



# Affirmative Action - Labor Law

Australia • Canada • Cuba • Guyana • India  
Indonesia • Malaysia • Nigeria • Northern Ireland  
Pakistan • South Africa • Sri Lanka

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## AUSTRALIA

Australian affirmative action legislation is premised on the notion that complaint-based sex and race discrimination laws are not sufficient to eliminate widely prevalent and entrenched discriminatory practices. Affirmative action legislation which is *proactive and preventative* thus helps to "counter the present and continuing effects of past discrimination ... and to improve the participation and status of members of [discriminated] groups within the employer's organization."<sup>1</sup>

A federal statute, the Affirmative Action (Equal Employment Opportunity for Women) Act 1986, obliges corporations and other private sector entities which employ more than 100 persons to implement an eight-step affirmative action program. Aimed at eliminating discrimination and the promotion of equal employment opportunities for women, the program includes requirements for consulting, reviewing policies and practices, the setting of objectives and future estimates, and monitoring and evaluating.

In the public sector, the Federal Public Service Reform Act 1984 makes affirmative action for women and designated groups mandatory. The aim of the legislation is to eliminate unjustified employment legislation and to enable those persons to compete for promotion and pursue career development as effectively as other persons.

No relevant information on the effectiveness of the legislation is at hand. In the context of other anti-discrimination legislation, however, it is assumed that such laws have the greatest impact through a long-term educative process, with effective enforcement being an essential precondition of the educative process.<sup>2</sup>

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<sup>1</sup> R. Hunter, *Indirect Discrimination in the Work Place* 80 (1992).

<sup>2</sup> W. B. Crighton, W. J. Ford & R. J. Mitchell, *Labor Law* 43 (2d ed., 1993).

## CANADA

Canada's answer to affirmative action laws has been employment equity legislation. On the Federal level, the current Employment Equity Act was brought into force in 1988.<sup>1</sup> Section 2 of this statute states that "employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences." Towards this end, the Employment Equity Act defines certain *designated groups*. The Act requires persons who employ more than one hundred persons "in connection with a federal work, undertaking, or business" to file annual implementation plans and timetables for the hiring and promotion of larger percentages of designated group members.<sup>2</sup> The implementation plans and timetables are usually the subject of negotiations between Government and industry. However, employers who refuse to submit the required plans are liable to be fined substantial sums.

Individual complaints can be referred to the Canadian Human Rights Commission. Compliance Officers are authorized to examine records and make recommendations. Proposed changes to the Employment Equity Act would give these Officers the authority to enter business premises to seize documents whenever they deem this to be necessary.<sup>3</sup>

Canada's Employment Equity Act presently covers approximately 600,000 persons working in Federal works, undertakings, and businesses. There is considerable debate in Canada as to what its effect has been. Human Resources Development Canada has stated that the increases in minority hiring that have occurred over the past seven years have been roughly equivalent to those encountered in the private sector. While the gaps between the average wages of the different designated groups and that of white males has generally decreased, there have been exceptions. For example, the gap between the average salaries of native workers and white males has actually increased by 5% over the past five years.<sup>4</sup>

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<sup>1</sup> R.S.C. ch. 23 (2d Supp. 1987).

<sup>2</sup> *Id.* § 5.

<sup>3</sup> Bill C. 64, 34th Parl., 1st Sess. (1995).

<sup>4</sup> Human Resources Development Canada, ANNUAL REPORT 12 (1993).

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**CUBA**

A search of sources available in the Law Library of Congress collection failed to locate any Cuban legislation specifically on affirmative action.

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## GUYANA

The legislation and regulations of Guyana do not appear to contain any provisions for affirmative action programs.

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## INDIA

The framers of the Constitution of India realized that any affirmative action framework would be highly controversial. Therefore, they considered it advisable to spell out its provisions in the Constitution which recognizes equality before the law as a basic individual right. However, the main task before the courts has been reconciling formal legal equality as an individual right with substantive equality as a right attached to a group or class.

Article 14 of the Constitution provides for the fundamental right of equality before the law. Article 15 prohibits discrimination on grounds of religion, sex, caste or place of birth. Thus, no citizen can be subject to any disability or restriction with regard to access to certain public positions on such grounds. The two exceptions to this rule are (1) the right of the State to make provision for the advancement of backward classes of citizens or for the scheduled castes and scheduled tribes; and (2) to make special provision for women and children.

Article 16 guarantees equality of opportunity and non-discrimination in regard to state employment. It has three exceptions. One, Parliament can make prior residence in a State a requirement for appointment. Two, the law may demand a specific religious affiliation from persons seeking appointment to any religious institution. Three, the State may reserve posts in favor of any backward class of citizens who are not adequately represented in its service.

Article 17 abolishes untouchability and prohibits its practice. In addition, Part 4 of the Constitution, titled "Directive Principles of State Policy," contains provisions establishing the Constitution's commitment to social equality, which are not judicially enforceable, however. Article 37 casts a responsibility on the State to apply these principles in making laws.

In exercising the powers under the stated constitutional provisions, federal and state governments make reservations, in employment and admissions to university programs, for the scheduled castes and tribes and backward classes. Such orders and reservations are subject to review by the Supreme Court.

The main contentious issues confronting the Supreme Court of India, in the context of preferential policies, has been the determination of the criteria as to who should benefit from these policies and the scope of such policies. The identification of *other backward classes* has, however, caused considerable difficulty for the courts and tension among the citizens. In the State of Mysore, the state has reserved 68% of the government positions for scheduled castes, scheduled tribes and persons from backward castes. Out of this 18% were for the scheduled tribes and castes, and the rest for backward classes. The reservation order also made a distinction between more backward classes and backward classes. The Supreme Court declared the order, based on such artificial

distinctions, as void. The Constitution uses the term *backward classes* and not *backward castes*, the court observed.<sup>1</sup>

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<sup>1</sup> *M.R. Balaji v. State of Mysore*, 1963 A.I.R. (S.C.) 649.

## INDONESIA

The closest thing in Indonesia to affirmative action is apparent in the country's economy, the one area in which many Indonesians have deplored the dominating position of certain ethnic minorities, in particular the Chinese Indonesians. The non-Chinese Indonesians, generally referred to as *pribumi* (literally, native or indigene), have benefited from the official policy which was adopted in the late 1970s to promote *pribumi* entrepreneurship. In certain fields of business, *pribumi* capital must consist of a majority share. *Pribumi* enterprises benefit from special credit programs such as the Small Investment Credit, the Permanent Working Capital programs, and other credit facilities designed to promote investment.

In 1979, the Government reserved a large number of items on its procurement list for small-scale *pribumi* enterprises. It is said that in spite of these incentives for the development of *pribumi* entrepreneurship, the ethnic Chinese advantage in the economy remained evident into the 1980s. In 1981, the Indonesian Government started a new campaign to create a class of *pribumi* commercial agents, the aim being to get more indigenous Indonesians into the larger economy. Apparently these efforts have borne fruit. It is reported that *pribumi* families have recently come to enjoy considerable success in business.

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## MALAYSIA

The Malays and other indigenous peoples of Malaysia such as the Dayaks, Kajangs, Muruts, and Ukits, are beneficiaries of constitutional provisions which are in the nature of affirmative action laws. Although the Malaysian Constitution guarantees equality to all persons before the law, it also stipulates that this does not invalidate or prohibit any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula, including the reservation of land, or the reservation to aborigines of a reasonable proportion of suitable positions in the public service. Thus, certain quotas are reserved for these persons, in the number of positions in the public service, and in the number of scholarships and other educational or training privileges or special facilities accorded by the Federal Government. Also, when any permit or license for the operation of a trade or business is required by federal law, a quota of such permits and licenses may be reserved for the indigenous Malays. Additionally, when the demand for places in universities, colleges and other post high-school educational institutions exceeds the supply thereof, a certain proportion of places may be reserved for indigenous Malays.

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## NIGERIA

Affirmative action in Nigeria is viewed as a means for national integration and development. The 1989 Constitution<sup>1</sup> provides for promotion of the *federal character of Nigeria*. The latter is defined as follows: "the distinctive desire of the peoples of Nigeria to promote national unity, foster national loyalty and give every citizen of Nigeria a sense of belonging to the nation...."

According to the Constitution "national integration shall be actively promoted whilst discrimination on the grounds of place of origin, circumstance of birth, sex, religion, status, ethnic or linguistic association or ties shall be prohibited."<sup>2</sup> It further guarantees that "the composition of the Government ... and the conduct of its affairs shall be carried out ... to reflect the ... need to promote national unity ... ensuring that there shall be no predominance of persons from a few States or from a few ethnic or other sectional groups in that government or in any of its agencies." The same applies to the state governments as well.<sup>3</sup> In the area of economy, the Constitution guarantees that "the economic system is not operated in such a manner as to permit the concentration of wealth or the means of production and exchange in the hands of few individuals or a group...."<sup>4</sup> Presidential appointments should also be made with "regard to the federal character of Nigeria and the need to promote national unity...."<sup>5</sup> Furthermore, "[t]he composition of the officer corps and other ranks of the armed forces of the Federation shall reflect the federal character of Nigeria...."<sup>6</sup> The Constitution also governs the establishment of political parties. Accordingly, "the rules of political parties should ensure that the members of the executive committee or other governing body ... reflect the federal character of Nigeria."<sup>7</sup>

The need for integration stems from a reality where 250 ethnic groups exist. Nigeria has a long history of tension among its diverse ethnic groups. A State Department human rights report notes that tradition continues to impose considerable pressure on individual government officials to favor their own ethnic groups. Certain minorities complain about the Government's failure to provide

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<sup>1</sup> THE CONSTITUTION OF THE FEDERAL REPUBLIC OF NIGERIA 1989, 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Oceana, 1994).

<sup>2</sup> § 16(2).

<sup>3</sup> § 15.

<sup>4</sup> § 17(c).

<sup>5</sup> § 157(5).

<sup>6</sup> § 197(2).

<sup>7</sup> § 221.

adequate social services, such as water and electricity. Thus, according to the report, discrimination still exists in spite of the constitutional provisions.<sup>8</sup>

Various programs to promote development of the *federal character of Nigeria* have been established. For instance, a quota system was introduced in the civil service system.<sup>9</sup> Similarly, a quota system applies in the educational system. Efforts to obtain information on the effectiveness of these programs under such a tight deadline were not fruitful. Any information received, if such a need arises, will be provided when received.

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<sup>8</sup> COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1994 188 (Department of State, 1995).

<sup>9</sup> NIGERIA -- A COUNTRY STUDY 239 (1991).

## **NORTHERN IRELAND**

In 1989, an affirmative action plan was enacted to secure fair participation in the employment of both Protestants and Roman Catholics in Northern Ireland. The Fair Employment (Northern Ireland) Act, 1989, amending an earlier Act of 1976, requires mandatory affirmative action from employers and the setting of goals and timetables, as directed by the Fair Employment Commission. The promotion of affirmative action is considered to have provided a effective new tool to secure change in the employment practices in Northern Ireland. The affirmative action plan calls for the adoption of practices encouraging the participation of the under-represented segments of the community and the modification or abandonment of practices that may have discouraged or restricted such persons from seeking employment.

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## PAKISTAN

All citizens of Pakistan are equal before the law and are entitled to equal protection of the law.\* The Constitution forbids discrimination on the basis of sex alone. However, it does not prevent the State from making any special provision for the protection of women and children. Article 26 ensures all citizens a guarantee of access to public places without discrimination on the grounds of race, religion, caste, sex, residence or place of birth, provided the place is not intended for religious purposes only. The article reserves the right of the State to make special provisions for women and children.

Article 27 provides for non-discrimination in State employment. It states that no citizen, otherwise qualified for appointment in the service of Pakistan, shall be discriminated against in respect of any such appointment on the grounds only of race, religion, caste, sex, residence or place of birth. This article has three exceptions. First, it provides that, in the interest of the said service, for a specified period not to exceed twenty years from the commencing day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan. Second, in the interest of the stated service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex. Third, it gives the provincial governments, or any local or other authority in a province, powers to prescribe conditions as to residence in the province as a requirement for appointment under that authority.

However, neither the constitutional provisions nor judicial decisions have further developed the concept of an affirmative action program for religious minorities or *backward classes*. The term *backward classes* was used in the "Objectives Resolution" which forms part of substantive provisions of the Constitution, but the term is not defined anywhere in the Resolution.

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\* THE CONSTITUTION OF THE ISLAMIC REPUBLIC OF PAKISTAN, art. 25.



## SOUTH AFRICA

In South Africa, in the post-apartheid era, all the discriminatory legislation has been repealed and the interim Constitution forbids all discriminatory acts.<sup>1</sup> It also establishes commissions, such as the Human Rights Commission, the Commission on Gender Equality and the Commission on Restitution on Land Rights, to implement the interim Constitution.<sup>2</sup> Furthermore, the new Labor Relations Bill contains a provision which will effectively prevent racially exclusive unions from registering and making use of the statutory system.<sup>3</sup>

On June 8, 1994, the Government announced a comprehensive affirmative action program for the public service by creating 1,000 new jobs and setting up an affirmative action monitoring mechanism to assist management to promote representation.<sup>4</sup> Since the demise of apartheid, private industry has also been trying to increase the ratio of black managers.

South Africa's white minority claims affirmative action will create reverse discrimination. They also claim that affirmative action will not always work for the benefit of the black South Africans.

Companies that cannot find qualified black South Africans to fill managerial positions because of the poor education system of the apartheid era are importing them from other countries.<sup>5</sup> However, affirmative action in South Africa is too recent to judge its effectiveness.

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<sup>1</sup> Act No. 200 of 1993, art. 8, STATUTES OF THE REPUBLIC OF SOUTH AFRICA CLASSIFIED AND ANNOTATED FROM 1910, 1211 (Durban, 1967-).

<sup>2</sup> *Id.* arts. 116, 119 & 121, at 1281 & 1283, respectively.

<sup>3</sup> WEEKLY MAIL & GUARDIAN (Feb. 8, 1995), at 10.

<sup>4</sup> CITIZEN (June 9, 1994), at 1.

<sup>5</sup> BUSINESS DAY (June 9, 1994), at 1.

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## **SRI LANKA**

Sri Lanka does not have any constitutional or other legal provisions for an affirmative action program for its minorities, the Tamils and the Muslims. However, according to the Embassy of Sri Lanka, by a decision of the Sri Lanka Cabinet and issuance of an executive order, positions in the State service are allocated on roughly the basis of the proportional populations of the Island. In any case, the entry of applicants into State employment is still based on the comparative merit of the candidate and his visa interview. The same principle applies for admission to the university.

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