaration on Human Rights and other international treaties on human rights that Nigeria is a signatory to as provided under Section 5 of the National Human Rights Commission Act as amended in 1995.

<sup>249</sup> Section 6 of the Economic and Financial Crimes Commission (Establishment) Act 2004.

to labour and employment. Thus in the event of an equal opportunity's Act the National Industrial Court will have jurisdiction. Section 7(6) of the court's establishing Act provides that the court in exercising its jurisdiction would consider international best practices. It is important that the court deals subjectively with each case that has to do with the application of affirmative action. Thus the long term aim of ensuring equality for "unequal" people would be achieved.

### **5.3 Conclusion**

In a country that is committed to democracy and the preservation of human rights, the protection and advancement of an equality right in the workplace is a necessary feature of such a country. The principles of equality and fairness should be seen in all spheres of employment in Nigeria.

It is thus imperative that the various forms of discrimination faced by different categories of Nigerians, both during recruitment and in the course of employment be addressed. The attendant bias for the stereotyping of some members of the vulnerable groups like persons living with disability, women and ethnic minorities; continues to strive. The aim of equity employment legislation is to prevent such forms of discrimination from encroaching into the workplace and laying a siege on the labour sector in Nigeria. It is however, hoped that such a change in the workplace would have a causal effect on the attitude of the society and thus brings about a societal change.

Therefore, Nigeria, as it stands on the threshold of the beginning of another century of our existence as a nation, finds itself in a unique position. The lessons of our international counterparts should prove helpful in avoiding their problems which were a consequence of discrimination in the workplace. Furthermore, the distinguished roles of the courts in South Africa and India in their application of anti-discrimination provisions and affirmative action should also provide a valuable lesson for Nigerian courts. The National Assembly having taken the initiative to expand the powers of the National Industrial Court

in section 7(6) of the NIC Act, now has the massive task to ensure that the relevant international treaties are domesticated and our Labour Act is amended to reflect anti-discrimination provisions and affirmative action.

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