

LEGISLATING WOMEN'S AFFIRMATIVE ACTION AND IT'S CONSTITUTIONALITY IN NIGERIA*

Abstract

The resistance to women based affirmative action (AA) has remained the enabling tool for perpetuation of Discrimination Against Women notwithstanding the Spirit and provisions of the Constitution of the Federal Republic of Nigeria (CFRN) 1999. The continuity of such resistance to women based "AA" reduces the said Constitution from its position as the basic law of the country particularly with reference to section 42 of the Nigeria Constitution on fundamental freedom from any form of discrimination against any person. Affirmative Action is enthroned even in the most developed countries of the world as the need arises. The current globalization has made it mandatory for countries to abide by international treaties and norms and Nigeria cannot afford to be left behind in the world developmental affairs. The propose of this discourse is to bring to bear the critical position of women based AA to Nigeria's development by eradication of any form of discrimination against the Nigerian Women of whatever class using the methodology of review of laws, cases and various literature.

Introduction

Over the years, Affirmative Action (AA) has been part and parcel of humanity donning the garb of exigencies. It is otherwise known or referred to as positive policies. It is often defined as temporary policy measures (usually by the Executive arm of government) designed to favour a disadvantaged group or reverse discrimination¹. It is aimed at remedying past discriminations. Thereby preventing a continuum of inequity and /or injustice based on gender thereby generating discrimination against women in perpetuity.

In this discourse, focus will be on espousing affirmative action vis-a-vis discrimination against women. The introduction of AA in Nigeria. The linkage between AA and provisions in human rights instruments. Whether, there is need for legislating AA to give impetus to judicial pronouncements and to accord with law as instrument of social engineering as well as agent of development. Not to be left out is inquiry into any form of legislations at whatever levels with regard to AA and women's rights issues in Nigeria.

Indeed, women all over the world have chains not just on their legs but also on their arms. These chains ought to be addressed and not ignored. Therefore, Affirmative Action involves equity for every human being. It also refers to federal character and quota system. Equity has been at the heart of many revolutions. Wars are fought for liberations. However, affirmative action is rather a subtle systematic and gradual machinery of achieving both equity and liberation without force. It is predicated on Governments' positive policies and the will to actualize such positive policies.

* **Ogugua V.C. Ikpeze** LL.B, BL, LL.M, Ph.D., FCI Arb, Senior Lecturer, Faculty of Law and Deputy Director UNIZIK Consultancy Services, as well as Staff Legal Adviser, Nnamdi Azikiwe University, Awka, Anambra State, Nigeria

¹ V.C. Ikpeze "Understanding Affirmative Action as Aid to Women's Human Rights in Nigeria" in Bar Perspectives, a Quarterly Publication of the Nigerian Bar Association (NBA) Edited by Hauwa Ibrahim, Abuja 2002 pp. 54 - 580

What is Affirmative Action

Tom Mullen defines it as attempts to make progress towards substantive rather than merely formal equality of opportunities for those groups that have been disadvantaged in the past. He further opined that it takes into account under representation and insignificant occupation of positions in the society. While examining the characteristics which have been basis for discrimination²

Buchan Love invoked the image of running a race and stated thus:

If race has started between two runners, and one is shackled, that by simply removing the chains and allowing the runners to continue is insufficient because one runner must be moved up to equal position with the other runner because to treat unequals as equals is to perpetuate inequity³.

It presupposes that except the upward movement is affected, the shackled participant to the race is already disadvantaged notwithstanding the attainment of such a runner to the category of the famous Nigerian sprinter, Innocent Egbunike⁴

- Affirmative Action (AA) refers to policies that take care of race, ethnicity or gender into consideration in an attempt to promote equal opportunity in employment, education public contracting and health programme⁵
- It is a policy project aimed at countering discrimination against minorities and women, especially in employment and education⁶.
- Again, it means positive steps taken to increase the representation of women and minorities in areas of employment, education, and business from which they have been historically excluded⁷.
- It is a policy or programme that seeks to redress past discrimination through active measures to ensure equal opportunities as in education and employment.⁸

Origin and Legality of Affirmative Action

Affirmative Action has its roots in the Civil Rights Movement in the United States of America⁹ whereby President John F. Kennedy by Executive Order 10925¹⁰

² Quoted by K. A. Shetting in his paper "Gender Based Affirmative Action" at Gender And Development Action (GADA) Conference held in Abuja 2001 p. 2

Mr. Shetting was then the Country Director of MacArthur Foundation in Nigeria.

³ *Ibid* p. 3

⁴ Of the 1980 fame

⁵ C. Jaffeclot, India's Silent Revolution, the Rise of Lower Caste in Northern India, 2003 p.321.

⁶ Of the 1989s' fame.

⁷ <http://on.wikipedia.org/wiki/affirativeaction> accessed 7/7/11

⁸ The Encarta Dictionary

⁹ A Robert, Affirmative Action. The Standard Encyclopedia of philosophy, Summer, 2009 p. 15

¹⁰ In March 1961. However that order did not advocate group differential treatment but only targeted elimination of discrimination *simpliciter*.

established the President's Commission on Equal Employment Opportunities Order which provided that:

Contractors doing business with the American government will take affirmative action to ensure that applicants are employed and employees are treated during their employment without regard to their race, colour or national origin¹¹.

By 1964, affirmative action was solidified by the Civil Rights Act¹². It is noteworthy that the Act was sponsored by Senators Joseph Clark and Clifford Case. The question is how any of our Law Makers can boldly fight for gender affirmative Act? More proactive is President Johnson's 1965 Commencement Speech which emphasized equality of opportunity by a more active interpretation of affirmative action that would ensure equality as a result. That is rather than mere rhetoric. It yields Executive Order 11246 on further assistance (USA) gainful employment. The United States of America Equal Employment Opportunities Commission (EEOC) was strengthened by the Equal Employment Opportunity Act of 1972. The USA affirmative action policies have been supported by landmark cases like **Brown v Board of Education**¹³ where the United States of America Supreme Court held as discriminatory the practice that encouraged separate schools for Blacks and White based on race **Griggs v Duke Power Co**¹⁴ where the USA Supreme Court adopted the disparate impact concept of discrimination as the theoretical framework for enforcing Title VII of the Civil Rights Act of 1964 and the Court unanimously held that an aptitude test and high school graduation requirement used by a company for employees selection were unlawful because it had a disparate racial impact as the races then did not have equal opportunities in the assessment of education information.

In **Union California v Bakke**¹⁵, secondly the Court had two decisions firstly it held that the affirmative action policy that will deny Allan Bakke – a white boy right to admission despite his high scores discriminated against him and supported his admission (supra) though the US Supreme held that the state compliance interest in favour of the Minority must continue so as to diversify education. Up till date, the USA intermittently enunciated AA to remedy any given disadvantaged position as seen in the 1994 Federal Communication Commission (FCC) affirmative action to assign 1000 of 2000 new radio licences for small Businesses for the Minorities so as to address rapidly growing pocket size phones, pagers and hand held computers.

Interestingly small companies owned by Women or Minorities could receive up to 60% discount on the cost of the licences and the benefit were estimated to be at the cost of \$10 billion¹⁶ which ought to be to the owners of the small business.

¹¹. <http://www.answers.com/topic/affirmative-action> accessed 2/8/2011

¹². By that 1964 Act Title VII gave support to the 1961 Order 10925 with particular reference to treat preferentially groups based on race colour, sex, religion and national origin. It is now education.

¹³. [1954] 347 US 483, 74 S. Ct 686, 98 L. Ed. 873

¹⁴. 1971 quoted in <http://www.answers.com/topic/affirmative-action#Uixzzlwkji/3kdn>

¹⁵. [1978] 438 US 265, 98 S Ct 2733, 57 L. Ed 2d 750

¹⁶. <http://www.answers.com/topic/affirmative-action> accessed 8/1/2011

It was as a result of the 1960s Civil Rights Organizations Movement which the emergence of two groups; the National Association for the Advancement of Coloured People (NAACP) and National Organization of Women (NOW). The groups pushed for more pragmatic programme that must go beyond mere equality to focus on victims¹⁷ of long term racial and gender base discrimination.

The Legality of Affirmative Action in Nigeria

The modes of creating affirmative action can be by:

- (a) Executive orders and implementation regulations,
- (b) Legislative enactments and
- (c) The Judiciary – (Courts).

In realty, different forms of affirmative actions have been practiced in Nigeria since the colonial rule. They are based on nationality, ethnicity and geographical spread. These early 'AA' benefited the elite men thus they were not seen as laced with problems.

For instance, the indigenization and Nationalization Policy of 1972/1973 sort to remedy the colonial era domination of the Nigeria economic sector by the expatriate companies. One such company was the United Africa Company (UAC). In the 1930's, the UAC controlled more than 40 percent of Nigeria's import and exports. Later on, six European firms formed what was known as the Association of West African Merchants. They controlled 66 percent of Nigeria's imports and nearly 70 percent of her exports. These controls were consolidated by the virtual monopoly of the banking sector by 2 British banks – The Barclays Bank and Bank of British West Africa where Nigerian entrepreneurs could not easily secure loan to compete with the foreign firms

The situation was discriminatory and was roundly condemned by the emergent indigenous firms. This resulted in special encouragement and support by the Nigerian Military Government 1972/1977 with the enactment of the Nigerian Enterprises Promotion Decrees. Incentives and more control were thereby given to Nigerian entrepreneurs. Behind these policy events were the indigenous group, the Lagos Chamber of Commerce.

In the 1972 Decree, Ownership of Nigerian businesses were classified into 3 categories. Firstly there is the 100 percent ownership, followed by 60 percent and then 40 percent even banks names were changed. Having known that the beneficiaries were Nigerian elite men. Are those not affirmative actions in favour of Nigerian men? It is noteworthy that it was applauded by Nigerians because it was seen as means of employment and development of the country. One may pause to ask, why are the men so unsettled with affirmative action police that seek to empower the women folk by removing entrenched discriminatory practices in all spheres of lives of the Nigerian women. Moreso, when it clearly smirks of violence against the women. All hands must be on deck to mete justice to the women by affirmative action.

Again, during the Colonial period, the Nigeria civil service was dominated in the upper bracket by expatriate civil servants, while Nigeria citizens were employed as

¹⁷. B. Schwatz, **Behind Bakke: Affirmative Action and the Supreme Court**, New York, New York University Press, 1988 p.3

assistants and paid much lower: These discriminatory practices led to protest by trade unions, civil servants and nationalist political parties. As a result, the colonial government implemented a deliberate policy of Nigerianization whereby expatriate members of staff were gradually replaced with Nigerian.

In the regions, governments also introduced discriminatory policies to favour their “sons of the soil” of great popularity is the policy of Northernization. That is the North for the Northerners. It was designed to replace as rapidly as possible expatriates and Southern Nigerians in the Northern civil service with qualified Northerners. This policy states that in recruitment – Northerners are to be employed first. Expatriates second and Southern Nigerians last. This removed open recruitment totally as open recruitment was seen a perpetuating the disadvantageous position of the Northerners who in the past enjoyed fewer educational opportunities and therefore lacked the formal qualifications that others possessed.

Visible Gender Based ‘AA’ was introduced in Nigeria only in the year 2000, Federal Government of Nigeria under General Olusegun Obasanjo formulated a National Policy on women¹⁸. This policy is extensive, covering all aspects of women’s rights. It will be discussed later. However, it was premised on two major human rights instrument. The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁹

The Introduction of ‘AA’ into Nigeria

There is no doubt that AA has long been introduced and practiced within the shores of Nigeria in economic and political spheres. Initially, under colonial rule whereby it focused on improving the male gender. Now, the focus is on women as the inequality between men and women in relation to economic, social and political emancipation seem to increase negatively the power play and boost underdevelopment of the nation. Thus, has remained the instrument of increased poverty and squalor in our society. For the poverty of the women folk equates to the poverty of any nation.²⁰

Affirmative Action in Nigeria ignored Women’s Issues

In reality, different forms of affirmative action have been practiced in Nigeria since the arrival of the Colonial Masters. Yet women were not carried along. This point is buttressed in the scholarly exposition of Isabela Okagbue²¹ thus the way in which men are treated becomes the measure of equality and equality is defined as being treated like men²².... This approach obscures the pervasive and systemic disadvantages that women suffer from in real life and does not allow for a questioning of the social, legal and cultural structures that are responsible for maintaining the disadvantaged position of women. It has been suggested that equality is not freedom

¹⁸ A United Nations Women’s Bill of Rights of 1979

¹⁹ The paramount regional human rights instruments of 1986.

²⁰ Reference is had to the United Nations year 2000, Millennium Development Goals (MDGs) especially MDG 3 that expects eradication of poverty amongst women indeed by the year 2015?

²¹ In women’s Rights are Human Rights, Lagos, Nigerian Institute of Advanced Legal Studies, 1996 p. 31

²² C Mckinnon, Deference and Dominance; on sex Discrimination_“quoted in **Feminist legal Theory: Readings in law and Gender** by Bartlett and Kennedy, 1991 p. 81

to be treated without regard to sex but freedom from systemic subordination because of sex²³.

Luckily, today there is growing acknowledgment of the need to incorporate gender awareness into mainstream development projects so as to take account of the different impact of development policies on men and women ... to ensure that the resulting conditions and outcome are equitable²⁴.

The Relativity of Quotas to Affirmative Action

Quotas is the proportional share assigned to a person or group of persons. It is also an allotment like in the Joint Admission Metrication Board (JAMB) University quotas like the catchments area allotment or the educationally disadvantaged states quotas. Again it is a quantitative restriction: a minimum or maximum. That is a number which must either be met (minimum) or a number that will never be exceeded (maximum). Therefore, quota is a measure of upliftment to a position already attained by others. Conversely, the affirmative action that had been implemented in Nigeria sought to redress imbalance, discrimination and under representation since the 1970's. Specifically the 1979 Constitution of the Federal Republic of Nigeria provided the concept of Federal Characte²⁵ which remained part of our national discourse and practicalised till date, though it is deficient because it did not take into cognizance gender balance. Based on that, quota application to the feminine gender has suffered negatively as seen in **Badejo v Federal Minister of Education**²⁶ where the (Plaintiff /Appellant who sued through her father) scored highly at the Unity School examination but was denied admission because of geographical quota. However the Appeal Court held that the interview was over. That decision was affirmed by the Supreme of Court of Nigeria.

The Constitution and Affirmative Action

The Constitution is without any iota? of doubt the supreme law of the country. It is the organic law and grundnorm from which and other laws are rooted. This is buttressed by its provisions:

Section 1 (1) This Constitution is supreme and its provisions shall have binding force on all authorities and persons throughout the Federal Republic of Nigeria.

Section 1 (3) If any other law is inconsistent with the provisions of this Constitution this constitution shall prevail, and that other law shall to the extent of the inconsistency be void.

With the above provisions the supremacy of the Constitution over any discriminatory Acts or customary laws that impugn the rights of any individual notwithstanding the sex is challengeable. In **Abubakar v AG Federation**²⁷ the Apex

²³ H. Charles, "Northern Feminist Approaches to International Law: Towards a Revision of Human Rights", 12 Human Rights Quarterly 1990 p. 632.

²⁴ The Commonwealth Plan of Action on Gender and Development, Commonwealth Secretariat, 1995, p. 32. By that plan of action it was hoped that by 1998 there will be at least 33% of women in professional and diplomatic staff categories.

²⁵ Section 153 (c) of the Constitution of Federal Republic of Nigeria (CFRN) 1999.

²⁶ [1996] 8 NWLR (pt. 464) 15

²⁷ [2007] All FWLR

Court emphasized the supremacy of the Constitution. Therefore, where policies are made without enabling laws, it often times remain unenforceable and hardly carried out perhaps because they are not laws *simpliciter*. Therefore, it is posited that enacting AA into positive laws is very paramount to the achievement of the goals of AA.

Furthermore, AA is a Constitutional provisions on the principles of equal opportunity and equality of all persons before the law as succinctly provided in:

17(1) The State social order is founded on ideals of freedom, equality and justice.

17(2) in furtherance of the social order

(a) every citizen shall have equality of rights obligations and opportunities before the law.

17 (3) (a) The State shall direct its policy towards ensuring that:

- all citizens without discrimination on any group whatsoever have the opportunity for securing adequate means of livelihood as well as adequate opportunity to secure suitable employment.

Instructive is the emphatic provision of

17 (3) (e) thus:

there is equal pay for equal work without discrimination on account of sex, or on any other ground whatsoever.

Therefore, if Chapter 11 of the 1999 Constitution of the Federal Republic of Nigeria, is made justiceable then the full import of AA will be addressed constitutionally and/or AA may become unnecessary as government in carrying out its constitutional duties will address any AA.

The 1999 Constitution of Federal Republic of Nigeria (FRN) and AA

The composition of the Government of the Federation or any its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the Federal Character²⁸ of Nigeria and the need to promote national unity and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from a few ethnic or other sectional groups in that Government or in any of its agencies.

The question here is: have women been considered in constituting the government at both Federal, State and Local Council levels? The answer to this question will confirm the desperate need for affirmative action with reference to the Nigerian women.

There is clear evidence that their representation is not just below expectation but non-existent in the conduct of the affairs of Nigeria. Only three areas will be emphasized in the discourse of affirmative action and the rights of women in Nigeria, viz:

1. Political Participation
2. Educational Pursuits.
3. Employment Opportunities

²⁸ . Section 153 (c) of the CFRN 1999

These aspects were carefully chosen to cover the civil, political and socio-economic rights of women.

Women and Politics

Women constitute at least 49% of the Nigerian population (1991 Census). That women have not been so represented leaves a lot to be desired. The discrimination is glaring especially when the present government promised to have at least 30% (prescribed quotas on status of women) women representative in its executive. How many women are appointed into the ministerial posts at Federal level and into the commissioner posts at various states level?

The case of Enugu State is still fresh. At the inception of the Fourth Republic, the Executive Governor of the State failed to appoint any woman into his cabinet. Women then protested, they even went to Court. This forced the governor to rethink and appoint some women into his cabinet.

The affirmative action on quotas extends even to political parties under section 223 (b) which stipulates that:

Members of the executive committee of other governing body of the political party must reflect Federal character of Nigeria.

Whether this federal character stipulation takes women into consideration is a question for all to answer.

In 1995 rotational presidency was enshrined in the Nigerian Constitution although it did not see the light of day. However, its tenets made power shift to the South possible. It followed the cancellation of the June 12 1993 presidential elections.

Women and Education

It must be noted that women here included the girl-child. Federal character is even more reflected in admissions into Nigerian Unity Secondary Schools and the Universities. Thus in the celebrated case of **Badejo v Federal Minister of Education**²⁹ a girl who scored high marks but failed to be admitted into any of the Unity Secondary Schools (Federal Government Colleges in the country). She discovered later that children who scored less gained admission depending on their places of origin and with regard to quota system. She then sued the Federal Government. The Court however, failed to develop our jurisprudence in that case. For the Court insisted that the litigant must show how she was disadvantaged based on the method of administering the Federal Government College Admissions. One may ask, has the litigant proved that she was actually disadvantaged? What would have been the position? The questions may be answered by comparing the situation with the American position on racial discrimination and the intended affirmative action pursuits to cure it in the case of **Brown v. Board of Education**³⁰. Here, the US Supreme Court declared that the segregation of children to public schools was unconstitutional. When other factors were considered that Court stated that the

²⁹ [1996] 8 NWLR (pt. 464) 15

³⁰ [1954] 347 US 183 24 S Ct 686. 98L. Ed. 873.

motivation behind the segregation was important so in the **Badejo v. Minister for Education** case the Court would have in mind the intendment of the quota provision in the Constitution. Though quota if implied here really places the girl children from certain geographical location at a disadvantage and must be remedied. The decision in **Gaston Country v. United States**³¹ where the US Supreme Court decided that racially neutral literacy test was discriminatory on the grounds that past school segregation denied African Americans equal educational opportunities is instructive on that.

Women and Employment

The employment of women in the labour market is highly discriminatory. The labour Act provides specifically for women on maternity leave in section 53 (a) which provide: right to maternity leave for women but the case of **Okunbowa v Group Consultant Nigeria & 2 Ors**³² illustrates differently. Here, her employers stated that if she goes on maternity leave she will be without pay. When she stays away for 3 months it will be treated as a breach of contract. Thus, they terminated her appointment. The Court held the termination a breach of the Labour Code which the Labour Act replaced. But in the **Ajiboye v Dresser Nig. Ltd**³³ an earlier case, the Court held differently and that the termination of her appointment a day before she was due back from maternity leaves was valid.

Other Forms of AA

Again, in the 1970's schools of Basic studies were established in educationally disadvantaged states especially in the North so as to prepare students for admission into universities.

All these policies were meant to rectify historic disadvantaged states in Nigeria. Presently, there has been a change in the education policy to catchments areas. This means that progress has been achieved on the previous AAs. The recent policy is that of catchments areas unlike previously when it cuts across geographical spread. For example, Unilag is no longer a catchment University for Anambra State students and Nnamdi Azikiwe University, Awka is no longer a catchment University for those from the North. This could be as a result of the fact that Federal Universities Polytechnics and Colleges of Education been established in virtually every State of the Federation. This means that some goals have been achieved.

This is why it is advocated that the National Policy on women be included in the Constitution or be enacted by the National Assembly. This will make way for actualization of 30% affirmative action by women representation in all affairs (governance) of Federal, State and Local Government Councils in Nigeria.

Types of Affirmative Action

Broadly, different types of affirmative action have been expressed based on the following:

³¹ [1969] USA case cited in [http://www. Answer.com/topic/affirmative-action](http://www.Answer.com/topic/affirmative-action) accessed 27/7/2011

³² [1972] CCHCJ 57

³³ [1974] CCHCJ 167

1. Politics
2. Race
3. Ethnicity
4. Religious
5. Employment
6. Business or Economy (Indigenization and Nationalization)
7. Education - Quota System of admission as well as different score based on sex of the candidate seeking admission.
8. Gender

For the purpose of this discourse, the National Policies on women in Nigeria will be of focus in the areas of employment (economic) and culture based affirmative action will be discussed.

Nigeria's Political Affirmative Action³⁴

By the time the geographical expression called Nigeria came into existence, people at the helm of the affairs of Nigeria were the British. The Queen of England ruled the colony through her agents as governors. The political affirmative action came after much agitation by Nigerian elites who have schooled abroad. To mention some of them Dr. Nnamdi Azikiwe, Herbert Macaulay, Chief Obafemi Awolowo, Dennis Osadebe and Anthony Enahoro.

With time, the Colonial Masters allowed them to participate in governing their country, especially by the 1946 Richards Constitution which introduced constitutional reforms. Whereby Northern, Eastern Regions and Western were created with a Central Legislative Council. Interesting too in government, the Executive was expanded to include two (2) Nigerians, Mr. S. B. Rhodes and Sir. Adcyemo Alakija. The Nationalist kept protesting. Several other Constitutional amendments saw to the independence of country with the characteristics of ruler ship by the Nigerian people.

Commencement of Women's Political Affirmative Action

The year 2000 witnessed the introduction of the National Policy on Women³⁵. It is a form of affirmative action. Women constitute about 50% of every nation's population but they are not so represented in politics and decision-making bodies. They are inadequately represented at the National Assembly (the Senate and House of Representatives), and at the State Houses of Assembly and the local governments councils, women are either completely absent or grossly underrepresented as well as at the highest decision making of the executive, and judicial arms of government. How can this imbalance be redressed? Since the sixties women, in the southern part of

³⁴ It is instructive as at the beginning of the geographical expression called Nigeria, the political terrain was controlled and played by the British Colonial Masters indigenous Nigeria came in when they started agitating and by Constitutional development they gradually participated from 1922.

³⁵By the then President Olusegun Obasanjo who was the first initiator of a compendium of policies on women covering the field that is all spheres of life. That policy gave hope to Nigeria Women. It has been replaced by the 2006 National Gender Policy.

Nigeria were enfranchised but their counterparts in Northern Nigeria became enfranchised in 1976. Women have always been willing to participate in politics but are often relegated to the positions of voters and praise-singers, formulating songs for the men. There were in the sixties women like Mrs. Funmilayo Ransome Kuti, Janet Mokelu, Margaret Ekpo who were very active politicians. The 70's saw women like Senator Franca Afebuwa, Maria Okwo, Oyibo Odinanmadu, Mrs. Adefarati and Janet Mokelu. This is about less than one percent representation. However, in the Fourth Republic which started in 1999, a slightly larger number of women came out from both the Northern and Southern parts of the country and ran for various posts. On the average, only about seven percent (7%) women participation was recorded. The percentage was increased slightly between 2003 to 2007 but it dropped in 2011 to about five percent (5%).

How did they fare? A cue will be taken from a research conducted in Kaduna and published by Women in Nigeria (WIN) Kaduna chapter with the help of the Independent National Electoral Commission (INEC).

An example of the 1999 position at Federal, State and Local Government Council level regarding party offices are as follows:

1. Women membership of political parties -5%
2. Female party executives – 7%
3. Women qualified as party delegates – 8%

At elected positions, women make up only about 1.6% of the total representation thus at

- | | | | |
|-----|--------------------------------|----------------------|---------------|
| (a) | Local Government – chairperson | 9 out of 774, approx | 1.2% |
| (b) | Councillors, | 143 out of 8,810 | approx – 1.6% |
| (c) | States Assembly, | 12 women out of 990 | – 13% |
| (d) | Governors, | none out of 36 | - 0% |
| (e) | House of Reps., | 12 out of 360 | - 33% |
| (f) | Senators, | 3 out of 109 | – 28% |
| (g) | Presidency | none | – 0% |

With regards to Ministers, women make up only about 18% approx. The data speaks the same for all the States of the Federation and FCT. It shows that only about 23% of women are serving in various capacities in politics and decision-making. The Presidency was unthinkable for women. It is noteworthy that of three registered political parties, there are no women executive members. Few of them were redundant ex-officio members while a few were “Women Leaders”. Could men have been women leaders? If women had been sponsored and encouraged would the result not have been different?

Factors That Hinder Women's Political Pursuits

The scarcity of women in decision-making spheres and politics in Nigeria has been attributed to a number of factors viz:

1. Socio-economic structure of our society
2. Culture

3. Character of Nigerian politics which is very hostile.

The socio-economic factor no doubt plays a great role in women involvement in politics. Women have little or no resources no money or material wealth for example land, cars, property to compete with their male counterparts.

Religion also plays a very important part in discouraging women as most religious traditions teach that the women's place is in the home or the kitchen as the case may be. There is a prevailing unequal division of labour in the household and child-care duties and negative attitudes towards women's participation in public life.

Culture definitely his one of the greatest prohibitive effects. The make belief system of politics being 'men's business' is culture oriented seen. Thus the traditional, Christian or muslim religions have the culture that women are to be led by men. This informed the notion that women cannot be good leaders. Women are made to believe this in its entirety. This is rather unfortunate and has an overwhelming hindrance factor.

Culture, includes the lack of resources for women. Men wield cultures as a means of subduing women. Men believe that culture and religion can be out grown if women are able to mobilize enough resources. Obviously money is power and power is freedom and confidence. Women, have imbibed from culture a nonchalant attitude towards politics. This can be rightly termed male-political conspiracy.

The character of Nigerian politics leaves women with little chance of getting involved in policies. Nigerian Politics is manifest in thuggery, night meetings at private homes, black mail and rigging. The question is for how long will women keep away from politics' in Nigeria?

The 2006 National Gender Policy

It was an improvement of the 2000 National Policy on Women by the Chief Olusegun Obasanjo democratic regime. Noteworthy is the fact that the national gender policy is premised on some principles aimed at entrenching affirmative action by promoting gender equality as a globally accepted development factor with particular tilt to sustainable development. For clarity, some of the key principles are hereunder stated:

- a. Commitment to gender mainstreaming as a development approach and tool for achieving the economic reform agenda, evidence based planning, value re-orientation and social transformation.
- b. Recognition of gender issues as central to and critical to the achievement of national development goals and objectives and a requirement for all policies to be reviewed to reflect gender implications and strategies as contained in the gender policy and implantation modalities specified in the National Gender Strategic Framework;
- c. Realization that effective and results- focused policy implementation demands a cooperative interaction of all stakeholders.
- d. Promotion and protection of human rights, social justice and equity.

Furthermore, over reaching institutional restructuring and increased professionalism is required in order to meet the demands of this policy document. The

efficacy of the policy strategies is contingent on a functional gender management system, while the following elements and actions are indispensable:

- Political Will
- Gender as a Core Value for Transforming Nigerian Society
- Confronting Patriarchy
- Coordinator, Networking and Monitoring
- Resource Mobilization

Legislative Protection of Gender Affirmative Actions

The legal framework of a nation is perhaps the most direct measure of its commitment to new policy initiatives. The National Policy on women having been formulated by the executive arm of government will be an incomplete exercise without the necessary legal backing, the proposed changes will remain unenforceable. The legal backing will be either by legal reforms of existing laws or by fresh legislative enactment. Recently, the National Assembly refused to domesticate the notorious women's Bill of Right – Convention on the Elimination of All Forms of Discriminations Against Women (CEDAW) 1979. It is noted that CEDAW contains all the provisions of the National Policy on Women as executively ordered by former President Obasanjo and that the enactment will enthrone Women's Human Rights in Nigeria and Women's re-positioning in the affairs of the Nation. The rationale being that lack of legislation gives room for non-implementation of even the best policies particularly if it is within the provisions of Chapter II of the 1999 Constitution of the Federal Republic of Nigeria (CFRN) which factually is where most policies that affect women reside and the Courts are limited³⁶ to pronounce on them as decided in **Adamu v Ag Bornu State**³⁷

Constitutional limits of Gender-Based Affirmative Action

Constitution of any given country is its supreme law. Often times any law in contravention to the Constitution is to the existent of its contradiction null and void.

In Chapter 4 of both 1979 and 1999 of the Constitutions of Federal Republic of Nigeria, the Fundamental Human Rights (which are basically the Civil and Political Rights) are entrenched and made justiciable. In Chapter 11 of the same constitutions the Economic Social and Cultural rights are stipulated but made non-justiciable. These rights affect women mostly in the pursuits of their human rights. Especially regarding the provisions of Section 14(1) (2) (c) (3) and (4). Affirmative Action (temporary Positive Measures of Government) is most predicated on rights whether Fundamental or Socio-economic as stipulated in Section 4 of CEDAW and other International Human Rights Instruments.

Again, the ambiguity in the provisions on quota by Federal Character³⁸ Entrenchment of Affirmative Action in the Constitution of any given State such as the Nigerian state makes its application easier and give instant authoritative legal backing to both the Private and Public sectors that will implement those policies as a matter of

³⁶. Section 6 (6) (c) of the CFRN 1999 on the non-justiciability of provisions of any part of chapter II on the Fundamental Objective and Directive Principle of State Policy.

³⁷. [1996] 8 NWLR (pt. 465) 203

³⁸. Section 153 (c)

law as shown in the US Supreme Court held that a private lessee should not discriminate against African Americans*. Again the US case of **Adarand v Pena**³⁹ the US Court held unconstitutional the affirmative action remedying past discrimination. However later in **United States v Paradise**⁴⁰ the Court ordered promotions for African Americans to remedy prior discriminatory practices meant to eradicate pervasive systemic exclusion of African – Americans. If quota can be Constitutionalised why not affirmative action for women's right? Constitutionalising affirmative action is necessary so as to protect women from actual discrimination that abound despite the provisions of section 42 of the 1999 Constitution of the Federal Republic of Nigeria and the principle of equality before the law in section 17 of the same Constitution.

It is desired that Constitutionalising affirmative action will cure some of these discrepancies and encourage claims to rights in whatever circumstance. This is also seen in some early cases decided in the US – in **Peter v Kiff**⁴¹ the US Court held that to have women subjected to registration before qualification to be appointed a Jury where no such law was applicable to the men violated the Fourteenth Amendment. This led to the Nineteenth Amendment for women employment non-discriminatory practices. For the Fourteenth Amendment was often held to be race-based affirmative action. The 19th Amendment Constitutionalised affirmative action.

In the South African 1996 amended Constitution, Section 187 provides specifically for Gender Equity Commission. It also stipulated some temporary measures (affirmative action) by the Executive arms of government. The Nigerian 2000 National Policy on Women which aimed at the achievement of 30% representation of women in all fields of endeavour was to last till 2010 indicating that it was time bound. It was hoped that the Courts will make pronouncement on them thereby legalizing the provisions of the National Policy on Women as seen in **Muokwu v Ejikeme**⁴². At times the Legislature can enact the policies into law. By that the Courts are further emboldened to address rights issues as decided in **Uke v Iro**⁴³ where the Court held that rights of all the sexes are protected by the Constitution and that any custom that makes women second class citizens is a custom fit for the garbage.

Affirmative Action is Time Bound

By definition or explanation, affirmative action remains temporary measures designed to spur a disadvantaged group especially from negative or low position. Therefore, it presupposes that at the attainment of the height, the measures will abate. The problem may be what will be the yardstick for measurement of attainment of the policies goals? Thus, there is need for established mechanisms of intermittent evaluation and re-strategizing. Therefore, frequent data collection, documentation, reports and records are key to successful affirmative action policies.

³⁹. [1986] 478 US 421

⁴⁰. [1987] 480 US 149

⁴¹. [1972] 407 US 493, 92 S ct, 2163 33 L.Ed 2D 83, see also **Hogt v. Horida** [1961] 368 US 57 82 S. ct 159 7 L.FEP Cases 733

⁴². [2000] 7 NWLR (pt. 657) 413

⁴³. [2002] NWLR (1555)

It is expected that the Courts must be alert and proactive as the intent of the Realists School of Thought lends great weight to rights issues and in fact to affirmative action. Indeed what the Courts say and nothing more pretentious are what is meant by the laws.

Great inspiration is gotten from the USA despite the criticisms of affirmative action particularly on gender based affirmative action, as well as inclusion of Minorities as seen in **Johnson v Transportation Agency**⁴⁴, where the Court held that the County Agency had not violated Title VII of the Civil Rights Act when, as part of an affirmative action a female employee gender was taken into account in promoting her ahead of a male employee with a slightly high score. The Court further held that a manifest imbalance existed in the workforce because women were under represented.

Recommendations

It must be clearly understood that legislating women's affirmative action is not strange to the Nigerian Constitutional provisions for example it is in line with section 153 (c) of the constitution on Federal Character. What needs to be done is to specifically and consciously Constitutionalize women's affirmative action by clear provisions in the constitution. That notwithstanding, it is recommended that:

- a. The women must be alert to advocate such legislations as rights issue do not come so easy. Atimes there may be need for revolution or rebellion.
- b. The executive arm of government must have the will to pursue such affirmative action policies by presenting Public Bills to the National Assembly on such policies. Thereby legalizing it for ease of application and /or enforcement.
- c. The Legislative arm of government must realize the full import of section 12(1) of the constitution and act proactively to enact laws that accord with current human rights tenets and expectations. Thus, C better the lots and lives of the Nigerian Women and by extension all Nigerians. This is because the saying that to train a woman is to train a nation equally implies that to empower a woman is to empower a nation.
- d. The Judiciary is expected to play proactive role by Judicial pronouncements that accord with 21st Century Bench globally. It is also instructive to bear in mind that the laws are what the Courts say and nothing more. That the power of interpretation of the law is geared towards equality, justice and development in accord with the year 2000 United Nations. Millennium Development Goals (MDGs) with the time bound of 2015.
- e. The men folk must view humanity in the totality of equality of men and women for any meaningful sustainable development.

Conclusion

Affirmative Action aims at remedying prior discriminatory practices or compensating past discriminatory practices or forestalling institution of any discriminatory agenda. It encourages and strives to maintain equality in the distribution of economic resources in all ramifications. In the main, it is designed to achieve in the easiest and best ways as well as shortest possible time rights denied over a period of time. The ultimate aim is geared towards justice, peace and development in any given society.

⁴⁴ . [1987] 480 U.S 616, 107 S.Ct. 1442, 94 L.Ed., 2d 615.