JUDICIAL ABOLITION OF EDUCATIONAL AFFIRMATIVE ACTION IN AMERICA: POTENTIAL IMPACT ON EQUALITY RIGHTS AND DEVELOPMENT AGENDA IN AFRICA

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ABSTRACT

This paper examined the potential impact of the recent decision of the American Supreme Court, which abolished affirmative action in university admission processes. Affirmative actions were designed by the universities to assist candidates belonging to minority races to gain admission into their choice of universities. Hitherto, persons belonging to those groups found it difficult to compete with the white candidates for admissions, as a result of some historical deprivations which subjected them to an inferior educational background in the lower schools. Affirmative actions, which started in America in the 1960s and quickly spread to other jurisdictions, are a reverse discrimination policy aimed at remedying the systematic injustice/ disadvantages to which the victims were subjected in the past. After many decades of recognition and application of this reverse discrimination policy in the United States, the Supreme Court in June 2023 held that the policy is unconstitutional. Considering the enormous influence of American Supreme Court decisions on constitutional and human rights matters in foreign jurisdictions, it is not unlikely that courts in Africa may begin to strike down affirmative actions. This paper, using the doctrinal methodology involving case law review, reports of dailies/periodicals and analysis of regional instruments, recommends that African courts should not be in a hurry to follow this American decision, which is detrimental to equality rights and the development agenda on the continent. Recommendations were also made on how to streamline and improve Affirmative Action implementations in Africa.

Keywords: Affirmative Action, Development, Diversity, Equality Right, Inclusivity, Non-discrimination.

1. INTRODUCTION

Non-discrimination is a complementary phrase to the right to equality, which is an affirmation that all human beings are equal in the eyes of the law.[1] Accordingly, individuals ought to be accorded equal respect and dignity by the public authorities without discrimination on the basis of such factors as race, colour, sex, ethnicity, language, religion and circumstances of birth.[2] Non-discrimination and the principle of equality are, however,

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1 Ana Maria Guerra Martins, *Equality and Non-Discrimination as an Integral Part of the EU Constitutional Identity*, (European Union Book Series, Vol. 1, 2020), 1.

2 Articles 2 and 3 of the African Charter on Human and Peoples' Rights; Section 42(1) of the Constitution of Federal Republic of Nigeria 1999. See also Osita Nnamani Ogbu, *Human Rights Law and Practice in Nigeria*, (2nd ed.), Snapp Press Ltd, 2013, 376.

not absolute rights. Unequal treatment may be reasonable where the aim is to achieve a legitimate goal and is based on acceptable criteria of differentiation.[3] Thus, it may be legitimate sometimes to treat persons differently in order to achieve fairness.[4]

The right to equality and non-discrimination, which is at the foundation of the universality of human rights, imposes an obligation to refrain from acts of discrimination as well as the duty to protect and advance the fulfilment and enjoyment of equality for all people.[5] It is recognised in the International Bill of Rights[6] and the basic laws of most domestic jurisdictions.[7] Equality lies at the heart of human rights as it ensures that every person is treated fairly and without discrimination; it fosters social cohesion, reduces poverty and inequality gaps and promotes a harmonious and just society.[8] In articulating legislative functions and all governmental policies and programmes in developing countries, it is argued that equality and non-discrimination should be the guiding principles, and a strategy to enable the society to achieve inclusive and harmonious growth.[9]

In human rights jurisprudence, discrimination or undue/unjustifiable differentiation is an impermissible practice against individuals or groups as it results in an unfavourable outcome or undue disadvantage, which usually engenders disharmony in human relations.[10] The concept of Affirmative Action (AA), which is relatively new in human rights jurisprudence,[11] is based on the belief that it is necessary to remedy the situation of certain groups of persons in the society who were historically disadvantaged or excluded from the enjoyment of certain rights, the effect of which has made it difficult or impossible for them to presently compete with other historically more favoured groups in the modern society.[12] Affirmative Action jurisprudence started in the United States of America[13] and quickly became popular in other democratic states.[14] Incidentally, the American judiciary, which lent this jurisprudence to the democratic world, has suddenly derecognised it in June 2023.[15]

This paper raises the issue of whether the courts in Africa should follow the American example of abolishing AA in the educational sector. The implication of such abolition for

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3 ibid. See also David Feldman, *Civil Liberties and Human Rights in England and Wales*, (Oxford University Press 1993) 854.

4 (n2)

5 See for instance, Article 3 of the Convention on the Elimination of All Forms of Discrimination against Women.

6 Article 2 of Universal Declaration on Human Rights, 1948.

7 For Instance, Section 42 of the Constitution of Nigeria, 1999.

8 Yashtiwari, 'Embracing Equality: Paving the Path to a Just Society', *The Medium* (23, July 2023), <www.medium.com>, accessed 27 December 2023.

9 See J. Zhuang, 'Inclusive Growth Towards a Harmonious Society in the People's Republic of China: Policy Implications', *Asian Development Review*, Dec. 2010, 25 (1).

10 ibid

11 The policy action was effectively recognized in the United States of America in the 1960s. See Executive Order 10925 of President John F. Kennedy, 1961 and Executive Order 11246 of President Lyndon B. Johnson, 1965, <https://www.dd.gov>regulations> accessed 27 December, 2023.

12 (n2) See also U.O Umozurike, *The African Charter on Human and Peoples Rights*; (Martinus Nijhoff Publishers)30.

13 Executive Order 10925 of 1961, op. cit.

14 John W. Dietrich, 'The International Spread of Affirmative Action Policies; What is True Equality?', *History and Social Sciences Faculty Journal* (Bryant University, Paper 85), <https://digitalcommons.bryant.edu/histss-jou/85>., accessed 20/12/23

15 *Students for Fair Admissions v. Harvard College* and *Students for Fair Admissions v University of North Carolina* et al, 600 US 181 (2023).

Africa is equally examined.[16] In circumstances where equality has become difficult to attain as a result of historic under-representation of certain classes of people in the society, AA has been suggested to alleviate such underrepresentation by deliberate promotion of opportunities for members of that class over other groups, to enable them to catch up with the other groups in the society.[17] Natural law theorists believe that everyone in society ought to be afforded equal rights and opportunities to live and to be happy.[18] Accordingly, laws, policies and programmes ought to be articulated and implemented without discrimination. The theory of naturalism is thus the philosophical basis of AA, also referred to as compensatory or positive discrimination.[19] It has been used in some jurisdictions in favour of women, minority groups and victims of apartheid.[20]

2. THE CONCEPT OF AFFIRMATIVE ACTION

In simple terms, AA is the practice or policy of favouring individuals belonging to particular groups regarded as disadvantaged or held down by the system over a long period of time.[21] Where such a group has continued to suffer the effects of such systemic discrimination, it will require official positive intervention to bring them to a reasonable level of equality with other groups in the society. The Policy is thus aimed at remedying the wrongs of the past and preventing present and future discrimination.[22]

Admittedly, AA amounts to current discrimination against members of other groups in society. Proponents, however, contend that it is a just and acceptable means of lifting a section of society which are underrepresented in such sectors as education and employment.[23] It is aimed at promoting diversity and increased participation by alleviating particular socio-economic and other hindrances.[24]

AA policies exist in various forms which differ from jurisdiction to jurisdiction, depending, inter alia, on the historical circumstances of the people. It can manifest in the use of quota systems, which reserve a certain percentage of government jobs or political positions

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16 U.O. Umozurike, 'The African charter on Human and Peoples Rights', American Journal of International Law, [1983] 77(4) 902 – 912.

17 The suggestion was rejected in Britain but accepted by participants at the Asian Cultural Forum on Development in Bangkong 1990. See Ogbu, (n2). p.385.

18 Henrik Friberg – Fernors, 'On the Problem of Defending Basic Equality: Natural Law and the Substance View', *Journal of Medicine and Philosophy*, [2023] 48(6)565 – 576.

19 T. Deane, 'A Commentary on the Positive Discrimination Policy in India', *Potchefstroom Electronic Law Journal*, [2009] 12(1); Marc Galanter, 'The Compensatory Discrimination Theme in the India Commitment to Human Rights', *India International Center Quarterly*, [1986] 13(3/4) 77-94. It has also been called a "rectificatory justice", See *Palgrave Handbook of Ethnicity*, <https//link.springer.com> accessed 11 December 2023.

20 Jonathan S. Leonard, 'Women and Affirmative Action', Journal of Economic Perspectives, [1989] 3(1) 61-75; Yolande Sadie, 'Affirmative Action in South Africa: A Gender Development Approach', Sabinet African Journals, <https://journals.co.za> accessed 20 September, 2023.

21 For definitions/descriptions, See Ogbu, (n2); I.K.E. Oraegbunam, 'Examining the Legality of Affirmative Action in Nigeria Today: Echoes from some other Jurisdictions', *Pre-Orc Journal of Gender and Sexuality Studies*, <https://journals.ezenwaohaetorc.org>. accessed 20 September, 2023.

22 Murell A.J. and Jones R., 'Assessing Affirmative Action: Past, Present and Future', *Journal of Social Sciences*, [2019] 52 (4) 77-92.

23 The American Association for Access, Equity and Diversity (AAAED) described Affirmative Action as a measure that focuses on demographics with historically low representation in leadership and professional roles; <https://inveestopedia.com>. Accessed 11 December 2023.

24 Promotion of diversity in institutions of learning was strongly emphasized in *Fisher v University of Texas* (579 US 365 2016) as a good reason for embracing AA in admission policies.

for women[25] and admissions into tertiary institutions for members of a group. It also exists in the form of a preferential treatment or special consideration in selection processes.[26]

In many African societies, past systemic policies resulted in the subjugation of women, and this rendered them socio-economically disadvantaged for a long period of time, a situation which today requires the use of AA to remedy.[27] Similarly, in South Africa, AA became necessary in favour of the majority black population after the demise of the apartheid system, which had done great injustice to them in the past.[28] In India, the Hindu caste system, which ascribed inferiority to certain classes of persons, eventually necessitated the adoption of some AA in their favour.[29] In the United States of America, some form of preferential treatment was created for blacks in employment[30] and admissions into some choice universities.[31] In Nigeria, the National Gender Policy stipulates that 35% opportunities in public offices be reserved for women in recognition of the need to bridge their long-standing exclusion from top public offices resulting from some entrenched sentiments.[32]

One fundamental feature of AA is that it is not meant to last forever[33]; it is usually temporary or transitional in nature, although the sunset date is not usually stated at the beginning.[34] Moreover, it is a relatively new expression in human rights law. The term was first used publicly in the United States in 1961 by President John F. Kennedy in a statement that was intended to achieve non-discrimination in the actions of some government contractors.[35] The expression became popular in the US and, with time, it became synonymous with preferences and extra opportunities in favour of disadvantaged groups and resting on the philosophy and rationale of achieving compensation for past discrimination, correcting current discrimination and diversification of the society.[36] Subsequently, it received judicial recognition as a constitutional right in the United States.[37]

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25 The National Gender Policy in Nigeria formulated a 35% quota for women in Nigeria for top public offices. See also O.V.C. Ikpeze, 'Legislating Women's Affirmative Action and its Constitutionality in Nigeria':, *African Journals Online*, 2011, <www.ajol.info> accessed 30 November 2023

26 Forms of Affirmative Action, <civil rights.uslegal.com> accessed 12 December 2023.

27 Kayode Olusola, 'Subverting Women's Subjugation in West African Society: The Roles of Popular Music', *KIU Journal of Humanities*, [2023] 8(1) 81-88.

28 J. Wagona Makoba and Mathibela E. Ntebeng 'Affirmative Action Policy and the search for Racial Equality in Post-Apartheid South Africa', *India Quarterly: A Journal of International Affairs*, [2002] 58(1) 165-181. The removal of certain disabilities through Affirmative Action concept seems to typify Henry Maine's theory of the society developing from "status to contract stage" see Katharina Isabel Schmidt, 'Henry Maine's Modern Law', *American Journal of Comparative Law,* [2017] 65 (1) 145 -186.

29 T. Deane, op. cit, Sanctioned by its Constitution, India is said to be the home of the world's most comprehensive affirmative action programme where historically discriminated groups are protected with vertical reservations implemented as "set-asides" and other disadvantaged groups with horizontal reservations known as "minimum guarantees", see Tayfun Sonmez and M. Bumin Yenmeza, 'Affirmative Action in India via Vertical, Horizontal, and Overlapping Reservations', *Econometrica*, 90(3) 1143 - 1176.

30 Forms of Affirmative Action, (n26).

31 See the *Fair Admission Cases* and others discussed in this paper, (n56)

32 See the *National Gender Policy*, 2006, <https://nesgroup.org> accessed 6 June 2024

33 Affirmative Action, *Encyclopedia Britannica*, last updated December 9, 2023; *Palgrave Handbook*, op. cit.

34 ibid.

35 In March 1961, President John F. Kennedy issued an Executive Order 10925 which introduced Affirmative Action in U.S. See US Office of Equal Opportunity and Diversity, 'A Brief History of Affirmative Action', <www.oeod.uci.edu>policies, accessed 2 December 2023.

36 William G. Tierney, 'The Parameters of Affirmative Action: Equity and Excellence in the Academy', *Review of Educational Research*, [1997] 67(2) 165-196.

37 *Regents of the University of Califonia V.* Allan Bakke, 438 U.S 265(1978)

The rationale for AA was articulated in the statement of President Lyndon B. Johnson in 1965 as follows:

> You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free now to compete with all the others", and still justly believe that you have been completely fair …
> Men and women of all races are born with the same abilities. But ability is not just the product of birth. Ability is stretched or stunted by the family you live with and the neighbourhood you live in, by the school you go to and the poverty or the richness of your surroundings. It is the product of a hundred unseen forces playing upon the little infant, the child, and finally the man.[38]

From the United States, AA quickly spread to other countries and became firmly rooted despite some strong opposition to the effect that this new form of discrimination is unnecessary and unconstitutional.[39] In America, as in Europe, the intensity of the controversy surrounding AA has refused to abate after more than half a century. Opponents have fiercely maintained that, rather than advancing the principle of equality, the policy is a direct assault on the constitutional provision on non-discrimination and equality.[40]

3. THE RISE AND FALL OF EDUCATIONAL AFFIRMATIVE ACTION IN AMERICA AND THE PUBLIC REACTION TO ITS ABOLITION

In the United States, the effect as well as the controversy of AA has been most pronounced in the education sector, notably in the considerations for admission into choice higher institutions of learning.[41] These institutions have for decades resorted to special affirmative measures which helped people of colour gain more admissions, which hitherto was almost impossible given their poor performances as a result of systemic barriers arising from under-investment in the pre-college schools they attended, among others, "all of which overwhelmingly advantaged white applicants".[42]

For centuries, Black people were subjected to slavery and later the policy of segregation in the school system[43] , which had the effect of lowering their capacity to compete favourably with the Whites in the considerations for admission into Colleges, especially with respect to choice courses as Law and Medicine.[44] To create opportunities for this class of persons and also ensure diversity in the student population in the institutions, the school authorities resorted to the practice of adjusting admission requirements for persons of

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38 Commencement Address at Howard University titled 'To Fulfill these Rights', dated June 4, 1965, The American Presidency Project, <https://www.presidency.ucsb.edu/node/241312, > accessed 12 December 2023.

39 J.W. Dietrich, (n.14)

40 Erwin Chemerinsky, 'Making Sense of the Affirmative Action Debate*', Ohio Northern University Law Review*, [1996] 22, 1159 -1176.

41 The Education Trust, 'Affirmative Action in Higher Education: Moving the Conversation Forward', <https://edtrust.org>affirmative-action>, accessed 1 December 2023.

42 ibid.

43 ibid.

44 To understand the historical barriers faced by the Blacks in the American educational system, see *Plessy v. Ferguson*, 163 US 537 (1896) and *Brown v. Board of Education of Topeka*, 347 US 483 (1954)

colour.[45] This policy increased the population of Blacks in choice universities and became a pathway for inclusivity and the building of diverse college communities.[46]

The Civil Rights Movement and a significant segment of the American population believe in "persistence of discrimination" in American society and the need for AA, especially in the employment and education sectors.[47] It has always been a popular idea, despite the fierce opposition from some white candidates who are short-changed by the affirmative action policy.[48]

In 1978, the AA controversy in university admissions eventually came to the attention of the Supreme Court. In the landmark case of *Regents of the University of California v Allan Bakke,*[49] the apex court held that using racial quotas in the admission process was unconstitutional as it violated the Equal Protection clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. However, the court held that the use of AA to admit more minority applicants is constitutional if it does not involve the use of specific quotas. The court ruled in favour of Allan Bakke, who challenged the admission policy of the school on the grounds that the school's policy of reserving specific quotas was unconstitutional. But this landmark case, at the same time, established the constitutionality of the use of AA or race-conscious admission policy, provided it involves the use of specific quotas.

Allan Bakke was twice refused admission to read Medicine at the university based on the quota system, which ensured admission for black candidates who had lower scores than his. The Supreme Court of California made a somewhat curious distinction between quota policy and AA of lowering grades for blacks, and on that basis, Allan Bakke (the Plaintiff) was ordered to be admitted, while still ruling that any race-conscious admission policy that did not involve the use of a specific quota system was constitutional.[50] In another landmark case of *Grutter v Bollinger,*[51] the US Supreme Court held again that race could be used for admissions in a limited way. Bollinger, who was the President of the University when this case was heard, was a passionate supporter of AA, which he believed was the only easy way to ensure reasonable admission opportunities for African Americans, Hispanics and Native Americans. For him, overruling the AA policy would lead to a very significant retrogressive

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45 Valerie Strauss, 'Why we still need Affirmative Action for African Americans in College Admissions', The *Washington Post*, July 3, 2014.

46 Theodore Cross and Robert Bruce Slatter, 'Only the Onset of Affirmative Action Explains the Explosive Growth in Black Enrollments in Higher Education', *The Journal of Blacks in Higher Education*, [1999] 23, 110-115, <https://www.jstor.org> accessed 30 January 2023.

47 Jerome Karabel, Emeritus Professor of Sociology at the University of California, after recounting the role of some giants of the civil rights movements like Philip Randolph, Bayard Rustin and Martin Luther King Jr, and following his observation on the wide wealth gap between white and black households in America, declared that something far more powerful than affirmative action is still needed. This observation was made few hours after the US Supreme Court abolished the educational affirmative action. See his article in TIME Magazine of June 29, 2023 titled, 'The Ambitions of the Civil Rights Movements Went Far Beyond Affirmative Action'.

48 Laura Sauthanam and Hannah Grabenstein, 'What Americans think about Affirmative Action in College Admissions', The Nation, June 29, 2023.

49 438 U.S. 265 (1978)

50 In Allan Bakke's case, it was revealed that the university reserved 16 seats in a class of 160 for minority students. It is this specific reservation that the Supreme Court quarreled with.

51 539 vs 306 (2003)

movement from the goal achieved in the decision in *Brown v Board of Education.*[52] However, his fear did not materialise as the apex court upheld the AA admission policy of the school.

The fear that the AA policy may not survive for long began to creep in sometime in 2013. Though the status quo established in *Allan Bakke and Bollinger cases* narrowly survived in *Fisher v University of Texas at Austin*,[53] the Supreme Court, in this 2013 decision, emphasised the necessity for other elements. Justice Kennedy held that:

> The compelling interest that justifies consideration of a race in college admission is not an interest in enrolling a certain number of minority students, but an interest in obtaining the educational benefits that flow from student body diversity.[54]

In Fisher's case, the race-conscious admission policy survived. But the emphasis was no longer on the use of AA to correct past injustices and/or disadvantages. The emphasis shifted to the supposed demographic balance of the student population. The judicial interpretation of AA began to slowly drift from a human-oriented policy of remedying the wrongs of the past to a policy aimed at creating a "holistic diversity" in the colleges.

The opponents of the AA admission policy refused to back down in their relentless efforts to establish its unconstitutionality.[55] Their struggle paid off in the 2023 decision of the Supreme Court in the consolidated judgment in *Students for Fair Admissions v Harvard College,*[56] and *Students for Fair Admissions v University of North Carolina, et al.*[57] *H*arvard College and the University of North Carolina are among some of the oldest higher institutions of learning in America.[58] Every year, tens of thousands of students apply to each of these schools, and very few are admitted.[59] In these two cases (as in other similar cases), the courts were called upon to decide whether the AA admission system is lawful under the Equal Protection Clause of the 14th Amendment of the US Constitution.

On 29 June 2023, the Supreme Court ruled that the race-based affirmative action in admissions processes in Harvard University and the University of North Carolina violates the Equal Protection Clause of the 14th Amendment.[60] The court expressed the view that race could still be part of the admission process, provided it is not the sole affirmative criterion. According to a dissenting Justice of the court, this landmark majority opinion (6-3) and (6-2) respectively, read by Chief Justice Roberts, has rolled back decades of precedents and enrolment of Blacks and Hispanics to read choice courses in choice universities.[61] It is a victory for the conservative activists who insist that the constitution must be "colour blind".[62]

The court tried to justify the decision in these words:

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52 This case overruled *Plessy v. Ferguson* on Segregation in the lower schools,(n44)
53 *Fisher I* (570 US. 297 (2013) and *Fisher 2* (579 US 365 (2016)
54 Justices Ginsburg, Breyer and Sotomayor concurred with Justice Kennedy.
55 Rita Braver, 'Opponents, Supporters of Affirmative Action on whether College Admissions can be truly colorblind', *CBS News*, June 4, 2023.
56 600 US 181 (2023)
57 Same citation as Harvard Case (consolidated judgment)
58 Founded 1636 and 1789 respectively.
59 Jeffrey Selingo, 'Harvard and its peers should be embarrassed about how few students they educate', *The Washing Post*, 8April 2021.
60 In a consolidated judgment
61 This observation was contained in the minority opinion of Justice Sonia Sotomayor, the first Hispanic Supreme Court Justice in USA.
62 *NBC News*, June 29, 2023.

> The Harvard and UNC admissions programs cannot be reconciled with the guarantees of the equal protection clause. Both programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involving racial stereotyping and lacking meaningful end points.[63]

The Chief Justice noted that this judgment is not meant to abolish the use of race completely in admission considerations. He stated that:

> Nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration or otherwise. In other words, the student must be treated based on his or her experiences as an individual, not on the basis of race.[64]

On the idea of educational diversity, which the universities have put forward as a defence, the Chief Justice said it is commendable, "but it is not enough to allow race to be used as a factor because race cannot be measured".

In the view of the minority dissenters, it is the rejection of the AA that actually subverts the constitutional provision on equality. Justice Sonia Sotomayor remarked that affirmative action was crucial to countering persistent and systematic racial discrimination. In her words:

> The court subverts the constitutional guarantee of equal protection by further entrenching racial inequality in education, the very foundation of our democratic government and pluralistic society.[65]

Continuing her criticisms of the majority opinion, Sotomayor profoundly remarked that:

> At bottom, the six unelected members of today's majority upend the status quo based on their policy preferences about what race in America should be like, but is not, and their preferences for a veneer of colorblindness in a society where race has always mattered and continues to matter in fact and in law.[66]

On Chief Justice Roberts' observation that the universities can still consider race in some situations, Justice Sotomayor calls it "an attempt to put lipstick on a pig".[67] She strongly condemned the Chief Justice's remark that race must be rejected because it cannot be measured. She believed that the majority is only trying to avoid public accountability by manufacturing this requirement. In her words, "to avoid public accountability for its choice, the court seeks cover behind a unique measurability requirement of its own creation".[68] Justice Ketanji Brown joined the dissenters to denounce the majority opinion in another

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63 Per Chief Justice John Roberts who wrote the majority opinion.

64 ibid.

65 Quoted by Nell Gluckman in his comments. See 'Destructive and Devastating: Dissenting Judges Denounce Majority Ruling in Admissions Case', *The Chronicle of Higher Education*, 29 June 2023.

66 ibid

67 ibid.

68 See Raheim Hamid and J. Sellers Hill, 'In Fiery Dissents, Justices Sotomayor and Jackson Rebuke Affirmative Action Ruling', *The Harvard Crimson*, 30 June 2023.

powerful remark. According to her, the majority opinion is "a tragedy for us all". She noted that:

> Our country has never been colorblind. Given the lengthy history of state-sponsored race-based preferences in America, to say that anyone is now victimized if a college considers whether that legacy of discrimination has unequally advantaged its applicants fails to acknowledge the well-documented "inter-generational transmission of inequality" that still plagues our citizenry. It is that inequality that admission programs such as UNC's help to address, to the benefit of us all. Because the majority judgment stunts that progress without any basis of law, history, logic or justice, I dissent.[69]

This decision immediately sparked a sharp public debate, which divided Americans along ideological lines.[70] While Donald Trump celebrated the case by saying "it was a great day for America",[71] the then-President Joe Biden strongly denounced the decision as a "severe disappointment".[72] He enjoined the Colleges to find other ways of maintaining diversity among the student population.[73]

Taking side with other liberals who condemned the ruling, Michelle Obama, the former First Lady, praised Affirmative Action as a key tool for remedying historic racial discrimination.[74] She noted that:

> It wasn't perfect, but there's no doubt that it helped offer new ladders of opportunity for those who, throughout our history, have too often been denied a chance to show how fast they can climb.[75]

Barack Obama, on his part, also noted that like other policies, AA "wasn't perfect, but it allowed generations of students like Michelle and me to prove we belonged".[76] On the way forward, he urged supporters that it is time "to redouble our efforts" to support students who have historically been systemically excluded from pursuing higher education.[77] To the then US Education Secretary (Miguel Cardona), "the court took away a very important tool that university leaders have used to create vibrant, diverse campus communities".[78] He added that:

> Our commitment to educational opportunity for all Americans is unshaken, and our efforts to promote diversity in higher education are undeterred. The Department of Education is a civil rights agency, committed to equal access and educational opportunity for all students.[79]

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69 ibid.

70 ' The Supreme Court's Affirmative Action Ruling Continues to Spark Debate', The Shield, 28 Nov. 2023 Olivia Silvester, 'Legacy Admissions Spark Debate on Equity on higher Education', The Los Angeles Loyolan, 28 Sept. 2023

71 *ABC News*, June 29, 2023.

72 White House Briefing on June 29, 2023, <www.whitehouse.gov>, accessed 30 November 2023; *USA TODAY*, June 30, 2023.

73 ibid.

74 *CBS News*, 29 June 2023

75 ibid.

76 ibid.

77 The National Desk, 29 June, 2023

78 *CBS News*, 30 June 2023

79 ibid.

The emotion-laden public debate on the appropriateness or otherwise of the use of race in the admission processes in Colleges is an eloquent testimony to the philosophical division of the American society between the Conservatives and the Liberals.[80] This division is equally evident in the judiciary.[81] The six Justices of the Supreme Court who struck down the AA admission policy are well-known conservatives, while the three dissenting justices are publicly known as liberals.[82] The sentiments expressed by many Americans deeply touch on the history of slave trade and slavery in America and its current impact on the political and socio-economic demographic factors in the society.[83] According to Ogbuli, writing for the Republic, a contentious journey lies ahead as America grapples with the intricacies of race, access and equal opportunity in the sphere of higher education.[84]

Both the court decision and the public debate have established that AA in the college admission processes in America is aimed at two objectives, namely: creating more opportunities for minority groups in the admission processes and, secondly, fostering greater diversity and inclusion in higher education institutions.[85] The judicial abolition of the race-conscious admission policy seems to have raised fears of a reversion to the racially skewed demographics of the past, as universities shift to race-blind admissions, potentially deepening educational disparities.[86] The only alternative left for the universities, as observed by Ogbuli, is to work towards fashioning out a new path to preserve diversity and inclusivity in the student populations.[87]

This calls for innovation and commitment in the search for a new model that will achieve equity without violating the constitutional provision on equality as determined by the apex court.[88] Some studies have shown that in states in America that had earlier banned AA through legislation, there has been a decline in the admission and enrolment of Blacks, Latinos and the indigenous people.[89] These declines are felt more in choice and flagship institutions.[90]

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80 *Reuters* 29 June 2023

81 Even before the judgment was delivered, CNN had predicted that, judging by the composition of the court, the decision would likely follow ideological divisions between the liberals and the conservatives. It came to this conclusion following the reaction of the Justices while lawyers addressed the court. *CNN News* of 31 October 2022.

82 Nina Totenberg, "Supreme Court Conservatives are openly Hostile to Affirmative Action in Admissions", *NPR*, 31October 2022.

83 Edwin Chemerinsky, *op. cit*. The continuing impact of the evil era of slavery is eloquently captured by Glenn C Loury in the article titled 'An American Tragedy: The Legacy of slavery Lingers in our cities' Ghettos", <www.brookings.edu>, accessed 28 November 2023

84 Kosi Ogbuli, "Race Still Matters", The Republic, 2 July 2023.

85 ibid.

86 ibid.

87 *US TODAY*, op. cit.

88 "Advancing Racial Equity After the End of Affirmative Action", *MIT Faculty Newsletter*, September/October 2023, Vol. XXXVI, No 1.

89 ibid. See also David Mickey – Pabello, 'Scholarly Findings on Affirmative Action Bans', *The Civil Rights Project*, October 26, 2020, <www.civilrightsproject.ucla.edu>, accessed 20 January 2023; Kosi Ogbuli, *op cit*; Peter Henrichs, "Affirmative Action and Racial Segregation", *The Journal of Law and Economimcs*, Vol 63 No 2.

90 Elisie Colin and Bryan J. Cook, 'The Future of College Admissions without Affirmative Action', *URBAN WIRE*, June 23, 2023.

On the other hand, the same studies found that diversity in higher education improves learning outcomes for all students, and the benefits extend beyond graduation.[91] AA supporters argue that this abolition would negatively affect not only students of colour but also other students as well. To them, as Blacks and other students of colour would be less likely to attend selective institutions that usually have more resources and higher graduation rates, other students would equally be unable to benefit from the perspectives and experiences that come with having a more diverse campus life.[92] They subscribe to the view of Justice Ketanji Jackson that the decision is a tragedy for all.[93] It must be noted at this juncture that the import of the American Supreme Court decision is that the educational AA was unconstitutional and void *ab initio*. Given the enormous influence of American courts in other jurisdictions, African courts are likely to be influenced by that decision sooner or later.

4. INFLUENCE OF AMERICAN CONSTITUTIONAL JURISPRUDENCE IN OTHER JURISDICTIONS.[94]

Judges around the world have long looked to the decisions of the United States Supreme Court for a guide in constitutional law and human rights cases since World War II.[95] Though this trend is gradually waning owing to a number of factors,[96] it is still true that the signature innovations of the American legal system have remained shining examples for other jurisdictions. These innovations include a written constitution, a Bill of Rights to protect individual freedoms and an independent judiciary with the power to strike down statutes.[97] In a good number of cases, the American constitution and constitutional cases have been cited and discussed in courts in such jurisdictions as Australia, Canada, Germany, India, Israel, Japan, New Zealand, South Africa and Nigeria.[98]

America can thus be described as a major exporter of constitutional and human rights jurisprudence to other democratic nations, including those that emerged in recent decades, particularly in Africa.[99] America's influence on other constitutions and legal systems manifests in similarities of phrasing and borrowed passages in those constitutions, particularly the provisions relating to constitutional supremacy, rule of law, separation of powers, human rights and federalism.[100] An influential American historian noted in 2009 that:

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91 ibid.
92 ibid.
93 Michelle Obama (n.75)
94 George Khoury, 'International influence and the US Supreme Court, <www.findlaw.com>legalblogs> accessed 25 November 2023.
95 Adam Liptak 'US Court is Now Guiding Fewer Nations', New York Times, 17 September, 2008.
96 ibid.
97 Jessie Kraytz, 'Global Influence of the US constitution', *U.S National Archives*, 17 September 2021.
98 The Worldwide Influence of the US Constitution has been profound although not without its Criticisms. See Jessie Kraytz, ibid.
99 Mark D. Rosen, 'Exporting the Constitution', *Emory L.J.* 2004), <https://scholarship.kentlaw.edu/fac-Schol/518>, accessed 2 December 2023.
100 George Atham Billias, *American Constitutionalism Heard Round the World, 1776-1989*, (University Press, 2009) 15. See for instance, the constitution of the Federal Republic of Nigeria 1999 Section 1 (Constitutional Supremacy), Section 4,5 and (Separation of Powers and Federalism) and chapter 4 (Fundamental rights); Australian constitution 1901, Section 5 (Federalism) and the Indian constitution, 1950 Article 1 and schedule 7 (federalism)

'The influence of American constitutionalism abroad was profound in the past and remains a remarkable contribution to humankind's search for freedom under a system of laws.'[101]

According to him, the waves of this constitutional influence regarding America's relationship with other nations[102] , including the period of independence movements and decolonisation of Africa, as well as the period of transitioning of once undemocratic regimes (including some in Europe) towards constitutional democracies incorporating elements of the US constitution.[103]

The spread of America's constitutional ideas, as would be expected, equally entailed strong reliance by foreign courts on decisions of American courts, particularly the Supreme Court, on the meaning and attributes of constitutional principles. Observations have been made that, in recent years, foreign courts have been relying less on American courts' decisions in determining the meaning and essence of constitutional concepts.[104] However, that does not negate the fact that American courts have been a global leading voice on issues of constitutionalism and human rights.[105] A few examples of the influence of American courts in other jurisdictions may be given.

One famous American constitutional law case that has been popularly cited in other jurisdictions is *Marbury v. Madison*[106] , which established the principle of judicial review and the power of the federal court to declare legislative and executive acts unconstitutional. Other constitutional cases that have defined the American nation and are popularly cited by courts and jurists in other jurisdictions include *Brown v Board of Education*[107] , which insisted that there is something inherently discriminatory in the racial segregation of schools. It was held that racially segregated public schools are unconstitutional and violate the 14th Amendment on equality and non-discrimination. This decision overturned the earlier decision in *Plessy v Ferguson*[108] , which validated segregation in public schools by establishing the "separate but equal" doctrine. In *Brown v Board of Education,* the court held that segregation per se is inherently unequal and discriminatory. The facts of these two cases reveal the historical discriminatory practices against racial minorities in the educational sector, which resulted in or contributed to the entrenched low standard, which in turn made it difficult for them to compete favourably in the admission processes into choice universities and choice courses.

The popular case of Roe v Wade[109] is another American authority that has seriously impacted the jurisprudence of many foreign jurisdictions and has, in fact, received global attention owing to long-standing ideological conflict between anti-abortion and pro-abortion groups in different parts of the world. In 1973, the US Supreme Court in that case practically

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101 ibid.
102 ibid.
103 See Carol J. Guarneri, 'Review of American Constitutionalism Heard Round the World', *Journal of World History* - Erstwhile European colonial territories like Nigeria and Kenya referenced the US constitution in developing their Presidential model of government incorporating such principles as separation of powers and judicial review etc. a number of Latin American countries also borrowed federalism and democratic practices from the US. See Jessie Kratz, 'Global Influence of the US constitution'. US National Archives, September 17, 2021. https://prologue.blogs.archives.gov accessed 20 February 2025 [2010] 21(3) 524-527
104 See Adam Liptak*, op. cit.*
105 ibid.
106 5 US 137 (1803)
107 *(*n.44)
108 (n.44)
109 410 US 113 (1973)

guaranteed a constitutional right to abortion (with some exceptions) by holding that the right to privacy implied in the 14th Amendment protected abortion as a fundamental right, thereby decriminalising the act. This decision has long inspired abortion rights lawyers in and outside the US, particularly in Latin American countries, which are known for their stringent restrictions against abortion.[110]

In 2022, the US Supreme Court overturned the decision in *Roe v Wade* and declared that there is no constitutional right to abortion. This decision in *Dobbs v Jackson Women's Health Organization*[111] is again causing ripples outside America, especially in the Latin American nations, where anti-abortionists have become more emboldened by the prospects of rolling back the gains of the abortion rights advocates in the years following the decision in *Roe v Wade*. Referring to the impact of the Dobbs decision in Latin America, a prominent abortion rights lawyer (Rebecca Reingold) noted that "the reversal of Roe means that the High Courts (in Latin American nations) have one less comparative law decision at their disposal to bolster arguments in favour of broad protections for abortion rights in their decisions".[112] Lamenting on this state of affairs, Reingold noted further that the decision in Dobbs "may diminish Latin American judges and legislators" willingness to take bold action on abortion in their respective countries, stalling or otherwise undermining efforts to achieve broader decriminalization.[113]

Latin-American nations are not alone in their respect for and willingness to follow the decisions of the American Supreme Court on major issues of human rights and constitutional law.[114] Americans are rightly, in our view, proud of their contributions to the constitutional development of other nations. Sending abroad the American ideas about the rule of law has long been a source of pride for their legal system.[115] Charles Fried (a Law Professor at Harvard) has referred to the Supreme Court of the United States (SCOTUS) as "the most respected, the most legitimate".[116] It is therefore important to consider at this stage whether the American decision on educational AA should be followed in Africa and to what extent.

5. AMERICAN AFFIRMATIVE ACTION DECISION AND THE COURTS IN AFRICA: THE NEED FOR CAUTION

From the foregoing discussions, it is obvious that AA is a subject that generates intense controversy. Both proponents and opponents usually advance what seem like strong and valid

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110 Ximena Isaza and Catalina Martinez, 'How Latin America Could Inspire and Inform the US Fight for Reproductive Justice', *Just Security*, (a New York based online Publication for analysis of security, democracy, foreign policy and rights) 19 August 2022, <https://www.justsecurity.org> , accessed 28 March 2024

111 597 US 215 (2022)

112 Quoted in *Jenichi v Serino*, 'How the End of *Roe* could Affect Abortion Access in Latin America', *WORLD*, July, 2022.

113 ibid.

114 Some popularly cited American Constitutional Law cases in other jurisdictions include *Hoffman v US*, 341 US 479 (on right to counsel); *US v Nixon*, 418 US 683 (1974) (on extent of executive powers); *Youngstown sheet and Tube Co v Sawyer* 343 U.S. 579 (1952) (on implied powers of the Federal Government); 5 US 137 (1803), *Brown V Board of Education* (n.44).

115 Sheldon Snook, 'Thank Goodness for the independence of America's Judiciary', *The Atlantic*, 4 December 2020.

116 Cited in Stephen G. Breyer, 'The Work of the Supreme Court', *Bulletin of the American Academy of Arts and Sciences,* [Sept. – Oct. 1998] 52 (1) 47 – 58.

reasons on the surface, but may be incapable of standing up to rigorous analysis. Arguments in favour of AA can be summarised as follows:

(i) It compensates for past injustices.
(ii) It promotes equality and representation.
(iii) Its social utility attributes are in its ability to improve the quality of a place.
(iv) It is a distributive justice mechanism which helps to ensure that opportunities are fairly and equitably distributed.
(v) It is morally permissible because it can help to close the gap between the privileged and underprivileged groups.
(vi) It helps to reduce ethic tension.[117]

For the opponents, the summary of their argument is that:

(i) It helps the wrong people
(ii) It has a natural tendency to become permanent.
(iii) It leads to inefficiency and a lowering of standards.
(iv) It stigmatises its beneficiaries as it tends to stamp on them a permanent mark of inferiority.
(v) It advances racism/ethnic hatred.
(vi) It undermines democratic values.
(vii) It is ineffective.
(viii) There is a need to reward individual merits.
(ix) It punishes people for being intelligent and hardworking. [118]

The major downside of AA is its abuse in some jurisdictions by using it as a tool of corruption and cheating. A situation where the policy enables unqualified or very lowly qualified candidates to gain admission into higher institutions or secure important jobs over bright and highly qualified candidates is bound to create disquiet and acrimony.[119] This situation must not be allowed in any modern society. Caution, integrity and reasonableness must be the watchwords in the application of AA, especially in developing countries of Africa, where ethnic acrimony and political tension have hindered the march towards modernity.

The above observation notwithstanding, there are concerns about the application of some American judicial ideas to developing states of Africa based on ideological and historical reasons. The decision that abolished educational AA in America with respect falls within the category of cases that should not be readily followed in Africa. A continent which is in a hurry to catch up with other regions of the world on issues of development should adopt an interpretative posture of inclusivity and diversity among its people. The

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[117] Edwin Rios, 'What was Affirmative Action Designed to Do and what has it Achieved, The Guardian, 29 June 2023, <www.theguardian.com>, accessed 20 May 2024.

[118] MW Van Wyk, 'A Critical Analysis of some popular Objections to Affirmative Action', SBL Research Review, 1998 2(1)-18.Tayo Bero, 'Affirmative Action is over in the United States, but only for Black people', the Guardian Friday 30 June 2023.

[119] Abuse of AA has been recorded in African countries and Asia. Constraint of space and time would not permit a detailed discussion of that issue. But suffice it to mention few sources. See Abdulkadir Sabudeen, 'Affirmative Action or Removing the Bar: A critique of Admission Requirements in Government schools in Nigeria", Journal of Social and Education Research, Vol. 3 No 1 (2024) June, 9-18; Gerbrandt Van Heerden, 'Affirmative Action Failures: Malaysia's warning for South Africa" Biznews, April 18, 2023 <https//www.biznew.com/ thoughtleaders/…>, accessed 20 June 2024.

development agenda, as represented in extant instruments,[120] is philosophically inconsistent with the conservative attitude which informs the majority opinion in the Harvard and North Carolina admission cases.

The general philosophy which underpins the Constitutive Act of the African Union and Agenda 2063 will render the American decision unsuitable in Africa. A few comments will suffice to show that the basis of the US ruling is of little comparative value for the developing states of Africa. The strategy of those seeking the abolition of AA in the US has been to incite the groups against each other through sponsored litigation. In the US and South Africa, white women were pitted against black women when AA was introduced to uplift the status of the latter group[121] . This sponsorship strategy gave birth to the US case of *Fisher v Texas* and the South African case of *SA Police Service v Solidarity*.[122] Solidarity is a well-organised conservative trade union.[123] Later, the focus of the opponents shifted to Asian-Americans, who were cited as victims of AA being extended to Blacks.[124] It was also argued that Indians and other coloured persons are victims of AA being offered to the Black race.[125] The fight to dismantle AA is thus a strategy of conservative groups which has the prospect of negatively impacting the much-needed unity in Africa, if followed wholeheartedly.[126]

The need for unity is at the very foundation of the African Union (and the defunct OAU).[127] A continent in urgent need of development must not encourage strategies that are capable of fomenting disunity among its people. The abolition of AA in America is capable of inspiring the conservative elements to push for similar abolition in Africa through the instrumentality of sponsored litigations[128]. It is our view that the benefits of affirmative action cannot be abruptly terminated at this stage of Africa's development. The continent, unlike the US, has not attained the level of socio-political and economic stability that can withstand the huge acrimonious fallout of such a ruling. Africa is still struggling with historic divisions along racial and ethno-religious lines and would rather pursue policies that accommodate and not exclude disadvantaged groups.

Rather than viewing AA with hostility, governments in Africa should supplement it by taking strong steps to improve the welfare of the people, paying particular attention on how to remedy those factors that engender backwardness and underdevelopment among particular groups with a view to turning the situation around as quickly as possible, thereby

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120 African Union Constitutive Act 2000; African Charter on Human and Peoples Rights 2001, New Partnership for Africa's Development, Agenda 2030, African Charter on Democracy, Elections and Governance 2007, East African Community Treaty 1999, Economic Community for West Africa Treaty 1975, SADC Treaty, 1992 and Agenda 2063 which is Africa's blueprint to catch up with the rest of the world on indices of development. (see (n138).

121 African Union Constitutive Act 2000; African Charter on Human and Peoples Rights 2001, New Partnership for Africa's Development, Agenda 2030, African Charter on Democracy, Elections and Governance 2007, East African Community, Treaty 1999, Economic Community for West Africa Treaty 1975 and SADC Treaty, 1992.

122 (2014) ZACC 23.

123 https://solidariteit.co.za accessed 20 May 2024.

124 'Who we are', Solidariteit Beweging,<https://beweging.co.za>who-we-are>, accessed 2/12/23.Tayo Bero, *op. cit.*

125 ibid.

126 African Union (and the defunct OAU) as the name implies is founded on the platform of unity for Africa. See African Union, *Encyclopedia Britannica*, <*https://www.britannica.com*> accessed 20 may 2024

127 ibid.

128 Bero, *(n121)*

rendering the AA controversy unnecessary. One major argument against AA is that some supposedly disadvantaged groups rely on it to fraudulently gain undue advantages against others,[129] a situation which breeds discontent and antagonism towards AA programmes. While the courts in Africa are urged not to hurriedly terminate or abolish AA, they are equally enjoined to stay vigilant to ensure that fraudulent AA programmes do not receive judicial approval in any guise. Governments are equally enjoined to ensure that AA does not become an instrument of inter-ethnic cheating or fraud.

Other reasons have been advanced in urging the courts in Africa to refrain from following the American AA abolition ruling. One of them borders on ideological differences that have marred the American Supreme Court decision.[130] The Republican-appointed Judges see AA as racial discrimination against the whites, while their Democrat-appointed colleagues consider it a necessary step to genuine equality.[131] This ideological rift in the US Supreme Court, which is unique to that jurisdiction,[132] clearly dictated the positions of the Justices in the Fair Admission cases. We agree with the suggestion that this American peculiarity renders the judgment comparatively weak and unpersuasive in other jurisdictions.[133]

It is important to recall that affirmative action is not mentioned in the Constitution of the United States. It was introduced through political and judicial interpretative ingenuity. Incidentally, some new democratic states within and outside Africa did not take similar steps in adopting the jurisprudence of AA.[134] Rather, they chose to include some forms of AA in their constitutions and laws.[135] The South African constitution, for obvious reasons, undertakes in Section 9(2) to advance and protect those adversely affected by past and persisting discrimination. This is a pragmatic way of reducing the evils of the defunct apartheid system. In Nigeria, the National Gender Policy stipulates that 35% of appointive offices should be reserved for women as a way of addressing gender imbalance in public offices brought about by past and present systemic exclusion.[136]

The need for unity and inclusivity underscores many provisions of the Constitutive Act of the African Union, 2020. The first paragraph of the Preamble to the Act states that the Union is inspired, inter alia, by the need "to promote unity, solidarity, cohesion and cooperation among the peoples of Africa and African States". Similar sentiments are repeated in some other paragraphs of the Preamble and Article 3, which spells out the objectives of the

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129 See Baker Donelson, 'When Affirmative Action Goes Wrong', *The Howard Baker Forum*, 28 Sept. 2009.

130 Nomfundo Ramalekana, 'Affirmative Action Judgment: A South African Perspective', *Oxford Human Rights hub*, July 11, 2023, <https://ohrh.law.ox.ac.uk>, accessed 12 December 2023.

131 ibid.

132 ibid.

133 African courts are thus enjoined to ignore or distance themselves from the ideological conflict raging in the American Supreme Court. See Nomfundo Ramalekana*, ibid*.

134 See J.W. Dietrich et al, (n.14)

135 India and South Africa are typical examples. See for instance, Article 16 of the 1950 Indian Constitution for AA in employment and Article 46 for promotion of educational and economic interests of the weaker sections of the society. See also Article 9(2) of the South African Constitution, 1996.

136 While the Bill to give legal backing to the policy is still pending before the National Assembly, it was reported that the Government was minded to enforce the National Gender Policy by allotting 35% of appointments in the public sector to women. See *Premium Times Newspaper* of 6 April 2022 <www.premiumtimesng.com> accessed on 20 December 2023

Union.[137] Gender equality and social justice were also provided for in Article 4. These provisions and the sentiments expressed therein may become difficult, if not impossible to implement, in an atmosphere of grievances and misgivings rooted in historic group marginalisation and injustice or even those arising inadvertently through some natural and/or unenvisaged dynamics.

Many developmental initiatives in Africa, like NEPAD, MDGs and Agenda 2063,[138] also emphasised a people-driven socio-economic agenda and the need for unity and inclusivity. The African concept of human rights is anchored on solidarity and socio-economic pathways.[139]

6. CONCLUSION AND RECOMMENDATIONS

This paper has endeavoured to highlight the controversial nature of Affirmative Action policy, which became a socio-political and legal reality in the past few decades in the United States of America and many other jurisdictions. The eventual juridical abolition of the policy in America resulted in emotion-laden public debate about its appropriateness or otherwise in remedying past historical and systemic injustices. This paper posits that AA is still relevant in Africa. Accordingly, African courts should not be in a hurry to follow the American decision. Efforts were made in this paper to highlight some African peculiarities which render that decision unsuitable for the developing continent. While urging caution by governments and courts in Africa, the following recommendations are made to ensure credibility in the implementation of AA programmes in Africa;

(i) In the implementation of Affirmative Action in Africa, efforts should be made to articulate the sunset date to avoid the temptation of allowing it to crystallise into a permanent feature, contrary to its original intention.

(ii) While it lasts, serious efforts should be made to tackle the root causes of the situation that necessitated the AA.

(iii) Affirmative Action should not be allowed to run in every aspect of the life of a nation. It should be limited to very carefully selected areas, essential for integrated national development.

(iv) Efforts should be geared towards preventing abuse, fraud and unreasonableness in the implementation of AA programmes. The qualification gaps between the beneficiaries and victims of AA in educational and job opportunities should not be unreasonably disproportionate. Robust mechanisms must be put in place to ensure strictness and integrity in the implementation.

(v) Efforts should be made to compensate outstanding and genuine victims of AA by conceding advantages to them in other areas.

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[137] Article 3(1) states that one of its objectives is "to achieve greater unity and solidarity between the African countries and the people of Africa".

[138] Agenda 2063 which is rooted in Pan Africanism and African Renaissance is a robust framework for addressing past injustices and the realization in the 21st century of "the Africa we want". It echoes the call that Africa must unite in order to realize its Renaissance. <https//au.int>documents>3, accessed 12 December 2023

[139] Aneth Amin, 'The Potential of African Philosophy in Interpreting Socio-Economic Rights in the African Charter on Human and Peoples' Rights', *African Human Rights Yearbook*, [2021] 5, 23-50.

(vi) Rather than using race or ethnicity or gender simpliciter, the socio-economic status of people within the beneficiary groups should equally be factored in to ensure that the benefits of AA do not go to the wrong persons.