LAW AND GENDER: THE FORMAL EQUALITY APPROACH IN THE FEMINIST JURISPRUDENCE

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Abstract
Formal equality is the principle of treating like people alike. In determining whether people are alike and thus deserve the same treatment, formal equality demands that people be judged according to their actual characteristics rather than on their basis of assumptions or stereotypes about who the y are or who they ought to be. In the context of sex, formal equality requires the state to provide men and women the same opportunity to exercise civic responsibility, such as voting and serving in public service. Sequel to this, the aim of this article is to critically examine law and gender with respect to the formal equality approach in the feminist jurisprudence. The objectives of this article were to explore the historical foundations for women's claim to formal equality, formal equality and the constitutional right to equal protection, formal equality in employment, and state public accommodations laws and associational freedoms, as well as challenges in implementation of formal equality approach in respect of gender and the solutions to these problems. The research methodology was doctrinal approach, using expository and analytical research design. The main sources of data collection were various legal literatures, both from the physical library and the e-library. It was observed that formal equality approach requires public benefits such as social security and unemployment compensation to be available to men and women on the same terms and that property rules, tax liabilities and maintenance rules be sex-neutral. Formal equality also dictates that employers apply the same hiring and promotion criteria to men and women. It was recommended among others that affirmative action plans should be designed to increase female representative in traditionally male occupations and pay equity schemes designed to restructure wage scale. Also, women's weakness should not be overemphasizing as some women are stronger than their male counterpart. In other words, strength and capability should be taken into account and not necessarily gender to have balanced equivalent opportunities.

Key Words: Approach, Equality, Feminist, Formal, Gender, Jurisprudence, Law

1. Introduction

Formal equality applies to sex based classifications that discriminate against men, as well as those that discriminate against women. Equality for men is justified not only as a matter of fair treatment for men, but also as a means of reducing stereotypes that restrict opportunities for women. For example, a policy that gives parental leave only to women and not men deprive men of a benefit and also reinforces a domestic division of labour that penalizes women.

Some assumptions about women have a factual basis, but nonetheless, statutes or practices based on these assumptions are impermissible under the formal equality principle because they are not narrowly enough drawn women on average may be less strong than men, but not all women are less strong than all men, and thus, ordinarily, formal equality requires that individual women have the opportunity to prove that they have the strength required for a particular job. Not only fairness concerns demand this opportunity, but also the concern that limiting women's opportunities will reinforce the stereotypes on which the limitations were based.

Many of the laws and practices challenged in court are based on stereotypes about women. Some stereotypes make descriptive generalizations that overbroad or factually unsupported such as the fact that women do not have the strength or ability to work in certain jobs. Other stereotypes are prescriptive, such as the assumption that a woman's office is in the home, not the workplace. Courts have invalidated many laws and practices that were based on stereotypes and those that remain are usually difficult to justify under the formal equality principle.

Sometimes, job requirements that appear neutral may in fact rest on stereotypes. For instance, a work place may use equipment designed with the height and weight of men in mind, since the work in question has traditionally been “men's work". Similarly, an employer may require all of its employees-male and female to work from 8am to 5pm or attend evening event, but these hours may be relatively disadvantageous to women because of the greater family obligations they tend to assume. A continuing dilemma within the formal equality framework is what to do about rules and practices that are formally equal to men and women but have a disparate impact on women.

In this paper, we will be looking at the historical foundations for women's claim to formal equality, formal equality and the constitutional right to equal protection, formal equality in employment, state public accommodations, laws and associational freedom, challenges in implementation of formal equality approach in respect of gender and the solution to these problems.

(1) Historical Foundation of Women's Claim to Gender Equality

(2) Throughout this nation's history and also in other jurisdiction, the conventional view has been that women are unfit for many occupations and that their biological characteristics and reproductive role make it necessary to limit their employment. In a United States case of *Muller v Oregon*,[1] decided in 1908, upheld an Oregon

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> statute that limited the maximum number of hours women could work in a single day to ten, based largely on women's assumed physical limitations.

On February 19, 1903, the legislature of the state of Oregon passed an Act providing that it would be a misdemeanor to employ any female in any mechanical establishment or factory or laundry more than ten hours in any one day. Defendant was charged with violation of the statue for ordering Mrs E. Gotcher to work more than ten hours per day in defendant's laundry. A trial resulted in a verdict against the defendant, who was sentenced to pay fine of $10. The Supreme Court of the state affirmed the conviction whereupon the case was brought here on writ of error.

The single question is the constitutionality of the statute under which the defendant was convicted so far as it affects the work of a female in a laundry. It is the law of Oregon that women whether married or single have equal contractual and personal rights with men, yet the legislation and opinion referred to above are significant of a widespread belief that women's physical structure and the functions she performs in consequence thereof, justify special legislation, restricting or qualifying the conditions under which she should be permitted to toil.

Constitutional questions, it is true, are not settled by even a consensus of present public opinion, for it is the peculiar value of a written constitution that it places in unchanging form limitations upon legislative action, and thus gives a permanence and stability to popular government which otherwise would be lacking. At the same time, when a question of fact is debated and debatable, and the extent to which a special constitutional limitation goes is affected by the truth in respect to that fact, a widespread and long continued belief concerning it is worthy of consideration. We take judicial cognizance of all matters of general knowledge.

Still again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity has continued to the present. As minors, though not to the same extent, she has looked upon in the courts as needing a special care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence, she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against full assertion of those rights she will still be where some legislation to protect her seems necessary to secure a real equality of right.

1208 U.S. 412 (1908)

Doubtless, there are individual exceptions, and there are many respects in which she has an advantage over him, but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained; even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is co constituted that she will rest upon look to him for protection; that her physical structure and a proper discharge of her maternal functions having in view not merely her own health, but the wellbeing of the race justify legislation to protect her from the greed as well as the passion of a man.

The limitations which the statutes place upon women contractual power upon her right to agree with her employer as to the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body in the functions to be performed by each, in the amount of physical strength, in the capacity for long continued labour, particularly where done standing, the influence of vigorous health upon the future wellbeing of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens, which rest upon her.

We have not referred in this discussion to the denial of the elective franchise in the state of Oregon, for while it may disclose a lack of political equality in all things with her brother that is not of itself decisive. The reason runs deeper and rests in the inherent different between the two sexes, and in the different functions in life which they perform.

Also in another American case of *Goesant v Cleary*,[2] Justice Frankfurter delivered the opinion of the court and said as part of the Michigan system for controlling the sale of liquor, bartenders are required to be licensed in all cities having a population of 50,000 or more, but no female may be so licensed unless she be "the wife or daughter of the male owner" of a licensed liquor establishment. The case is here on direct appeal from an order of the District Court of three Judges, denying an injunction to restrain the enforcement of the Michigan law. The claim denied below, one judge dissenting could not forbid females generally from being barmaids and at the same time make an exception in favour of the wives and daughters of the owner of liquor establishments. Beguiling as the subject is, it need not detain us long.

To ask whether or not the equal protection of the laws clause of the fourteenth Amendment barred Michigan from making the classification the state has made between wives and daughters of owners of liquor places and wives and daughters of non-owners, is one of

[2] 208 U.S. 412 (1908)

those rare instances where to state the question is in effect to answer it. We are to be sure dealing with a historic calling. We meet the alewife sprightly and ribald in Shakespeare, but centuries before him she played a role in the social life of England. The fourteenth Amendment did not tear history up by the roots, and the regulation of the liquor traffic is one of the oldest and most untrammeled of legislative powers. Michigan could, beyond question forbid all women from working behind a bar. This is so despite the vast changes in the virtues that men have long claimed as their prerogatives and now drawing a sharp line between the sexes, certainly in such matters as the regulation of the liquor traffic. The constitution does not require legislature to reflect sociological insight, or shifting social standards, any more than require them to keep abreast of the latest scientific standards.

While Michigan may deny to all women opportunities for bartending, Michigan cannot play favourite among women without rhyme or reason. The constitution, in enjoining the equal protection of the laws upon states precludes irrational discrimination as between persons or groups of persons in the incidence of a law. But the constitution does not require situations which are different in fact or opinion to be treated in law as though they were the same". Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to defend group of females. other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition.

Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross examine either actually or argumentatively the mind of Michigan legislators nor question their motives since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to try to monopolize the calling, nor is it unconstitutional for Michigan to withdraw from women the occupation of bartending because it allows women to serve as waitresses where liquors is dispensed. The district court has sufficiently indicated the reasons that may have influenced the legislature in allowing women to be waitresses in a liquor establishment over which a man's ownership provides control. Nothing need be added to what was said below as to the other grounds on which the Michigan law was assailed.

Judgment affirmed:

Mr. Justice Rutledge with whom Mr. Justice Douglas and Mr. Justice Murphy joined in dissenting. While the equal protection clause does not require a legislature to achieve "abstract symmetry" or to classify with "mathematical nicety" that clause does require lawmakers to remain from invidious distinctions of the sort drawn by the statute challenged in this case.

The statute arbitrarily discriminates between male and female owner although he himself is always absent from his bar, may employ his wife and daughter as barmaids. A female owner may neither work as a barmaid herself nor employ her daughter in that position even if a man is always present in the establishment to keep order. This inevitable result of the classification belies the assumption that the statute was motivated by a legislative solicitude for the moral and physical wellbeing of women who, but for the law, would be employed as barmaids since there could be no other conquerable justification for such discrimination against women owners of liquor establishments, the statute should be held invalid as a denial of equal protection. These and others form the historical foundations for the women's claim to formal equality in Nigeria.

3. Formal Equality and the Constitutional Right to Equal Protection

3.1 The Right to Equal, Individualized Treatment

Equality claims often arise in the context in which a person asks to be treated as an individual, and without regard to membership in a particular category. The state cannot avoid categories when it makes laws. For example, the state sets age limits concerning rights to vote, drink alcoholic beverages and marry, even though maturity levels vary, because it would be too difficult to make individual determination of maturity in every case. So, too, employers' hiring decisions may depend on applicants' educational levels, years of experience, or test scores, even though these are not perfect measures of job fitness. The state is not allowed to rely on some categories, however, regardless race and national origin. These classifications are subject to strict scrutiny, achieved through other, more tailored means. The court has never held that option for the "intermediate standard of review".

In *Reed v Reed*,[3] the Supreme Court invalidated a gender classification for the first time. Sally Reed had custody of her son Richard, but his father's visitation rights had increased, as Richard got older. Richard had a troubled adolescence, involving depression and juvenile crime, and eventually he committed suicide with his father's gun. His mother blamed her former husband for the difficulties. She applied to administer his limited estate, which included only a few personal belongings (clothes, a clarinet and less than $500 in saving). The father filed a competing application, which was granted under an Idaho statute giving men a preference. In reviewing that statute, the court articulated the traditional rational basis test, but determined that the male preference was not reasonably related to the statute's objective.

In *Frontiero v Richard*,[4] the court struck down a law requiring female military personnel to demonstrate a spouse's dependency before receiving economic benefits to which married male personnel were automatically entitled. The statute assumed that all female spouses were dependent, although employment statistics at the time showed that 60 percent of all

3404 U.S 71 (1971)

4411 U.S 677 (1973)

married women living with their husbands were employed outside the home. Sharron Frontiero's husband was going through college on the G1 Bill, receiving a stipend of $205/month. The Air Force, for whom Sharron worked as an officer, refused to recognize him as her dependent, so the couple had no right to either married quarters on the base or the supplemental housing allowance available to married men. Sharron's husband was also not entitled to use medical facilities available to female spouses. While four Justices thought that strict scrutiny should be used to review gender classification in the law, this position did not get a majority of the justices' votes.

3.2 The Right to Equal Group Treatment

In *Reed and Ovr*, the state had in place a system of individualized fact finding, the only question was whether part of that fact-finding could be in administering an estate and in Ovr, a proxy for financial dependency. In both administrative burden and is likely to produce more accurate results in terms of the goals of the statutes. However, in many contexts, the state needs to draw lines to decide questions that do not lend themselves to individualized fact finding. Common examples include the right to vote, marry, drive, serve in the military and attend public schools.

In *Stanton v Stanton*.[5] This case presents the issue whether a state statute specifying for males a greater age of majority than it specifies for females denies in the context of a parent's obligation for support payments for his children, the equal protection of the laws. This case is an appeal arising from divorce proceedings following a judgment requiring the father to pay child support to the mother for a daughter and a son. The father discontinued support payments for the daughter when she turned 18, pursuant to the law, which set the age of majority for girls at 18 and the age of majority for boys at 21. The trial court denied the mother's motion for further support, which the Supreme Court affirmed.

In *Craly v Boren*,[6] The interaction of two sections of an Okiahoma Statute prohibits the sale of "non-intoxicating" 3.2% beer to male under the age of 21 and to females under the age of 18. The question to be decided is whether such a gender based differential constitutes a denial to males 18-20 years of age of the equal protection of the laws in violation of the fourteenth Amendment. This action was brought in the District Court for the Western District of Oklahoma on December 20, 1972 by appellant Craig, a male then between 18 and 21 years of age and by appellant whitener, a licensed vender of 3.2% beer. The complaint alleged that law constituted invidious discrimination against males 18-20 years of age. A three-judge Court sustained the constitutionality of the statutory differential and dismissed the action.

The Supreme Court reverse it saying that to withstand constitutional objectives and must be substantially related to achievement of those identification of the objective underlying

5421 U.S 268 (1979).

6429 U.S 190 (1976).

the statutes in question as the safety represents an important function of state and local governments. Gender-based distinction closely serves to achieve that objective and therefore the distinction cannot withstand equal protection challenge.

3.3 Indirect Discrimination

Discrimination can also be indirect, such as when a state acts on a basis other than sex, but the impact of its laws or practices disproportionately affects members of one sex. In *Personnel Administrator of Massachusetts v Feeney*,[7] this case presents a challenge to the constitutionality of the Massachusetts veterans' preference statute on the ground that it discriminates against women in violation of the Equal protection clause of the fourteenth amendment. Under this statute, all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying non-veterans. The preference operates overwhelmingly to the advantage of males.

Feeney is not a veteran. She brought this action alleging that the absolute preference formula established in the Massachusetts statute inevitably operates to exclude women from consideration for the best Massachusetts Civil Service jobs and thus unconstitutionally denies them the equal protection of the laws. The district court agreed and it was reversed by the Supreme Court on the ground that the appellee, however has simply failed to demonstrate that the law in any way reflect a purpose to discriminate on the basis of sex.

The Human Rights Committee observed that non-discrimination together with equality before the law and equal protection of the law without any discrimination constitute a basic and general principle relating to the protection of human right.[8] The committee defined discrimination in the context of the international covenant on Civil and Political Rights (ICCPR) to mean any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons on an equal footing of all rights and freedoms.

Discrimination, when it consists of an ability to differentiate right from wrong and good from bad, is an essential part of everyday life. According to David Feldman, much of education and arguably the whole of culture are directed to establishing acceptable criteria for preferring one work of art, objective, technique, or person, to another and encouraging people to develop their critical faculties to enable them to discriminate effectively according to these criteria. Discrimination becomes morally unacceptable only when it is based on a consideration which is normally irrelevant.[9]

7442 U.S 256 (1979)

8 See the Human Rights Committee General comments No. 18th of 11th October, 1989.

[9]Felman, D et al, Civil Liberties and Human Rights in England and Wales (New York Oxford University Press Inc.) 1993) pp. 854-855.

The outlawing of certain types of discrimination is justified on the basis of the simple premise that there are certain criteria for treating people differently which should never be regarded as normally relevant or which are relevant in an admissible way only in restricted range of situations which can be defined by law. Section 42(1) of the Nigerian 1999 Constitution of Nigeria guarantees the right to freedom from discrimination. The section implies that the unacceptable criteria for discrimination which the constitution forbids are when they are based on a citizen's ethnic group, place of origin, sex, religion, or political opinion, or the circumstances of one's birth.

3.4 Formal Equality in Employment

In U.S.A, the Equal Pay Act of 1963 requires employers to give women and men equal pay for equal work and title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers from discriminating with respect to the compensation, terms, condition or privileges of employment based on the individual's race, colour, religion, sex, or national origin. In *EEOC v Madison-Community Unit School District No. 12*, The Equal Employment Opportunity Commission brought this suit against the School district of Madison, Illinois, charging that the district was paying female athletic Coaches in its high school and junior high school less than male coaches in violation of the Equal Pay Act of 1963.

In Price Waterhouse v Hopkins, Ann Hopkins was a senior manager in an office of Price Waterhouse When the partners in her office later refused to re-propose her for partnership, discriminated against her on the basis of sex in its decision regarding partnership. Judge Gesell in the Federal District Court for the District of Columbia ruled in her favour on the question of liability and the court of appeals for the District of Columbia affirmed.

3.5 First Lady Syndrome and Gender Discrimination

It is pertinent to take a cursory look at the first lady syndrome, which has surfaced in Nigeria both at the Federal, State and Local Government levels since the regime of former military dictator, Ibrahim Babangida, and to consider whether it is likely to alleviate the plight of women. The 'First Lady' means the wife or close relation of a man who won election to an executive position. The system gives a group of women whose credentials for the job rest on their position as wives of men in authority, the responsibility of mobilizing women, planning and implementing public programmes for them, with little or no accountability for the funding earmarked for those projects.[10]These women use their influence to silence or force into loyalty those far better equipped to take up the responsibility.[11]

10For a classic example of abuses of the First Lady Phenomenon and usurpation of state power outside the law, see Ofiebor, O. "Empress of Excesses: The President's Wife spins out of control" The News I July, 2013. P.14.

11*Ibid.*

It has been rightly contended that the basis for the creation of these outfits closely align them to the whims and caprices of the male ruling class who use the outfit to boost their ego. It is also maintained that the so-called representation of women in the various regimes that propagated the concept does not appear to have charted a new course for their emancipation. Rather, these regimes have only found an avenue to silence the large female collectivity and promote the interests of the male ruling class.[12]

The system also promotes mediocrity as it is not based on competence. To the extent that first lady's power is tied up to their relationship with men in power, their actions can only reinforce the very basis of Nigeria Women's subordinate status. Any' scheme for political empowerment of women should aim at enabling them aspire for, on equal basis with men, any political position no matter how significant the office. Accordingly, the convention on the political Rights of women provides as follows: "Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination."[13]To create a subordinate role for women will obscure and engender their unequal status with men and may even lead to the perpetuation of subordinate role for women in politics.

Moreover, any affirmative action for the purpose of redressing inequality or inequity must apply generally to all women, and must also be for a temporary period, and not become a permanent feature. Support can be found for this proposition in Article 4 of CEDAW which provides that "adoption by states parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discriminatory, but shall in no way entail as a consequence the maintenance of unequal or separate standards; and these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved".

Furthermore, the First Lady-syndrome can be considered discriminatory from the perspective of men because there is no equivalent positions for men whose wives win election to executive position. While discrimination against women is discouraged, discrimination against men is no less prohibited. In *Jones v Eastleigh Borough Council*,[14] a local authority allowed women free access to the authority's swimming pool at 60 while for men, the age was 65. Mr. Jones, who was over 60 but under 65, was charged fees and the House of Lord held that this constituted discrimination.

3.6 Discrimination in Appointments/Federal Character Principle

One of the leading scholar on federalism in Nigeria, Professor Adele Jinadu, observed that ordinarily, federalism, through the creation of two independent leveIs of governmental authority with direct impact on the citizens, within the same national space, necessarily

[12]Okeke,P.E."First Lady Syndrome:The Engendering of bureaucratc corruption in Nigeria" CODESRIA Bulletin Nos 3&4 1998 p. 16-19. The author commendably and incisively made a critical analysis of the First Lady phenomenon.

[13]Article II.

[14](1992) AC 751.

create dual citizenship-national and state citizenship. When federalism is based on ethnic, as opposed to geographical diversity, as in the case in Nigeria, state citizenship is reduced to indigeneship, generally defined more by blood ties than by residency claims. This, according to him, is the logical of ethno-federalism.[15]

Ethnicity or state of origin is expressly recognized by the constitution. In acknowledgement of the fact, Omege, JCA in *Awolowo v Akapo*[16] observed that by the provision of the Nigerian 1999 Constitution (as Amended) every citizen of Nigeria has the right to reside where he wishes, though right of residence does not necessarily confer a right of indigeneship of the place on the resident except he so wishes. Apparently, this case seems to suggest that one is not necessarily an indigene of the place where he reside except he so wishes. However, it does not follow that contrast, under America federalism, residency confers right of indigeneship on its citizens residing in any State.[17]

One of the areas where indigeneship has been exploited in Nigeria is in employment within the public service. Section 42(3) of the 1999 constitution law by reason only that the law imposes restrictions with respect to the appointment of any person to any office under the state or as a member of the armed forces of the federation, or a member of the Nigerian police force or to an office in the service of a body corporate establishment directly by law in force in Nigeria, this limitation was not part of the draft submitted by Sir Henry Willink Commission for consideration in the constitutional Conference of 1958. The Commission's recommended provision on the right to freedom from discrimination read as follow:

> *(i) No enactment of any legislature in Nigeria, and no instrument or executive or administrative action of any government in Nigeria shall (either expressly or in its practical application)*
> *(a) Subject persons of any community, tribe, place or origin, religion or political opinion to disabilities or restrictions to which persons of other communities, tribes, place of origin, religion or political opinion are not made subject; or*
> *(b) Confer on persons any community, tribe, place of origin, religion or political opinion any privilege or advantage which is not conferred on persons of other tribe, place of origin, religion or political opinion.*

[15] A I Jinadu, "Constitutional Challenges to Democracy &Good Governance in Nigeria" a paper presented at the National Conference
on the Review of the Nigeria 1999 constitution organized by the Citizen's Forum for Constitutional Reform(CFCR), Rockview Hotel, Abuja 13-14 February,2008 p.8.

[16] (2003) 8 NWLR (pt.823) p. 451 at 522.

[17] Section 1 of Amendment XIV (1868) of the Constitution of America provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of a citizens under the law".

> *(ii) Nothing in this provision shall prevent the prescription of proper qualification for the public service.*[18]

The limitation on the right to freedom from discrimination in respect of state or public appointments were imported into the 1979 constitution through amendment to the original draft and it appeared in the subsequent 1999 constitution.[19] On the other hand, the 1979 constitution in Chapter II introduced the fundamental objectives and directive principles of State policy. Section 15 of the objectives and directives provides, inter alia, that national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, states, ethnic or linguistic association or ties shall be prohibited. For the purpose of promoting national integration, it shall be the duty of the state to, among other things, secure full residence rights for every citizen in all part of the federation.

Section 14(3) and (4) of the Constitution which provides for the federal character principle, read as follow:

> *14(3) The composition of the Government of the Federation or any of its agencies and the conduct of its affairs shall be carried out in such a manner as to reflect the federal character of Nigeria and the need to promote national unity, and also to command national loyalty, thereby ensuring that there shall be no predominance of persons from a few states or from few states or from few ethnic or other sectional group in that government or in any of its agencies.*
>
> *(4) The composition of the government of a state, a local government council, or any of the agencies of such government or council or such agencies shall be carried out in such a manner as to recognize the diversity of the people within its area of authority and the need to promote a sense of belonging and loyalty among all the people of the federation.*

"Federal character" according to section 318 of the 1999 constitution "refers to the distinctive desire of the people of Nigeria to promote national unity, foster national loyalty and to give every citizen of Nigeria a sense of belonging to the nation as expressed in section 14(3) and (4) of the constitution". In pursuit of the federal character principle the constitution also provides in section 147 (1) and (3) as follows:

> *(1)- There shall be such offices of ministers of government of the federation as may be established by the president.*

18 See the Report of the Henry Willink Commission published in The Constitution: A Journal of Constitutional Development (2001) vol.2 p. 88.

19 See section 27 1960 constitution; 26 1963 constitution. Cf section 39 1979 constitution and section 42 1999 constitution.

> *(3)- Any appointment under subsection (2) of this section by the president shall be in conformity with the provisions of section 14(3) of this constitution; provided that in giving effect to the provisions aforesaid the president shall appoint at least one Minister from each state, who shall be an indigene of such state.*

The inclusion of the federal character principle in the constitution is accompanied by the establishment in the Third schedule to the constitution of a Commission to oversee its implementation. Under the Third schedule to the 1999 Constitution, the Federal Character Commission is empowered to:

> *(a) Work out an equitable formula subject to the approval of the National Assembly for the distribution of all cadres of posts in the public service of the Federation and of the state, the Armed forces of the Federation and of the Police Force and other government security agencies, government owned companies and parastatals of the states.*
> *(b) Promote, monitor and enforce compliance with the principles of proportional sharing of all bureaucratic, economic, media and political posts at all levels of government; and*
> *(c) Take such legal measures, including the prosecution of the head or staff of any ministry or government body or agency, which fails to comply with any federal character principle, or formula prescribed or adopted by the commission.*

The Federal Character Commission (Establishment etc.) Act[20] established the Federal Character Commission. The opinion has been expressed that the exception under section 42(3) of the 1999 constitution is a corollary to Chapter 2 of the constitution which provides for federal character in the composition of governments at all levels and their agencies.[21] The validity of this opinion is however in doubt because similar provisions under the 1960 and 1963 constitutions contain similar exceptions to, or limitations on, the right to freedom from discrimination even when these constitutions did not provide for the federal character principle.[22]

The question is whether there are conflicts among section 42(3), which exempts appointments to public offices in states from the non-discrimination principle; section 15

[20]Cap F7 Laws of the Federation of Nigeria, 2004.
[21]T Babwale, "The Citizenship Question: Indigene Settler Dichotomy and Nigeria Unity" in R T Akinyele, (ed) *Contemporary Issues on Boundaries and Government in Nigeria* (Friedrich Ebert Foundation, 2005) p. 40.
[22]The 1960 and 1963 constitutions of Nigeria have no provisions on fundamental objectives and directive Principles of state policy.

which prohibits discrimination without qualification and section 14(3) which entrenches discrimination through the federal character principle. While there is apparent conflict in the above provisions, attempt will be made to find harmonious interpretation of the sections.[23]A community reading of sections 14(3), 15 and 42(3) of the 1999 Constitution will mean that there may be permissible discrimination in appointments by the Federal, State or Local Government or its agencies but the discrimination should have the purpose of reflecting the diversity of the country in such appointments in a way that there will be no predominance of persons from one state or ethnic group in any public institution or service. It is only this interpretation that will make for national integration enjoined by section 15. It must, however, be noted that as the bulk of the population of states and local governments are their indigenes, it is expected that the number of indigenes in their employment will be proportionate to the population of the indigenes.

There is no doubt that the federal character principle entrenches discrimination. However, the discrimination is for a limited purpose. Apart from the provision regarding the appointment of a person to ministerial position, the federal character principle in respect of a state did not talk about the indigenes of a state but about the diversity of the people within the state. In the circumstance, non-indigenes of a state can actually invoke the federal character principle to their own advantage. The Supreme Court decision in *Lafia Local Government v Governor Nasarawa State*[24]supports this proposition.

A point that needs to be emphasized is that though section 42(3) qualifies or limits the right guaranteed by section 42(1), the limitation must be by law and not through executive action not backed by law. In *Emmanuel Bijoe v State of Kerela*[25] the Supreme Court of India held that two departmental circulators which have no statutory basis, were mere departmental instructions, and cannot form the foundation of any action aimed at denying citizens their fundamental rights. It ought to be noted that qualification to section 42(1) is only in respect of appointments. It does not enable the termination of the appointment of a person already employed in the service of the state. In other words, the removal of a person already employed in the public service of a state on the basis of indigeneship constitutes a violation of section 42(1). Thus, Abia State Govemment, for instance, acted unconstitutionally when it 'disengaged' non-indigenes of the state who are from the South East geo-political zone from the state public service.[26]

4. State Public Accommodations Law and Associational Freedoms

In U.S.A, in addition to federal and state laws prohibiting sex discrimination in employment, many states have passed civil rights acts prohibiting sex discrimination in public accommodations and in private clubs and organizations. Challenges to the

[23] The Supreme Court of Nigeria has enjoined harmonious interpretation of different provisions of the constitution. See *Adesanyav President* (1981)2 NCLR 358; *Akaighe v Idama* (1964) 1 All NLR 322; *Lafia Local Government Council v Governor, Nasarawa state* (2012) 17 NWLR (pt. 1328) 94.

[24](2012) 17 NWLR (pt.1328)94 at 143.

[25] (1988) 14 CLB No.1 p.42.

[26]See circular dated 25th August 2011 issued by the Head of Service of Abia State.

application of these statutes have claimed infringement of rights of expression, association and privacy protected by the federal and state constitutions. Such rights have long served to protect the activities and privacy of politically unpopular groups, including those involved in the civil rights movement. The question is how far this protection extends and to whom.

In 1984, the United States Supreme Court faced this issue with respect to sex discrimination in the case of *Robert v United States Jaycees*.[27] There the court rejected first amendment challenges to a Minnesota anti-discrimination statute under which the Jaycees had been required to admit women as full voting members. Three years later, the court considered a challenge to California's Unruh Act, a broad Public accommodations law that had been used to require Rotary clubs in the state to admit women.[28]

Also in *Foster v Back Bay Spas*,[29] Foster brought an action to require the defendant to allow him join the health club. The club does not admit men. Foster argues that this policy violates the Massachusetts Public accommodation statue that prohibits discrimination based on sex. Health workers' affidavit and person statements describe the sense of intimidation certain women, including post-menopausal women and women who have undergone mastectomies or who have suffered abuse, will feel in a coed exercise atmosphere, such that they would cease their exercise program. While the court recognizes the impact that the admission of men into the club may have on these women, intimidation and the assumption that all male health works members will harass and leer at their exercise compatriots is still an insufficient ground on which to create a privacy exception. Absent the unclothed exposure of intimate body parts, or the touching of body parts by members of the opposite sex, this court can find no basis for overriding the public accommodations statute's mandate.

Further, an affidavit from a member of the Islamic faith stated that Islamic women who are forbidden from revealing any part of their body (except for their face and hands) while in the presence of men would no longer be able to use the health works facility at all if men were allowed to join. Healthworks, however, is not a religious facility providing exercise facilities only to Islamic women. It is a public health club. And while this court recognizes the disparate impact the inclusion of men will have on women of the Islamic faith, this court cannot allow Healthworks to discriminate against men by allowing women of all faiths access to a single-sex exercise space on the basis of the religious believe of a portion of its members.

The court concludes that there is no legitimate privacy interest to be recognized or protected which would excuse the discriminatory exclusion of males in violation of the public accommodations statute, the inquiry need not go further. Since the customers of

[27]468 U.S 609(1984).

28481 U. S 537 (1987)

291997 Mass super. Lexis 194 (superior Court, Suffolk, sept. 29, 1997)

Healthworks have no privacy right to be protected, the court is not required, indeed cannot, consider whether Healthworks' privacy is reasonable. For the reasons set forth above, Foster's motion for summary judgment is granted.

In Nigeria, right to freedom of association is guaranteed under section 40 of the 1999 constitution of Nigeria and Article 10 of the African Charter on Human and People's Right, which has been ratified and domesticated by Nigeria. This right is also guaranteed by Article 22 of International Covenant on Civil and Political Rights (ICCPR) as well as Article 20 Universal Declaration of Human Rights (UDHR). Also, section 39 of the Nigerian 1999 Constitution (as Amended) guarantees the right to freedom of expression. Also Article 10 guarantees the right to freedom of expression. Also section 37 of the Nigerian 1999 constitution guarantees the right to private life.

5. Challenges in Implementation of Formal Equality Approach

5.1 Rigidity

When men and women are similarly situated, requiring that they be treated equally often opens up opportunities for women that were previously unavailable to them. To the extent that men and women are differently situated however, applying the same rules to them may produce different unequal outcomes. The strict implementation of formal equality approach to men and women could lead to rigidity. This is because men and women are biologically different and cannot produce similar result in a given task.

5.2 Low Productivity

Implementation of formal equality approach to men and women could lead to low productivity. A woman given a very tasking job to do would not be as efficient as her male counterpart. This could lead to low productivity of the task.

5.3 Family Challenges

Men and women are differently situated-applying the same rules to them often lead to some family challenges. For example, a job that requires being outside home for months would not be suitable for women as it would be difficult for her to take care of the home and children.

5.4 Health Hazard

Applying the same rules to men and women could lead to some health hazards. Also applying the same rules to everyone in respective of the sex could also lead to some health hazards. For example, some people are less fragile than others-An asthmatic person is not suitable for certain types of job. Exposing him/her to such jobs could lead to some health complications.

5.5 Immorality

Applying the same rules to men and women could lead to sexual immorality. An employer may require all of its employees-male and female to work from 8am to 10pm but these

hours may be relatively disadvantageous to women and could lead to sexual immorality among the employees.

5.6 Interference of Religious Belief

Certain types of work interfere with certain religious belief and as such not suitable for those persons who believe in such religions irrespective of the sex. For example, a job that requires you to wear a certain type of clothes will not be suitable for a woman who is a Muslim.

6. The Way forward

a) Affirmative action plans should be designed to increase female representative in traditionally male occupations and pay equity schemes designed to restructure wage scale.
b) Biological differences should be taken into consideration for example, only women become pregnant and pregnancy can disadvantage workers in current work environments with respect to hiring, promotion and job security. Disability leave provisions should be designed for pregnant women and flexible work schedules to neutralize this disadvantage.
c) Division of labour should be implemented to cushion the effect of the biological differences between men and women to ensure functional equivalent opportunities.
d) Differences should be taken into account to eliminate their negative effects. This could be done by deciding which differences matter and implementing alternative approach that will best accommodate them.
e) Finally, women's weakness should not be overemphasizing as some women are stronger than their male counterpart. In other words, strength and capability should be taken into account and not necessarily gender to have balanced equivalent opportunities.

7. Conclusion

As was stated, formal equality is the principle of treating like people alike and in determining whether people are alike, and thus deserving the same treatment, formal equality demands that people be judged according to their actual characteristics rather than on the basis of assumptions or stereotypes about who they are or who they ought to be. In doing it, it is submitted that various factors should be taken into consideration to have balanced and efficient equivalent opportunities.