

A Critical Analysis of Employment Equity Measures in South Africa

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Preliminary Matters

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Abstract

This thesis analyses the Employment Equity Act 55 of 1998 and its application in labour law in South Africa. After an initial examination of the general concepts with regards to employment equity and current international conventions regarding employment equity, the study will move on to examine employment equity as it stands in the law today. In examining the current law regarding employment equity, a brief historical background will be offered in order to show the legacy of apartheid: the immense disparity between the different categories of South African people in the modern era. By using this background and analysing the relevant provisions of the Constitution, it will be argued that there is a very real need for employment equity measures to bring about a true sense of equality in South Africa and that such measures are fully endorsed by the Constitution.

After it has been established that affirmative action is an important tool in the creation of an equal South Africa, the measures put in place to help create this equal South Africa will be critically analysed. This critical analysis will point out certain weaknesses in the current affirmative action system. Following this critical analysis of the South African employment equity law, the employment equity systems used in Brazil, Canada and Malaysia will be examined in detail. The purpose of this analysis will be to find the strengths and weaknesses and successes and failures of these foreign systems. This will be done in order to highlight those areas of the foreign systems that can be implemented into South African law in order to make the South African employment equity system stronger. The weaknesses of those systems will also be highlighted in order to learn valuable lessons from other system's failures so that South Africa does not make the same mistakes.

The final part of this thesis will be in depth discussions and the proposal of solutions to the weaknesses of the South African employment equity system that have been highlighted throughout the thesis. These proposals will be put forward in order to ensure the most efficient and effective employment equity system in South Africa. There will

also be a reassessment of the most valuable lessons learned from the foreign systems that would be easily implemented into or avoided by the South African system in order to ensure an effective employment equity system.

The purpose, therefore, of this thesis is to critically analyse employment equity in South Africa. A further purpose will be to propose certain amendments and changes to the current system to ensure the Employment Equity Act is reflective of the needs of the people South Africa.

Acknowledgements

It is at this point that I take the time to acknowledge and give thanks to those people who have assisted me in the completion of this thesis. I would firstly like to thank Ms Rosaan Kruger and Dr Graham Glover for assisting me with certain aspects of this work. I would also like to thank Mr Gordon Barker, my supervisor, for all the assistance he has given me throughout the entire process of writing this thesis. However, most of all, I would like to dedicate this work to my parents. Without my parents and their support, both financial and emotional, I would not have been available to come this far in life. I hope for nothing more than to make you proud and bring a smile to your faces.

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CHAPTER I

INTRODUCTION

1.1 Purpose of the Study

1.2 Structure of the Thesis

1.1 Purpose of the Study

Affirmative action is a controversial concept. It is also a concept which has created hope for many. Most people do have a view about affirmative action and either support it or feel it is an unnecessary threat. For many, I would suggest, the negative response to this concept is a visceral one based on limited knowledge and anecdotal evidence. One of the objectives of this work to explain affirmative action in the South African context and to help to clarify issues around what is, I will argue, one of the most important and positive measures to be implemented in South Africa.

This work supports affirmative action and will argue that it has a major role to play in modern South African society. The fact that affirmative action will be supported does not mean that the concept is supported in its entirety. It will be argued that this policy is dynamic. Whilst supporting the need for affirmative action, the purpose of this study is to analyse the present policy, compare it with, and contrast it to, some foreign affirmative action policies and make recommendations for a more effective affirmative action system in South Africa.

1.2 Structure of the Thesis

1.2.1 Chapter II – General Concepts and International Instruments

Chapter II serves the function of introducing the concept of affirmative action in a broad and general manner. The concept of affirmative action will not be discussed in fine detail in this chapter in order to prevent repetition and an overlap with later parts of the work. Chapter II will also deal with the two major international instruments which cover the concepts of discrimination and employment equity. These are: the International Convention on the Elimination of All forms of Racial Discrimination¹, and the Convention on the Elimination of All Forms of Discrimination against Women.² The

¹ International Convention on the Elimination of All forms of Racial Discrimination of 1965.

² Convention on the Elimination of All Forms of Discrimination against Women of 1979.

purpose of this portion of chapter II will be to provide a brief introduction to some important concepts and review international views and positions on affirmative action and employment equity.

This background is necessary in order to be able to have a greater insight into the views and positions of affirmative action in South Africa and to fully understand the manner in which is implemented. The South African Constitution requires courts to look at international law when coming to decisions and, therefore, a review of international instruments regarding affirmative action is essential.

1.2.2 Chapter III – Employment Equity in South Africa: The Past and The Present

In order to arrive at a conclusion of what needs to be changed under the current affirmative action system; first, one needs to explain the current system that is in place.

The third chapter of this thesis will be an analysis of affirmative action in South Africa as it stands in the law today. Chapter III will serve three major functions:

- i. A determination on the constitutionality of affirmative action;
- ii. A discussion on possible alternatives to affirmative action; and
- iii. A critical analysis of the measures in place that create and regulate affirmative action. This critical analysis will serve to highlight the weaknesses of the current affirmative action system.

1.2.3 Chapter IV – Employment Equity around the World: Lessons for South Africa

Chapter IV is an analysis of certain foreign legal systems as they relate to affirmative action. This will help give an insight into the status of affirmative action in some parts of the world. The purpose of comparison between the South African system and foreign systems is to find possible areas of weakness in the South African system and strengths in the foreign law systems. The purpose of comparing and contrasting these systems is to

make recommendations that may lead to a more effective affirmative action policy in South Africa. The affirmative action systems of Brazil, Canada and Malaysia will be examined in this chapter.

1.2.4 Chapter V – Employment Equity in South Africa: The Future

The fifth chapter of this thesis is a critical review of affirmative action in South Africa. Chapter V answer questions raised in chapter III of the thesis relating to the weaknesses with the current affirmative action system in South Africa. The purpose of this part of the thesis is to be forward looking; to submit recommendations as to the future of affirmative action in South Africa to ensure its continued existence in the best possible way.

CHAPTER II

GENERAL CONCEPTS AND INTERNATIONAL INSTRUMENTS

- 2.1 Affirmative Action Defined**
- 2.2 The Origins of Affirmative Action**
- 2.3 The Purpose of Affirmative Action**
- 2.4 Types of Affirmative Action**
- 2.5 Employment Equity in the International Arena: International Instruments**

“You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders as you please. 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 the race and then say, ‘you are free to compete with all the others,’ and still justly believe you have been completely fair.”

– Lyndon B Johnson³

2.1 Affirmative Action Defined

Affirmative action has been defined by both the UN Economic and Social Council and the International Labour Organisation as “a coherent packet of temperate measures, aimed at correcting the position of the target group to obtain effective equality.”⁴ Accordingly, it can be seen that affirmative action is the implementation of certain measures for a limited period of time aimed at improving the way of life for designated groups. This is done in order to ensure that substantive equality⁵ is given effect.

2.2 The Origins of Affirmative Action

“The phrase affirmative action was first used [in a racial discrimination context] by President John F. Kennedy in 1961, in an executive order that prohibited federal government contractors from discriminating on the basis of ‘race, creed, color, or national origin... [and required them] ...to take affirmative action’ to prevent such discrimination.”⁶ After Kennedy’s inauguration, the then Vice-President Lyndon Johnson asked Hobart Taylor Jr, a black lawyer from Detroit to work on the first anti-discrimination law.⁷ Taylor said “I put the word affirmative in there at that time. I was

³ President of the USA in a speech at Howard University (1965). See <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650604.asp> to view the speech in full text.

⁴ Buys ‘Why should affirmative action have a sunset clause?’ at <http://www.solidaritysa.co.za/Home/wmview.php?ArtID=164> (accessed on 15 May 2006).

⁵ The concept of ‘substantive equality’ will be discussed in further detail in chapter III of this work.

⁶ Oxford Reference ‘Affirmative Action’ at <http://www.oxfordreference.com/views/ENTRY.html?entry=t122.e0020&srn=2&ssid=355374901#firsthit> (accessed on 13 March 2005).

⁷ Beckwith and Jones *Affirmative Action: Social Justice or Reverse Discrimination?* (1997).

searching for something that would give a sense of positiveness to performance under that executive order, and I was torn between the words *positive action* and the words *affirmative action* ... And I took *affirmative action* because it was alliterative.”⁸ Nine years later in 1970, the Johnson administration created the Equal Employment Opportunity Commission.⁹ The main aim of this Commission was the growth of minority representation in federal employment and contracting.¹⁰

These were the seeds of what would become an international concept.¹¹ The fact that affirmative action is so well established and widespread gives a opportunity for South Africans to examine the way in which affirmative action has functioned in other countries over the years. An examination of the way in which those countries have developed their own affirmative action policies over the years can only benefit the process in South Africa.

2.3 The Purpose of Affirmative Action

Affirmative action includes “any measure aimed at ensuring the equal employment opportunities and equitable representation of suitably qualified persons from designated groups in all occupational categories and levels of the workforce.”¹² This definition seems somewhat complex yet it merely encompasses the fact that the end goal of affirmative action is equal opportunity. The best way to show the purpose of affirmative action is to use a practical example based on the speech of Lyndon B Johnson quoted at the beginning of this chapter:

Two swimmers are on the starting blocks preparing to dive into the pool to swim a two hundred and fifty metre sprint. The gun fires and the first swimmer in lane 1 dives in while swimmer two in lane two is held back by

⁸ Beckwith and Jones *Affirmative Action* 39.

⁹ Beckwith and Jones *Affirmative Action*. See <http://www.eeoc.gov/> for further information on the US Equal Employment Opportunity Commission.

¹⁰ Beckwith and Jones *Affirmative Action*.

¹¹ A further in-depth analysis and case studies on various countries around the world that have adopted affirmative action will be made in chapter IV of this work.

¹² Basson *Essential Labour Law: Volume 1 – Individual Labour Law* 3rd ed (2002) 324.

her opponent's coach. After going fifty metres into the lead, swimmer two is released by the coach and allowed to compete against swimmer one.

By looking at this simplistic example, it can clearly be seen that the second swimmer is at a major disadvantage. The question must be asked, what must be done to solve this situation? The two possible solutions are: either restart; or make the first swimmer wait for the second swimmer to catch up. Unfortunately, in life, society cannot be restarted. For this reason disadvantaged groups need to be allowed to catch up to those groups who have previously had no constraints on them. "It is clear from the text that affirmative action measures designed to enhance the position of previously disadvantaged people form part of the right to equality."¹³

By allowing for members of a certain race or gender to catch up while members of another group are forced to wait ensures substantive equality in society. It allows for all people to have an equal opportunity to compete in 'the race'. The majority of affirmative action policies around the world favour 'non-white' race groups and women as these are the groups that have traditionally been discriminated against in societies around the world.¹⁴ "Supporters of affirmative action argue that the history of discrimination ... has resulted in white males dominating and controlling the social network of social institutions which is the focus of power and authority in our society ... Thus, in order to truly achieve justice and fairness there must be a shift in the power base in these institutions."¹⁵

2.4 Types of Affirmative Action

Beckwith and Jones point out that affirmative action can range from one extreme to another and can be along a continuum of positive favouritism on the basis of race – reverse discrimination. They term the one pole *weak affirmative action*. Under this form,

¹³ Kruger *Equality and Non-Discrimination in South Africa* (2004) Unpublished 5.

¹⁴ One only needs to look at the affirmative action systems of Brazil, Canada, Malaysia, the USA and South Africa, for example, to observe this phenomenon.

¹⁵ Beckwith and Jones *Affirmative Action* 11.

all racially and gender oppressive laws are struck down though persons who were previously disadvantaged are not given special status. It is, in essence, the creation of formal equality.

The group from which an individual or group comes allows them access to “certain privileged positions, special scholarships for disadvantaged classes, using under-representation, or a history of past discrimination as a tie breaker when candidates are relatively equal and the like.”¹⁶ The major policy consideration under this form of affirmative action is the stress of equal opportunity and the ability to compete in society without any regard being taken to a person’s characteristics.

The second pole is the other extreme of reverse discrimination. This type of affirmative action is termed *strong affirmative action*. This type of affirmative action involves a stronger form of reverse discrimination by giving people opportunities on the basis of their race or gender, with the end goal being substantive equality.¹⁷ “This view stresses *equal results* by using timetables, goals, or quotas as criteria by which to judge whether one has achieved fairness.”¹⁸

Affirmative action can be implemented in various ways. Among these are:

- by the allocation of certain jobs or promotions to certain disadvantaged groups;
- by the granting of government contracts to certain groups only;
- the granting of business loans to designated groups; or
- making less stringent requirements or greater admission to the designated groups.¹⁹

¹⁶ Beckwith and Jones *Affirmative Action* 11.

¹⁷ Beckwith and Jones *Affirmative Action*.

¹⁸ Beckwith and Jones *Affirmative Action* 12.

¹⁹ Human Development Report ‘Building Multicultural Democracies’ at http://hdr.undp.org/reports/global/2004/pdf/hdr04_chapter_3.pdf (accessed on 12 March 2005) 69.

2.5 Employment Equity in the International Arena: International Instruments

There are two major international conventions governing the elimination of all forms of discrimination and the implementation of affirmative action measures. These two conventions govern the promotion of formal and substantive equality. The first is the International Convention on the Elimination of All forms of Racial Discrimination²⁰ and the second is the Convention on the Elimination of All Forms of Discrimination against Women.²¹

2.5.1 International Convention on the Elimination of All forms of Racial Discrimination

(a) General

ICERD was opened for signature on 7 March 1966 and finally came into operation in 1969, with South Africa ratifying this Convention in 1998.²² One aspect to note from a South African perspective is the condemnation of segregation and apartheid under article 3 of the Convention. Upon its adoption, this Convention became the “first human rights instrument to establish an international monitoring system and was also revolutionary in its provision of national measures toward the advancement of specific racial or ethnic groups.”²³

(b) Formal Equality

As stated above, ICERD aims to achieve formal equality. This is promulgated early in ICERD and discrimination is defined as follows:

²⁰ International Convention on the Elimination of All forms of Racial Discrimination of 1965. Hereinafter referred to as ICERD.

²¹ Convention on the Elimination of All Forms of Discrimination against Women of 1979. Hereinafter referred to as CEDAW.

²² Cotter *Discrimination Law: Professional Practice Guides* (2005).

²³ Cotter *Discrimination Law* 10.

“In this Convention, the term ‘racial discrimination’ shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”²⁴

Furthermore, in Article 5, signatories agree to guarantee certain rights to the people of their respective countries. These include a guarantee not to discriminate against civil, political, economic, social and cultural rights as well as guaranteeing all persons within their jurisdiction protection and remedies against acts of racial discrimination.²⁵ The promotion of formal equality continues under article 2 (1) and article 5 (f), which, respectively, read as follows:

“State Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races...”²⁶

“The right of access to any place or service intended for use by the general public, such as transport hotels, restaurants, cafes, theatres and parks.”²⁷

(c) Substantive Equality

In a similar vein to the later created South African Constitution, the earlier ICERD does not merely promote formal equality but also promotes substantive equality. Article 2 is worded in such a way that it not only promotes formal equality but also makes way for affirmative action measures. This Article requires parties to the Convention to condemn all forms of racial discrimination and to eliminate racial discrimination by all appropriate means. This may seem that it is merely promoting formal equality but the “elimination by all appropriate means” implies the implementation of affirmative action measures.

²⁴ Article 1 of ICERD.

²⁵ Dugard *International Law: A South African Perspective* 2nd ed (2001).

²⁶ Article 2 (1) of ICERD.

²⁷ Article 5 (f) of ICERD.

Although Article 2 only makes an indirect reference to the adoption of affirmative action, the Convention does directly recognise affirmative action. Article 1 (4) allows for affirmative action by stating that:

“Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.”²⁸

“On the other hand, article 2 (2) obliges states to take affirmative action ‘when the circumstances so warrant.’”²⁹ Article 2 (2) reads as follows:

“State Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.”³⁰

(d) Enforcement

“Of particular note is the enforcement procedure of the [ICERD], which provides for an optional system of individual petition whereby an individual, or group of individuals, can lodge a complaint within the Convention.”³¹ Under this enforcement procedure, the Committee on the Elimination of Racial Discrimination created to help enforce the Convention receives reports from States who are party to the Convention. The Committee

²⁸ Article 1 (4) of ICERD.

²⁹ Dugard *International Law* 249.

³⁰ Article 2 (2) of ICERD.

³¹ Wallace *International Law* (2002) 222.

then examines these reports and makes recommendations. On top of this, “by signing the Convention, each state automatically accepts the possibility of an inter-state complaint.”³² The matter will then be heard by the International Court of Justice unless the disputing States agree to other means of resolution.³³ One of the weaknesses of the system is that any award made is not binding and, therefore, the country alleged to have violated the ICERD may, in effect, continue to do so.

2.5.2 Convention on the Elimination of All Forms of Discrimination against Women

(a) General

CEDAW was opened for signature in 1979³⁴ and came into force on 18 December 1979.³⁵ South Africa became party to the Convention after ratifying it in 1995. In order to be capable of complying with the provisions of CEDAW upon ratification, “Parliament adopted the General Law Fourth Amendment Act³⁶ [in 1993] which removed all traces of legislative discrimination against women so as to enable South Africa to ratify CEDAW.”³⁷ Under this Convention, parties to CEDAW agree to implement both formal and substantive equality measures in the promotion of equality between men and women.

(b) Formal Equality

In terms of CEDAW, discrimination refers to any distinction based on a person’s gender, which “has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights in any field.”³⁸ Article 2 goes on to say that signatory states are required to implement a policy aimed at removing all forms of discrimination against women. States are also required to adopt “appropriate legislative and other measures,

³² Dixon *International Law* 2nd ed (1993) 285.

³³ Wallace *International Law*.

³⁴ Dugard *International Law*.

³⁵ Cotter *Discrimination Law*.

³⁶ Act 132 of 1993.

³⁷ Dugard *International Law* 250.

³⁸ Article 1 of CEDAW.

including sanctions where appropriate, prohibiting all discrimination against women.”³⁹ Article 11 (1) becomes more specific when it guarantees the right to equality with specific regard to employment and equal pay.

(c) Substantive Equality

“Affirmative action is recognised in article 4 (1), which permits states to adopt ‘temporary special measures aimed at accelerating *de facto* equality between men and women.’ Article 4 (2) provides that special measures aimed at protecting maternity ‘shall not be considered discriminatory’.”⁴⁰ These measures, must, however, be removed once the objectives of equality of opportunity and treatment have been attained⁴¹, thus only giving affirmative action measures validity if they are temporary measures. The inclusion of the temporary nature of affirmative action measures could be problematic with regard to South African affirmative action. South African affirmative action measures have no structure for the removal or even an amendment of the measures once its goals have been achieved. This will be discussed in further detail in chapter V of this work.

(d) Enforcement

In terms of enforcement of CEDAW, the Convention creates a twenty-three person Committee on the Elimination of Discrimination against Women. A party to the Convention will make a report to this Committee for its consideration. “In 1999 an Optional Protocol was adopted to permit the committee to receive and consider individual petitions relating to violations of the Convention and to investigate systematic violations of the Convention.”⁴²

³⁹ Article 2 (a) of CEDAW.

⁴⁰ Dugard *International Law* 249 – 250.

⁴¹ Cotter *Discrimination Law*.

⁴² Dugard *International Law* 250.

CHAPTER III
AFFIRMATIVE ACTION AND EMPLOYMENT EQUITY
IN SOUTH AFRICA: THE PAST AND THE PRESENT

- 3.1 South Africa: a Historical Background**
- 3.2 Right to Equality and the Prohibition of Unfair Discrimination**
- 3.3 Levelling Down: An Alternative to Affirmative Action?**
- 3.4 The Employment Equity Act 55 of 1998**
- 3.5 Affirmative Action in South Africa**

3.1 South Africa: a Brief Historical Background

Before examining the Employment Equity Act⁴³, it is appropriate to give a brief historical background of South Africa. That South Africa suffered a torrid past of oppression, discrimination and racism is well known and well-documented. This was not merely a societal racism but was implemented by the government and so was an institutionalized racial system established and enforced by a variety of laws. There was a callous disregard of the concept of equality for all citizens. Legislation was specifically implemented with the function of creating a society that favoured white males and gave white males ample opportunity to succeed while, at the same time, destroying the hopes of ambitions of black people and women around South Africa.⁴⁴ The fact that the oppression occurred is not an issue and is accepted history and need not be dealt with in great detail. However, the legal ramifications are the focal point of this work. This thesis considers the actions taken to rectify the discrimination of the past and to create an equal society for all people where race and gender no longer need to be considered as a problem or a classification; a South Africa where people are people: not Black, White, Indian, Coloured, women, men, disabled or able.

After the election to power of the National Party in 1948, racial discrimination was gradually institutionalized.⁴⁵ “The NP was led by D.F. Malan, who stood for drastic measures against the ‘black menace’, coined the concept of ‘apartheid’ and consistently enforced this devious policy.”⁴⁶ Laws were promulgated that touched every aspect of social life, including a prohibition of marriage between ‘non-whites’ and whites, and the sanctioning of ‘white-only’ jobs. “The Group Areas Act, rigidifying the racial division of land, and the Population Registration Act, which classified all citizens by race, were passed in 1950. The pass laws, restricting black

⁴³ Act 55 of 1998, hereinafter referred to as the EEA.

⁴⁴ See the Group Areas Act 41 of 1950, the Population Registration Act 30 of 1950 (Amendment Act 6 of 1980), the Immorality Act 21 of 1950, the Bantu Education Act 47 of 1953 and many other examples for an example of this type of legislation. See Thompson *History of South Africa* (2001) for a further discussion on the history of South Africa and oppressive legislation.

⁴⁵ Southern Domain Online Travel Guide ‘Brief History of South Africa’ at http://www.southafrica-travel.net/history/eh_menu.htm (accessed on 7 July 2006).

⁴⁶ Southern Domain *Brief History*.

movement, came in 1952.”⁴⁷ Laws forbade most social contacts between races, authorised segregated public facilities, established separate school systems with lower standards for non-whites, and restricted each race to certain jobs. More than eighty percent of South Africa’s land was set aside for its white residents despite the fact that they comprised less than ten percent of the population.⁴⁸

As a response to these harsh laws, there was a continuous struggle to oppose apartheid in all its respects.⁴⁹ The struggle was spearheaded by the African National Congress which fought a mainly political campaign.⁵⁰ A “watershed moment came when, after an ANC campaign to gather mass input on freedom demands, the Freedom Charter - based on the principles of human rights and non-racialism - was signed on June 26 1955 at the Congress of the People in Soweto.”⁵¹

White South Africa eventually yielded to world pressure and to domestic violence in 1990 by repealing most of the apartheid laws. Three years later, a new constitution gave people of all races the right to vote, and the following year South Africans elected a Black man, Nelson Mandela, as President.⁵² A Constitutional Court was established in 1994 by South Africa’s first democratic constitution - the interim constitution of 1993. “The 1993 constitution, agreed upon at multiparty talks, ushered in a legal order based on the concept of constitutional supremacy and an 11-person court was established and continues to function under the final Constitution of 1996 as the highest legal authority in the land in all constitutional matters.”⁵³

⁴⁷ [Big Media Publishers \(Pty\) Ltd ‘A short history of South Africa’ at http://www.safrika.info/ess_info/sa_glance/history/history.htm](http://www.safrika.info/ess_info/sa_glance/history/history.htm) (accessed on 7 July 2006).

⁴⁸ SAHO ‘The Freedom Charter Special Project’ at <http://www.sahistory.org.za/pages/specialprojects/june26/menu.html> (accessed on 7 July 2006).

⁴⁹ See such incidences as the Rivonia Trials of 1963–64, the Sharpeville Massacre of 1966 and the Soweto Uprising of 1976 for an example of the continuous struggle. See Steyler ed *The Freedom Charter and Beyond: Founding Principles for a Democratic South African Legal Order* (1992) for further discussion on such incidences.

⁵⁰ Southern Domain ‘Brief History’.

⁵¹ SAHO ‘Freedom Charter’.

⁵² SAHO ‘Freedom Charter’.

⁵³ Author Unknown ‘History of the Court’ at <http://www.constitutionalcourt.org.za/site/thecourt/history.htm> (accessed on 7 July 2006).

3.2 The Prohibition of Unfair Discrimination and the Right to Equality

“Apartheid systematically discriminated against black people in all aspects of social life. Black people were prevented from becoming owners of property or even residing in areas classified as ‘white’ which constituted nearly 90% of the land mass of South Africa; senior jobs and access to established schools and universities were denied to them; civic amenities, including transport systems, public parks, libraries and many shops were also closed to black people. Instead, separate and inferior facilities were provided. The deep scars of this appalling programme are still visible in our society.”

– O’Reagan J⁵⁴

In 1993, the interim Constitution⁵⁵ came into effect and the legalised right to equality was a challenging new experience in South Africa. This was a radical change from the past of South Africa, as described in the previous section. In the new order, all people had an equal opportunity and an equal status in the eyes of the law. The questions are now posed; what was the result of merely giving the right to equality? Was there any effect on social status of different race group? Did the labour market suddenly open up to allow for equal opportunities for all people and was there no longer a gap between the races?

Just because all citizens in South Africa were granted the right to equality did not mean that they were necessarily equal. People were still disadvantaged as a result of the long term effects of previous racial and gender discrimination. There was still a huge disparity between different groups of people in society.⁵⁶ This was a major problem that required some analysis and a solution to this problem needed to be found. The solution to the problem was affirmative action.

⁵⁴ *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) par 40.

⁵⁵ Act 200 of 1993.

⁵⁶ At the end of the apartheid era in 1995 whites accounted for 13% of the population and earned 59% of personal income; Africans, 76% of the population, earned 29%. See Human Development Report ‘Bringing Multicultural Societies Together’ at 69 for a further discussion on these statistics.

Affirmative action has many critics.⁵⁷ Many people believe that it is a contradiction of the Constitution⁵⁸ in that it seems to deny the right to equality. Some white people, especially white males, claim that they are being cheated out of an equal opportunity to work. “Now, on the basis of race, blacks are claiming special status and reserving for themselves privileges they deny to others. Isn’t one as bad as the other?”⁵⁹ The purpose of this commentary on the right to equality is to argue that affirmative action not only complies with the Constitution but is endorsed by the Constitution and ensures that the Constitutional right to equality has its full effect.

In setting about this task, sections 9 (1) and 9 (2) of the Constitution will be examined and their purposes will be analysed. Certain problems with section 9 (2) and affirmative action – allowed by section 9 (2) – will be analysed and hopefully resolved. In resolving the problems, section 9 (3) and 9 (4) will be analysed. It will be submitted that, although some critics may believe that section 9 (2) – which allows for affirmative action – does not comply with the right to equality, section 9 (3) leaves little room for debate surrounding the unconstitutionality of affirmative action.

3.2.1 The Right to Equality: Formal Equality

The right to equality is formulated in section 9, which is part of chapter 2 of the Constitution, the Bill of Rights. The institutionalisation of the right to equality made a huge leap from the previous era in which so many South African citizens had been denied any form of equality. In previous years, as mentioned earlier in this chapter, the entire political and social system had been based on a system of inequality and different laws, attitudes and possibilities for different groups of people, whether it was based on race, religion, gender or sexual orientation.

Section 9 of the Constitution states:

⁵⁷ See Rautenbach *Liberating South African Labour from the Law* (1999); Brassy ‘The Employment Equity Act: Bad for Employment and Bad for Equity’ (1997) 18 *ILJ* 1359; and Cavanagh *Against Equality of Opportunity* (2002) for examples of anti-affirmative action literature.

⁵⁸ Constitution of the Republic of South Africa, 1996.

⁵⁹ Beckwith & Jones (eds) *Affirmative Action: Social Justice or Reverse Discrimination* (1997) 143.

“Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law;⁶⁰

The importance of the right to equality was articulated by Mohamed DP when he stated in *Fraser v Children’s Court, Pretoria North*⁶¹ that:

“There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised.”⁶²

The importance of the right to equality is also shown by the right to equality’s positioning in the Bill of Rights. On reading the document, it is noticeable that the first individual right in the Bill of Rights is the right to equality. The importance of the right to equality, and equality as a value upon which South Africa is founded, does not end there. In fact, it does not even start there. The first place in the Constitution that the right to equality is mentioned is in the preamble. It is then referred to again in section 1 of the Constitution. These provisions read that South Africa is a “democratic and open society in which ... every citizen is equally protected by law” and in section 1: “The Republic of South Africa is one sovereign state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.”⁶³

Equality is mentioned in four further provisions. It is mentioned in sections 3 (1) and 7 (1) respectively. It is then mentioned in both sections 36 and 39 (1) (a). The importance of the right to equality is clearly shown by its inclusion in so many sections of the Constitution. The reason for equality’s paramount and central role is due to its non-existence prior to 1994. Giving the right to equality to all people is perceived as the only

⁶⁰ Section 9 (1) of the Constitution.

⁶¹ 1998 (1) SA 300 (CC). See SAHO ‘Freedom Charter’ for a further discussion on the case of *Fraser v Children’s Court, Pretoria North*.

⁶² *Fraser v Children’s Court, Pretoria North* para 20.

⁶³ Carpenter ‘Equality and Non-Discrimination in the new South Africa Constitutional Order (1): The early Cases’ 2001 (64) *THRHR* 409 at 409.

way for a society with such diverse peoples to be a truly just society. It has been put best by Kruger, that an “appraisal of these constitutional provisions regarding the role of equality and non-discrimination leaves no doubt as to the central place of equality in the South African legal system.”⁶⁴

However, the equality provision as provided for in section 9 (1) – which was adopted from the Canadian Charter of Rights and Freedoms⁶⁵ – is merely a form of *formal* equality. “Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike.”⁶⁶ One must ask if this goes far enough to redress the inequality of the past as the problem with mere formal equality, is that “economic inequality in the forms of poverty and unemployment ... are the outcomes of injustice and inequality.”⁶⁷ Accordingly, by merely having formal equality, a large percentage of South Africans appear to be the victims of inequality.

“If one looks at the 2003 survey, 14.6 per cent of the African population above the age of 20 had received no formal education at all, while the white population was only 0.3 per cent.

The Gini coefficient is used to measure inequality of distribution of personal income and consumption in society. A perfectly equal society will have a coefficient of 0 while a maximally unequal society will have a coefficient of 100. South Africa’s coefficient was measured at 59.3 in 2004, ranking it as one of the most unequal societies in the world. The richest ten per cent of the population was responsible for almost half of the country’s income or consumption expenditure.”⁶⁸

⁶⁴ Kruger *Equality and Non-Discrimination in South Africa* (2004) Unpublished 4.

⁶⁵ Davis *Fundamental Rights in the Constitution – Commentary and Cases* (1997) 61.

⁶⁶ Currie *et al The Bill of Rights Handbook* 5th ed (2005) 232.

⁶⁷ Nikelly ‘Origins of Equality’ (1990) 46 *Individual Psychology* 20 at 25 – 26.

⁶⁸ Currie *Bill of Rights* 233 fn 4 and 6 of 233.

These statistics make the right to equality seem like a rhetorical - a right that is not in touch with reality.⁶⁹ Based on these findings it can be argued that “although South Africa has made a remarkable transformation from a racial oligarchy to a democracy, the entire social and economic fabric of our society is riddled with the pernicious consequences of the policy of institutionalised racism of the past.”⁷⁰

However, this only appears so when looking at equality from a formal equality point of view. The Constitution is concerned with more than attempting to give the right to equality by bringing about a sense of parity between different classes of persons as will be seen in the following section. “A formal approach to equality assumes that inequality is aberrant and that it can be eradicated simply by treating all individuals in exactly the same way. A substantive equality, on the other hand, does not presuppose a just social order.”⁷¹

3.2.2 The Right to Equality: Substantive Equality

“Few egalitarians propose equality in an absolute sense; rather, they usually advocate eliminating particular kinds of existing inequalities.”⁷² The South African Constitution addresses this way of dealing with inequality. In the preamble to the Constitution it is stated that one of the fundamental values of South Africa is to “improve the quality of life of all citizens and free the potential of each person.”⁷³

The preamble contains the first reference to what is known as substantive equality in the Constitution. Section 9 (2) of the Constitution reads as follows:

⁶⁹ One only needs to look at the world around oneself when in South Africa to note the vast disparity between the race groups with regard to social status. A drive through any rural area or looking at any informal settlement in any area of South Africa will show this.

⁷⁰ Devenish *Commentary on the Bill of Rights* (1999) 39.

⁷¹ Thompson and Benjamin *South African Labour Volume 1* (2005) C 1-14.

⁷² Joseph ‘Some Ways of Thinking About Equality of Opportunity’ (1980) 33 *Western University Political Quarterly* 393 at 394.

⁷³ Preamble of the Constitution. In essence, substantive equality can be said to be an equal status in life, an equality of opportunity and social well being. It is the acceptance that formal equality is not enough to create true equality.

- (2) “Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken;”

Examining this clause, it can be assumed that the drafters of the Constitution had substantive equality in mind. They also understood that the only way to achieve this was by the implementation of supportive legislation. In fact, the “post-constitutional Parliament focuses sharply on correction of injustices and imbalances.”⁷⁴

It can be argued that affirmative action is a means to bring back a sense of parity to South African society and redress the discrimination and oppression of the past. In the case of *Public Servants’ Association of South Africa v Minister of Justice*⁷⁵, the “High Court held that the words ‘design’ and ‘achieve’ denotes a causal connection between the designed measures and objectives.”⁷⁶

Section 9 (2) and its contained affirmative action policy came into question again before the Constitutional Court in the case of *Minister of Finance v Van Heerden*.⁷⁷ In this case, the court set out certain parameters and requirements for an affirmative action policy to be acceptable. The Constitutional Court scrutinised section 9(2) in the *Van Heerden* case and Harms JA stated that:

“Section 9(2) of the Constitution does not postulate a standard of necessity between the legislative choice and the governmental objective. The text requires only that the means should be designed to protect or advance. It is sufficient if the measure carries a reasonable likelihood of meeting the end. To require a sponsor or a remedial measure to establish a precise prediction

⁷⁴ Venter ‘Equality in the Constitution’ (2005) at www.fwdklerk.org.za/download_docs/05_11_05_Code_Good_Practoce_Venter_E.doc (accessed on 10 March 2006) at 5. See also the Labour Relations Act 66 of 1995, the Employment Equity Act 55 of 1998, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, the Promotion of Access to Information Act 2 of 2000 and the Basic Conditions of Employment Act 11 of 2002 for legislative examples of such corrections of injustices.

⁷⁵ (1997) 18 ILJ 241 (T).

⁷⁶ Currie *Bill of Rights* 265.

⁷⁷ 2004 (6) SA 121 (CC).

of a future outcome is to set a standard not required by section 9(2). Such a test would render the remedial measure stillborn, and defeat the objective of section 9(2).”⁷⁸

This interpretation of section 9(2) clearly allows the government to go about the task of bringing about a state of substantive equality. The government can now legitimately implement procedures that are based in the present if they are ‘designed to protect or advance’.⁷⁹ The court has clearly interpreted section 9(2) in such a way as to give the legislature a significant power to bridge the gap between the races and bring about equal opportunity and status for all people.

3.2.3 Some Problems with Section 9 (2): The Questions

“It is clear from the wording of section 9 (2) that affirmative action measures are to be seen as supportive of the ideal of equality and not as an exception to or limitation on the right to equal treatment and non-discrimination. However, this raises a number of difficult issues which have not yet been addressed by the Constitutional Court.”⁸⁰ Three major problems have been identified as arising from affirmative action measures and their conflict with equality.

The first problem is that section 9 (1) states that all people are ‘equal before the law and have the right to equal protection and benefit of the law’. In fact, “equality requires that the government apply its laws even-handedly. This concept is not part of any law, but rather is derived from the notion of equality.”⁸¹ Does the right to equality not then

⁷⁸ *Minister of Finance v Van Heerden* para 42.

⁷⁹ See *National Coalition of Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).for an explanation for the need for remedial legislation designed to correct the injustices of the past, where it was held at para 60 that: “Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for our Constitution to merely ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely.”

⁸⁰ Carpenter ‘Equality and Non-Discrimination (1)’ 412.

⁸¹ Chemerinsky ‘In Defence of Equality: A Reply to Professor Westen’ (1982) 81 *Michigan Law Review* 575 at 581.

contradict itself by section 9 (1) promoting equal protection and benefit of the law and section 9 (2) allowing for a deviation from section 9 (1) by allowing one group to benefit more from the law?

It is submitted that it does not. Section 9 (1) of the Constitution is not the most essential part of the right to equality. This section is only relevant in an ideal society where all people have equal status and equal opportunities. To gain this type of equality, the South African Constitution is required to go further and does so in section 9 (2). This section needs to be in place to ensure section 9 (1) has full effect.

The second problem arises around the interpretation by the courts of section 9(2)⁸². This interpretation has given the legislature a huge array of powers. It has almost stated the government can take any steps it deems necessary in order to bring about substantive equality. These judgments, in fact, do not even require the government to be completely sure of what it is doing as the government only requires a 'reasonable likelihood of meeting the end'.⁸³ As can be seen, this creates a significant problem in the law and an opportunity for a tremendous abuse of power by government.

The second problem is, therefore, the problem of a possible abuse of power. What prevents the government from going too far in the aim of protecting 'those groups'? It can, in theory, take any measures, as long as there is a *reasonable* – not definite – likelihood of meeting the end result. By doing so, inequality and discrimination may once more be allowed to creep into South African society. This argument may sound weak, but the only limitation in section 9(2) is that the government must promote the achievement of equality. The question must then be asked: "Equality of what?" and even though this may seem more obvious, 'equality for whom?'⁸⁴

⁸² See *Public Servants of South Africa & Another v The Minister of Justice & Another*; *Motala v University of Natal* 1995 (3) BCLR 374 (D); *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T); and *Minister of Finance v Van Heerden* for examples of the court's interpretation of section 9 (2) of the Constitution.

⁸³ See *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC).

⁸⁴ Carpenter 'Equality and Non-Discrimination (1)' 412.

Furthermore, the third problem is that section 9 (2) could be in conflict with section 9 (3). Under section 9 (3), any discrimination based on one of the listed grounds, including race and gender, is presumed to be automatically unfair. “Most forms of affirmative action explicitly require consideration of race or sex. They plainly invoke discrimination in the ordinary sense: they require race or sex to be taken into account in awarding benefits or advantages.”⁸⁵

Following section 9 (3), it would seem that affirmative action measures must be presumed to be unfair.

The first problem has been solved, therefore, two questions remain unanswered:

1. Could there be an abuse of power? and
2. Does affirmative action amount to unfair discrimination?

The best way to address these questions and decipher whether or not any of these problems could have a detrimental effect is to delve deeper into section 9 and analyse sections 9 (3) and (4) – the ‘protection against unfair discrimination sections’, which will be done later in this chapter under 3.2.5.

3.2.4 The Prohibition of Unfair Discrimination

The South African Constitution is unique in that it does not prohibit discrimination.⁸⁶ Section 9 (3) – (4) of the Constitution deals with the prohibition of *unfair* discrimination as follows:

- (2) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁸⁵ Townshend-Smith *Discrimination Law: Text, Cases and Materials* (1998) 64.

⁸⁶ The Canadian Constitution, for example, outlaws all forms of discrimination, be they fair or unfair discrimination. See Hogg *Constitutional Law of Canada Student Edition* (2002) for a further discussion on the Canadian Constitution.

- (3) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.⁸⁷

What is discrimination? What happens if a person is discriminated against on a ground not listed by this section? Discrimination has been referred to by the Constitution in sections 9(3) and (4), yet is a fairly nebulous concept due to the fact that the Constitution only refers to ‘unfair discrimination’. The concepts found in these two sections will be discussed in further detail to determine whether or not affirmative action can be considered to fall under the definition of ‘unfair discrimination.’

(a) ‘Discriminate’

Discrimination, in the ordinary sense of the word, can be said to be “treating people who are alike, unlike.”⁸⁸ How does this differ from *differentiation*? Several academics have attempted to define the term discrimination in the following ways:

“The theory of civil rights law has often identified ‘discrimination’ with prejudice, and defined an act as discriminatory when it is caused by prejudice.”⁸⁹

“‘Discrimination’, as it is ordinarily used, refers to a process of noticing or marking a difference often for evaluative purposes.”⁹⁰

“Discrimination is a particular form of differentiation. Unlike mere differentiation, discrimination is differentiation on illegitimate grounds.”⁹¹

The International Labour Organisation⁹² has included a definition of discrimination in its conventions:

⁸⁷ Section 9 of the Constitution.

⁸⁸ Makins (ed) *Collins New Pocket English Dictionary* (1992) 330.

⁸⁹ Sustein ‘Three Civil Rights Fallacies’ (1991) 79 *California Law Review* 751 at 753.

⁹⁰ Rutherglen ‘Discrimination and its Discontents’ (1995) 81 *Virginia Law Review* 117 at 127.

⁹¹ Currie, De Waal and Erasmus *The Bill of Rights Handbook* 5th ed (2005) 243.

⁹² Hereinafter referred to as the ILO.

“For the purpose of this Convention the term *discrimination* includes –

- (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
- (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.”⁹³

Discrimination can, therefore, be defined as the differentiation of an individual or group of people on illegitimate grounds. The Constitution lists several grounds under section 9 (3) of the Constitution. The question has been posed as to whether or not these listed grounds are the only grounds that the Courts will consider to be differentiation on illegitimate grounds. According to the Constitution, “discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”⁹⁴

The major problem with section 9 (5) is that it can be interpreted to mean that discrimination is only unfair if such discrimination is based on one or more of the grounds listed in section 9 (3) of the Constitution. This raises the question as to whether listed grounds are the only grounds that the Courts will consider to be differentiation on illegitimate grounds.

⁹³ Article 1, Convention 111 of the International Labour Organisation, Discrimination (Employment and Occupation) Convention, 1958. As can be seen from the definition of discrimination by the ILO, discrimination is a form of differentiation but is differentiation with the deliberate purpose of treating individuals as unequal and denying them certain rights.

⁹⁴ Section 9 (5) of the Constitution.

(b) ‘One or More Grounds’

Discrimination on the Listed Grounds

According to the Constitution, “discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”⁹⁵ Several cases have arisen since this was drafted relating to claims on one or more of the listed grounds. An example is the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*.⁹⁶ This case centred on the fact that sodomy was a criminal offence and this, therefore, discriminated against people on the basis of their sexual orientation and gender. Discrimination on the basis of sexual orientation and gender is fairly obvious in this case since sex between two women was not illegal. Sexual orientation and gender are both listed grounds in the Constitution. The Court accordingly declared that it was unconstitutional for sodomy to be considered as a crime and so the law criminalising sodomy was struck down.

A second example is the case of *Fraser v Children’s Court, Pretoria North*. In this case, the applicant and second respondent (Naude) lived together and during that time Naude became pregnant. While pregnant she decided to give the child up for adoption. The applicant did not agree with this decision and so launched series of unsuccessful applications to prevent the child being given up for adoption and to be given custody of his child. He was denied this opportunity as section 18 (4)(d) of the Child Care Act⁹⁷ only required the consent of the mother to give up children born out of wedlock for adoption. The court declared this to be unconstitutional as it discriminated against fathers of children born out of wedlock on the basis of their gender. The Constitutional Court ordered Parliament to bring this provision of the Child Care Act in line with the Constitution within two years.

Discrimination on Analogous Grounds

Although section 9 (3) and (4) of the Constitution respectively declare that the State and

⁹⁵ Section 9 (5) of the Constitution.

⁹⁶ See De Vos ‘Sexual Orientation and the Right to Equality in the South African Constitution’ (2000) 117 *SALJ* 17 for a further discussion on the *National Coalition* case and the right to equality.

⁹⁷ Act 74 of 1983.

individuals may not discriminate on one or more of the listed grounds, this is not a *numerus clausus* of the grounds of discrimination. This is merely a list of the grounds of discrimination that will lead to a presumption of unfair discrimination. Although this list is not an exhaustive one, “certain scholars ... have opined that the prohibition is restricted to the enumerated grounds and those which are analogous to those expressly listed.”⁹⁸

An example of what constitutes analogous grounds occurred in the case of *Andrews v Law Society of British Columbia*⁹⁹. In this case, McIntyre J interpreted “section 15 as a prohibition of discrimination and [defined] discrimination as disadvantage caused by the classifications listed in section 15 and *analogous classifications*.”¹⁰⁰ An analogous ground, as referred to by McIntyre J is one “that is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.”¹⁰¹

This can be adopted into South African law as there are several listed classifications but there could be many more grounds. To attempt to consider all possible discriminatory scenarios would result in two major problems. Firstly, all acts of discrimination would be presumed discriminatory creating an unfair reverse onus. Secondly, the list of grounds would have to be impossibly long and would always be growing as it is impossible to conceive all possible scenarios of discrimination.

The Constitutional Court has, in fact, adopted the American approach as per McIntyre J in the *Andrews* case. In the case of *Harksen v Lane NO*,¹⁰² the issue of discrimination on the basis of marital status was brought into question.¹⁰³ In this case, Goldstone J, like McIntyre J, highlighted the importance of dignity in discrimination and stated:

⁹⁸ Devenish *A Commentary on the South African Bill of Rights* (1999) 50.

⁹⁹ 56 DLR (4th) (1989) 1.

¹⁰⁰ Devenish *Commentary* 50.

¹⁰¹ Currie *Bill of Rights* 244.

¹⁰² 1998 (1) SA 300 (CC). See Fredman ‘Understanding the Right to Equality’ (1998) 115 *SALJ* 243 for a further discussion on the case of *Harksen v Lane NO*. See also *Ntai & others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC) and *Roberts v Agricultural Research Council* (2001) 22 *ILJ* 2112 (ARB) for further cases revolving around unlisted grounds.

¹⁰³ This case was decided under the interim Constitution, which did not include marital status as one of the listed grounds. Marital status was only included later on, in the final Constitution.

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their memberships of particular groups.”¹⁰⁴

Although the discrimination was not based on one or more of the listed grounds, the Constitutional Court, nonetheless, found the discrimination to be unfair. They came to this finding as they considered marital status to be a ground that was analogous to the listed grounds and discrimination on this basis would be unfair.

In *Larbi-Odam v MEC for Education (North-West Province)*¹⁰⁵, the Constitutional Court heard a challenge against a “regulation prohibiting non-citizens from being permanently employed in State schools.”¹⁰⁶ Although citizenship was not, in fact, one of the grounds listed in section 9 (3), it “had the potential to impair the fundamental human dignity of non-citizens affected by the regulation.”¹⁰⁷ It was, therefore, considered to be an analogous ground and thus was an illegitimate ground of discrimination.

The case of *Hoffman v South African Airways*¹⁰⁸ is another prime example. Hoffman argued that he had been unfairly discriminated against on the ground of disability due to being HIV positive. The Constitutional Court held that HIV was not a disability but that discrimination on this basis would constitute an infringement of dignity as it was discrimination due to a person’s medical health. Discrimination on the basis of HIV, as part of discrimination on the basis of illness, was held to be analogous to the listed grounds and was, therefore unfair discrimination.

(c) ‘Direct or Indirect Discrimination’

Section 9 (3) of the Constitution refers to direct and indirect discrimination. The inclusion

¹⁰⁴ *Harksen v Lane NO* para 41.

¹⁰⁵ 1998 (1) SA 745 (CC).

¹⁰⁶ Carpenter ‘Equality and Non-Discrimination in the new South Africa Constitutional Order (3): The Saga Continues’ 2002 (65) *THRHR* 37 at 38.

¹⁰⁷ *Currie Bill of Rights* 257 .

¹⁰⁸ 2000 (11) BCLR 1211 (CC). See Cameron ‘Legal and Human Rights Responses to the HIV / AIDS Epidemic’ (2006) 17 (1) *Stellenbosch Law Review* 39 at 47 for a further discussion on the case of *Hoffman v South African Airways*.

of the two forms of discrimination (direct and indirect) is not merely a South African phenomenon. “This bifurcated approach to discrimination was adopted in two English statutes dealing with race and gender discrimination, and by the Canadian courts, in construing both federal and provincial human rights statutes.”¹⁰⁹ The main function of this approach, it is submitted, is to ensure that discrimination cannot occur in any possible manner. However, the question that must now be posed is; what is the difference between direct and indirect discrimination?

Direct Discrimination

“Direct discrimination is defined in s 6 of the [English] Employment Equality Act 1998 as treating one person less favourably than another ‘is, has been or would be treated’.”¹¹⁰ Direct discrimination is a fairly easy concept. A person is directly discriminated against on a particular ground, be it one of the listed groups or an analogous ground. “The test for establishing direct discrimination consisted of applying what was termed the ‘but for’ test. If it is established that a person would not have been denied a benefit ‘but for’ his or her sex, then direct discrimination had been established.”¹¹¹

Indirect Discrimination

The issue of indirect discrimination is more complicated than the issue of direct discrimination. The best way of explaining this issue is by example. A good example is provided by the US case of *Griggs v Duke Power Co*¹¹². The facts of this case were fairly simple. As one of its requirements for hiring and promotion, the company required applicants to possess a high school diploma. The court held that although the direct effect of this cannot be seen to be discriminatory, “indirectly, it had the effect of keeping black people out of the job since disproportionately few were able to meet this requirement.”¹¹³

¹⁰⁹ Devenish *Commentary* 46.

¹¹⁰ Cotter *Discrimination Law: Professional Practice Guides* (2005) 117.

¹¹¹ Fredman *Discrimination Law* (2002) 105.

¹¹² 401 US 424 (1971). For a further discussion on the case of *Griggs v Duke Power Co*, see Dupper ‘Old Wine in a New Bottle? Indirect Discrimination and its Application in the South African Workplace’ (2002) 14 SA Merc LJ 189 at 190.

¹¹³ Currie *Bill of Rights* 260.

A South African example is the Prevention of Illegal Squatting Act.¹¹⁴ It is claimed that “the problem of squatting in South Africa is almost entirely confined to the black community, and implementation of the Act therefore amounts to *de facto* discrimination.”¹¹⁵ Although this statute can be seen as *prima facie* non-discriminatory, it clearly discriminates against black people as they are the predominant members of the group – nearly the entire group – that it affects.

A further example of indirect discrimination can be found in American law. In *Dothard v Rawlinson*,¹¹⁶ the court held that Rawlinson had been discriminated against in an indirect manner.¹¹⁷ The Alabama Board of Corrections created certain requirements for acceptance to the post of prison guard. These requirements were that all applicants must be no less than 5 feet 2 inches tall and must weigh no less than 120 pounds. Although Rawlinson had studied correctional psychology and was well qualified for the job, she did not meet the requisite weight requirement. “Evidence presented to the court indicated that a combination of the height and weight requirements would exclude 41.13% of the female population, but only 1% of the male population.”¹¹⁸ Thus, although the rule did not set out to discriminate in any way, it had the impact of being discriminatory towards women who were denied jobs due to the requirements set down in the rule.

As can be seen, indirect discrimination is aimed at insuring no discrimination gets through the net. By clamping down on indirect discrimination, it stops the continued existence of laws that are *prima facie* non-discriminatory but have the end result of being discriminatory. Indirect discrimination is a vital feature of the right not to be unfairly discriminated against. The inclusion of indirect discrimination “ensures substantial equality, particularly in a country with a legacy of the prejudicial consequences of past institutionalised inequality.”¹¹⁹

¹¹⁴ Act 52 of 1951.

¹¹⁵ Van der Vyver ‘Private Sphere in Constitutional Litigation’ 1994 (57) *THRHR* 370 at 378.

¹¹⁶ 433 US 321 (1977).

¹¹⁷ The court held at 322 B that: “For the reasons we have discussed, the District Court was not in error in holding that Title VII of the Civil Rights Act of 1964, as amended, prohibits application of the statutory height and weight requirements to Rawlinson and the class she represents.”

¹¹⁸ Basson *et al Essential Labour Law: Volume 1: Individual Labour Law* 3rd ed (2002) 307 – 308.

¹¹⁹ Devenish *Commentary* 51.

An example of both direct and indirect discrimination being examined to find whether or not discrimination has occurred is the American case of *A Complainant v Civil Service Commissioners*.¹²⁰ In this case, the complainant applied for a position, which “was confined to persons entitled to be registered with the then National Rehabilitation Board.”¹²¹ Although being successful in the initial stage of the hiring process and passing a typing test, he was denied the job because he failed to meet the standard required during his interview.¹²² The complainant was unsuccessful in his application as the Court found that there was no direct discrimination. Furthermore, the “Equality Officer also found that the evidence available was insufficient to establish a prima facie case of indirect discrimination on the grounds of disability.”¹²³

(d) ‘Unfairly’

Fair Discrimination

“‘Unfair’ discrimination is prohibited in terms of section 9 (3) of the 1996 Constitution. This suggests that ‘fair’ discrimination is sanctioned.”¹²⁴ The term ‘fair discrimination’ may be thought to be an oxymoron but discrimination need not always be unfair. Although certain actions may amount to discrimination on an illegitimate ground and, therefore, not merely differentiation, the discrimination may be considered to be fair. The best way to explain what constitutes fair discrimination is by looking at case law.

An example is the case of *President of the Republic of South Africa v Hugo*.¹²⁵ In this case, Nelson Mandela, the then President of South Africa, used his prerogative powers and released all female prisoners who were parents of children under a certain age. Hugo applied to the court and argued that he had been unfairly discriminated against on the

¹²⁰ Dec-E-2002/015.

¹²¹ McCann ‘Disability Discrimination in the Workplace and the Equality Act, 2004’ at http://www.sys.ie/fileadmin/Documents/SYS_Lecture_disability.pdf (accessed on 13 March 2006) at 29.

¹²² McCann ‘Disability Discrimination’.

¹²³ McCann ‘Disability Discrimination’ 29.

¹²⁴ Devenish *Commentary* 45.

¹²⁵ 1997 (4) SA 1 (CC). See Kende ‘Gender Stereotypes in South African and American Constitutional Law’ (2000) 117 *SALJ* 745 at 745 for a further discussion *President of the Republic of South Africa v Hugo*.

basis of his gender in that female prisoners were the only candidates considered for early release. Although the President had discriminated against prisoners on the basis of their gender, “the judge emphasised that to determine whether the impact of the discrimination is unfair, one must have regard not only to the group which has been disadvantaged but also to the nature of the power in terms of which the discrimination is made and the nature of the interests affected.”¹²⁶

“The effect of the act was to do no more than deprive fathers of minor children of an early release to which they had no legal entitlement ... Moreover, it could be said that the purpose of the President’s act was to achieve a worthy and important societal goal.”¹²⁷

The case of *Harksen v Lane NO* is another good example of the difference between ‘fair’ and ‘unfair’ discrimination. This case revolved around section 21 of the Insolvency Act.¹²⁸ This section purportedly violated the solvent spouse’s constitutional rights. These were; the right not to have property expropriated without compensation; and the right to equality before the law and not to be unfairly discriminated against. This contention arose due to the fact that the spouse of an insolvent can be deprived of their property due to the fact they are the insolvent’s spouse.

The Court found that the discrimination was not unfair for three main reasons. Firstly, it did not affect a vulnerable group or a group that which had suffered discrimination in the past. Secondly, it intended to achieve a worthy goal in that it prevented spouses from defrauding creditors. Thirdly, it did not impair the fundamental right to dignity of solvent spouses.

¹²⁶ Carpenter ‘Equality and Non-Discrimination in the new South Africa Constitutional Order (2): An important trilogy of decisions’ 2001 (64) *THRHR* 619 at 621.

¹²⁷ Currie *Bill of Rights* 246.

¹²⁸ Act 24 of 1936. Section 21 (1) of the Insolvency Act reads as follows: “Effect of sequestration on property of spouse of insolvent: (1) The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section.”

Unfair Discrimination

As has been shown, fair discrimination is permissible in terms of the Constitution. However, unfair discrimination is not. What is *unfair* discrimination though? “Unfair discrimination is discrimination with an unfair impact. Such an impact is deemed unfair if it imposes burdens on people who have been victims of past patterns of discrimination ... or where it impairs to a significant extent the fundamental dignity of the complainant.”¹²⁹

The approach of the Constitutional Court is set out in the case of *Prinsloo v Van der Linde*.¹³⁰ The Constitutional Court held the following:

“In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest 'naked preferences' that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner.”¹³¹

A second example from case law is the case of *Pretoria City Council v Walker*.¹³² Although the majority of the Constitutional Court found the discrimination *in casu* to be discrimination on the listed ground of race, such discrimination was not found to be unfair. The Court held that “section 178 (2) of the interim Constitution did not require that tariffs for electricity consumption should be identical for all consumers.”¹³³ The court held that such a differentiation was rationally related to the quality of service and type of circumstances of the user is permissible and does not amount to unfair discrimination.

¹²⁹ Currie *Bill of Rights* 246.

¹³⁰ 1997 (3) SA 1012 (CC). See Fagan ‘Dignity and Unfair Discrimination: A Value Misplaced and a Right Misunderstood’ (1998) 14 *SAJHR* 220 at 224 for a further discussion on the case of *Prinsloo v Van der Linde*.

¹³¹ *Prinsloo v Van der Linde* para 27.

¹³² 1998 (2) SA 363 (CC).

¹³³ Devenish *Commentary* 46.

3.2.5 Some Problems with Section 9 (2): The Answers

Once again, the two questions revolving around section 9 (2) posed in 3.2.3 remain unanswered:

- (a) Could there be an abuse of power? and
- (b) Does affirmative action amount to unfair discrimination?

(a) Could there be an abuse of power?

It is argued that section 9 (3) is a safeguard to the abuse of power. If the legislature decides that equality allows for one race being made dominant over another, then the Constitutional Court can argue that the legislature's act amounts to unfair discrimination and strike the law down. It is the term *unfair discrimination* that limits the legislature and preventing them from abusing their power. They are allowed to discriminate, even if there is only a 'reasonable likelihood of meeting the end', as long as it is not *unfair*.¹³⁴

(b) Does affirmative action amount to unfair discrimination?

It has been argued above that section 9 (2) of the Constitution – the provision that allows for affirmative action – does not conflict with the Constitution itself. Section 9 (2) can continue to function and, as shown above, an abuse of power will be kept in check by section 9 (3). For this reason, the legislature may implement procedures and laws that allow for discrimination on the listed grounds in order to bring about a state of substantive equality as long as they are not *unfair* discrimination.

¹³⁴ See *East Zulu Motors v Empangeni / Ngwelezane Transitional Local Council* 1998 (1) BCLR (CC); *Moseneke v Master of the High Court* 2001 (2) BCLR 103 (CC); *Satchwell v President of the Republic of South Africa* 2002 (9) BCLR 986 (CC); *Du Toit v Minister of Welfare and Population Development* 2002 (10) BCLR 1006 (CC); *J and B v Director General, Department of Home Affairs* 2003 (5) BCLR 463 (CC); and *Khosa v Minister of Social Development* 2004 (6) BCLR 569 (CC) are examples of challenges against the government revolving around the right to equality and the prohibition against unfair discrimination.

In order to determine whether or not affirmative action passes the test of being *fair* discrimination, one must go through the step by step inquiry of what constitutes *unfair* discrimination as set out in the case of *Harksen v Lane NO*¹³⁵:

- (a) Does the provision differentiate between people or categories of people?
- (b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
 - i. Firstly, does the differentiation amount to 'discrimination'?
 - ii. If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'?
- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause.¹³⁶

The first step of this three stage inquiry is based in section 9 (1) in that it must be determined whether or not people are not receiving equal benefit or protection under the law. It must, therefore, be determined whether or not affirmative action differentiates between people or categories of people. The entire purpose of affirmative action is to differentiate. Accordingly, it would seem that affirmative action fails the first proviso of the enquiry

Moving on to the second step of the enquiry, one finds that affirmative action does 'discriminate' as it differentiates on illegitimate grounds – both race and gender are listed grounds. Due to the fact that the discrimination is occurring on one or more of the listed grounds, the affirmative action can be automatically presumed to be unfair.¹³⁷

¹³⁵ *Harksen v Lane NO* para 54.

¹³⁶ See Dupper 'Justifying Unfair Discrimination: The Development of a 'General Fairness Defence' in South African (Labour) Law' (2001) *Acta Juridica* 147 at 149 for a further discussion on the test developed in the *Harksen* case, with particular reference to unfair discrimination in the labour law context. See also De Waal, Currie and Erasmus *The Bill of Rights Handbook* 5th ed (2005) at 217 for a discussion of the three step enquiry established in the *Harksen* case.

¹³⁷ In terms of the shifting in onus, it would therefore be on the government who implement affirmative action measures to prove that affirmative action is fair.

Although presumed to be unfair discrimination, the next and most important step in the inquiry, is whether or not affirmative action is actually fair or unfair discrimination. In order to determine this answer, one must consider whether the ‘differentiation is rationally related’¹³⁸ to the outcome. In order to find a conclusion, one must consider what the rationale of affirmative action is. This question can only be answered after an analysis of the purpose affirmative action.

As has been proposed earlier in this chapter, giving all people the right to equality does not make all people equal. There is no sense of substantive equality and, therefore, the likelihood is that people will continue to suffer due to the inequalities of the past being carried through to the present. Although the right to equality exists and all people are required to be treated equally, there is still a gaping disparity between the different races and genders with regards to employment and employment opportunities. It can therefore be argued that “affirmative action is justified by its consequences.”¹³⁹ The intended consequence of affirmative action is the bridging of the gap between different groups in order bring about a sense of parity.¹⁴⁰ For this reason, it can be argued that the differentiation is rationally related to the outcome.

Following the application of the *Harksen* test to affirmative action, it is submitted, then, that criticism of affirmative action in South Africa is premature. Affirmative action is allowed for in section 9 (2) and is not, as has been suggested, an unnecessary over-extension of power by the government. Affirmative action passes the discrimination test in that it amounts to fair discrimination. For this reason, affirmative action can be seen to be a vital tool in South African society. It fully promotes the right to equality in that it allows for all people who had previously been disadvantaged to be given an equal opportunity. Affirmative action is therefore an important part of the Constitution, it is

¹³⁸ The test to determine whether or not discrimination is unfair based on the differentiation being rationally related to the outcome was set in *Pretoria City Council v Walker*.

¹³⁹ Currie *Commentary* 265.

¹⁴⁰ This sense of ‘parity’ will be found once employment equity has been reached.

“not an exception to equality, but is a means of achieving equality understood in its substantive or restitutory sense.”¹⁴¹

3.3 Levelling Down: An Alternative to Affirmative Action?

“Even when it is not raised overtly, the presumptively available option of levelling down hangs over potential discrimination claims like a dark cloud, undermining the effectiveness of equality rights, and even deterring individuals from bringing such claims in the first place.”

- DB Blake¹⁴²

3.3.1 Introduction

There are two ways in which inequality can be dealt with in the process of bringing about equality. The first is to ensure that those who are worse off are given some form of advantage so that they may catch up to those who are better off. The second means, the process that will now be discussed, is to take away from those who are better off so that they are at a level with those who are worse off. This second process, known as ‘levelling down’ seems to be an inadequate system in that everyone is better off. “However, while equalitarianism implies that levelling down may nonetheless make things better in at least one respect (i.e., in respect of equality), prioritariness deny that it may make things better in any respect.”¹⁴³

3.3.2 Egalitarianism

“Egalitarianism, we were once told, is the ‘politics of envy’. It is better, so egalitarians were alleged to believe, to make everyone equal than to allow inequalities, even if some or all would be better off.”¹⁴⁴ This, it is submitted, is a very narrow and blinkered view.

¹⁴¹ Currie *Bill of Rights* 264.

¹⁴² Blake ‘When Equality Leaves Everyone Worse Off: The Problem of Levelling Down in Equality Law’ (2004) 8 *University of Pittsburgh School of Law Working Paper Series* 512 at 522-523.

¹⁴³ Brown ‘Giving Up Levelling Down’ at <http://personal.bgsu.edu/~browncf/papers/GivingUpLevellingDown.pdf> (accessed on 24 April 2006).

¹⁴⁴ Wolff ‘Levelling Down’ at

To accept the egalitarian view that everyone is equal and, therefore, the world is a better place is a complete and utter devotion to the notion of equality and a rejection of any other social concept of self-worth and self-gain.

However, some egalitarians have come to accept the fact that levelling down is not appropriate in the majority of cases but still feel that it can be used in some cases. One such egalitarian author is Wolff who puts the following example forward as a situation when levelling down would be the acceptable process to bring about substantive equality:

“Suppose, for example, we want to maximise the preference satisfaction of the worst off. Doing this may require us to move to a form of society in which everyone, including the worst off, has fewer material resources. For example the worst off may now get better use of, and thus more preference satisfaction from, their smaller bundle of resources because of reduced over-crowding effects. Preferring a lower total stock of material goods may in one way seem inefficient or wasteful but this is irrelevant.”¹⁴⁵

Although egalitarians seem to have accepted that merely attaining equality is not enough, this example shows nothing of this new found acceptance. This example clearly illustrates that the author believes that people will be satisfied if every person has an equal portion even though that portion is smaller than what they have before the levelling down. This somewhat simplistic view overlooks the possibility that there is likely to be mass dissatisfaction of both those who were advantaged now having less and those who were disadvantaged who are still not well off. The example also ignores the possibility this may result in a waste of economic resources leaving the state a backward and archaic economy unable to compete in the world economic stage.¹⁴⁶

<http://www.homepages.ucl.ac.uk/~uctyjow/Levelling%20Down.doc> (accessed on 24 April 2006).

¹⁴⁵ Wolff ‘Levelling Down’.

¹⁴⁶ See Brown *Giving Up Levelling Down* (2002) for a further discussing of the egalitarian approach to levelling down.

3.3.3 Examples of Levelling Down

Although this discussion on levelling down is critical of the process, levelling down has been used on several occasions in the United States of America in a professed attempt to achieve equality. In the case of *Cazares v Barber*¹⁴⁷, a school opted to use levelling down procedures to bring about equal treatment. Cazares was one of the top students and was heavily involved in the student government, for which she served as the leader. The school's selection committee was required to choose candidates to induct into the National Honour Society and rejected Cazares even though she was a model student and had better formal qualifications than the majority of inductees. Cazares was rejected due to the fact that she had fallen pregnant at 15 and was neither married nor lived with the father of the child.

Cazares successfully sued the selection committee "on the basis of sex in violation of her rights under both Title IX and the Fifth Amendment."¹⁴⁸ The schools response to this victory by Cazares, however, was not to induct her into the National Honour Society but cancelled the ceremony, terminated its participation in the society and implied that it was due to Cazares' actions. "Although all of the students were treated the same with respect to the denial of NHS participation, Elisa Cazares was left no better off, and quite possibly worse off, for having won her sex discrimination case."¹⁴⁹

A second case in which levelling down was used in order to bring about equality was the case of *Cohen v Brown University*¹⁵⁰. In this case, Brown University was challenged due to the fact that it did not adequately and equally cater for female athletes. Brown's response was to cancel 213 men's positions in athletics to create equality. The matter was taken to court and the Court rejected Brown's response as "Brown had not made a good

¹⁴⁷ 959 F.2d 753 (9th Cir. 1992).

¹⁴⁸ Blake 'When Equality 517.

¹⁴⁹ Blake 'Problem of Levelling Down' 518.

¹⁵⁰ 101 F.3d 155 (1st Cir. 1996).

faith effort to comply, the district court imposed its own remedy, ordering Brown to add several new women's varsity teams.”¹⁵¹

Despite the fact that it seemed that the United States took a step forward in helping to create an equal society where everyone is well off, the First Circuit court forced the promotion of equality to take two steps back. The first Circuit Court “did not share the district court's perception of any tension between Brown's plan and Title IX, and faulted the district court for imposing its own remedy.”¹⁵² The First Circuit Court did not feel it was important to consider Brown's motives for its proposal to cut men's opportunities drastically and merely accepted the fact that it was taking measures to bring about equality.¹⁵³ The action of Brown to cancel 213 men's positions in athletics to create equality, therefore, stood as a valid decision.

A third case, showing that levelling down is a process used in all levels of society from high schools to town municipalities, is the case of *Palmer v Thompson*¹⁵⁴. In this case, the applicants successfully challenged policy of the city of Jackson, Mississippi to operate racially segregated swimming pools. In order to bring about the equal treatment of all the people of Jackson, regardless of race, the municipality used levelling down procedures rather than integrate the pools. “The city decided to end its role in providing public pools to city residents by closing the four pools that it owned and relinquishing its lease on the fifth.”¹⁵⁵

3.3.4 Levelling Down: An Inadequate Concept

The cases referred to clearly show the irrationality of levelling down as a process of bringing about substantive equality. In these cases the process was used in bad faith. In

¹⁵¹ Blake ‘Problem of Levelling Down’ 535.

¹⁵² Blake ‘Problem of Levelling Down’ 535.

¹⁵³ Blake ‘Problem of Levelling Down’.

¹⁵⁴ 403 US 217 (1971).

¹⁵⁵ Blake ‘Problem of Levelling Down’ 519.

fact, one can go so far as to say that the “uncritical acceptance of levelling down functions to undermine popular support for equality law.”¹⁵⁶

A further negative critique of levelling down can be shown in this example used by Brown in his discussion about the concept:

“The population of Inegalitaria is divided roughly into two equal-sized classes such that (a) everyone within the same class is equally well off, and (b) everyone in one class is better off than everyone in the other. In short, Inegalitaria has significant inequality.

Now suppose that one day Inegalitaria is struck by a bomb. Fortunately ... there are no casualties. None the less, the results of the bombing are devastating; the infrastructure of the village is entirely destroyed. Consequently, everyone is reduced to roughly the same low level of welfare; everyone is made rather badly off, but more or less equally so.”¹⁵⁷

As shown by these examples, levelling down is an alternative to affirmative action measures. However, the measures would leave everyone worse off and, therefore, everyone dissatisfied. Such dissatisfaction is a certain way for political and economic stability to collapse. It would seem to be unacceptable to place such a high premium on equality that everything else is sacrificed to the concept of equality. Equality is an important state that society should aim to achieve but society should not achieve this state if it is detrimental to its people. For this reason, it is submitted, that levelling down is a concept that should be rejected. It is a process of ‘cutting off one’s nose to spite one’s face’ and would seem to have no place in South Africa. For this reason, there is no doubt about the fact that affirmative action (levelling up) is the best system available.

¹⁵⁶ Blake ‘Problem of Levelling Down’ 522.

¹⁵⁷ Brown ‘Giving Up Levelling Down’ 3.

3.4 The Employment Equity Act 55 of 1998

“We want to build a South Africa with a diverse and representative workforce. We want to abolish discrimination in the workplace. Let this Bill be the subject of debate in every workplace and by all workers and employers.”

– T. T. Mboweni, MP¹⁵⁸

“The Employment Equity Act is the third and final volume of the trilogy in which the new Labour Law is written, the first two being the Labour Relations Act¹⁵⁹ and the Basic Conditions of Employment Act.”¹⁶⁰ The EEA was assented to on 12 October 1998 and has since become an important part of the labour law and, in particular, the promotion of equity and substantive equality in South Africa. The EEA is a comprehensive piece of legislation in the fight against discrimination and provides South Africa with a vital tool in the battle against discrimination in the labour arena. It is the EEA that sets out the affirmative action measures that have been accepted into South African law.

3.4.1 The Employment Equity Bill¹⁶¹ and the Employment Equity Act

There are a number of significant changes from the original Employment Equity Bill¹⁶² to be found in the EEA. Firstly there has been “an extension of the application of the Act from employers with workforces greater than 50 to those with annual turnovers ranging from R2-million in the agricultural sector to R25-million in the wholesale trade and commercial sectors.”¹⁶³

Secondly the EEA relates to the merit of applicants for a job. Applicants are no longer ‘suitably qualified’ only if they possess the formal qualifications, prior learning and

¹⁵⁸ Employment Equity Bill Memorandum (1997).

¹⁵⁹ Act 28 of 1956.

¹⁶⁰ Grogan ‘More Equal than Others’ (1998) March *Employment Law Journal* 3.

¹⁶¹ This Bill was a product of debate and discussions triggered by the Green Paper on Employment and Occupational Equity published in July 1996. See <http://www.polity.org.za/html/govdocs/bills/1997/equity.html> for a complete copy of the Employment Equity Bill, accompanied by a commentary by TT Mboweni.

¹⁶² Hereinafter referred to as the EEB.

¹⁶³ Grogan ‘Equity Creeps Closer’ (1998) November *Employment Law Journal* 15.

relevant experience required for the job. In terms of section 20 (3) (d) an applicant can be suitably qualified for a position if they possess the ‘capacity to acquire, within a reasonable time, the ability to do the job’. A less significant change is that the “adoption of positive measures to redress social imbalances” has now plainly and openly been referred to as affirmative action.

3.4.2 Influences on the Employment Equity Act and Related Acts

(a) International Labour Organisation (ILO)

Since being readmitted into the international political arena, several ILO conventions have been ratified by South Africa. These include the International Convention on the Elimination of All Forms of Racial Discrimination and The Convention on the Elimination of All Forms of Discrimination against Women.¹⁶⁴ These conventions have been discussed in further detail in the previous chapter and no further discussion need be advanced at this stage.

(b) Influence of the interim and final Constitution

The interim Constitution and final Constitution have both included a provision for substantive equality. The EEA is the fulfilment of section 9 (5) of the Constitution in that it is a legislative measure with the aim of bringing about substantive equality. The Constitution also binds the way in which the EEA is interpreted and applied. In the *George v Liberty Life*¹⁶⁵ it was held by Landman P that:

“In giving content to the unfair labour practice, it is my view, imperative to take into account the values of the broader community. An important source of such values, which will guide this court, are the rights enshrined in the Interim Constitution.”¹⁶⁶

¹⁶⁴ Convention on the Elimination of All Forms of Discrimination against Women of 1979.

¹⁶⁵ (1996) *ILJ* 571 (IC).

¹⁶⁶ *George v Liberty Life* 584.

*In Association of Professional Teachers and Another v Minister of Education & Others*¹⁶⁷, Landman P and AC Basson AM stated that:

“In exercising its unfair labour practice jurisdiction, the Industrial Court will also be called upon to infuse the very wide definition of the unfair labour practice definition with meaning in accordance with the provisions of the chapter of the Constitution setting out our Bill of Rights.”¹⁶⁸

(c) The Labour Relations Acts

The Labour Relations Act of 1956 included no specific provisions preventing discrimination in the form of refusal to appoint an applicant on any grounds. Other legislation, in fact, promoted discrimination on arbitrary grounds; for example: the Bantu Building Workers Act¹⁶⁹ of 1951, the Industrial Conciliation Act¹⁷⁰ of 1956 and the Wage Act¹⁷¹ of 1957.

“The Labour Relations Act,¹⁷² 1995, was the first piece of legislation to deal with discrimination in the workplace. Section 187, for example, provides that dismissal based on discrimination is automatically unfair.”¹⁷³ The LRA was enacted before the EEA but the EEA has since repealed Schedule 7 Items 2 (1) (a), 2(2) and 3 (4) (a) of the LRA. These Items of Schedule 7 all dealt with the topic of discrimination in the workplace. Item 2 (2) gave an employer grounds of justification – inherent requirements of the job and affirmative action measures – against a claim of unfair discrimination.¹⁷⁴

(d) The Promotion of Equality and Prevention of Unfair Discrimination Act

Although the Promotion of Equality and Prevention of Unfair Discrimination Act¹⁷⁵ was enacted after the EEA, it is very closely related to the implementation of the EEA.

¹⁶⁷ (1995) 16 *ILJ* 1048 (IC).

¹⁶⁸ *Association of Professional Teachers and Another v Minister of Education & Others* 1056.

¹⁶⁹ Act 27 of 1951.

¹⁷⁰ Act 28 of 1956.

¹⁷¹ Act 5 of 1957.

¹⁷² Act 66 of 1995.

¹⁷³ Basson *Individual Labour* 303.

¹⁷⁴ Thompson *Labour Law*.

¹⁷⁵ Act 4 of 2000. Hereinafter referred to as PEPUDA.

PEPUDA impacts strongly on the issue of discrimination in South Africa. The EEA, however, deals with the employer-employee relationship whereas PEPUDA is aimed at other sectors and spheres of the country. The use of a variety of legislative measures revolving around discrimination is necessary “to ensure a coherent development of anti-discrimination law across all sectors of society.”¹⁷⁶

Although they are separate Acts and aimed at different sectors of society, the EEA and PEPUDA are complementary to each other and work in unison to prevent discrimination. The EEA, for example, “does not apply to members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service”¹⁷⁷ However, any claim that would arise involving members of these three services or where unfair discrimination has been committed by an independent contractor and a supplier of an employer can be brought in terms of either the Constitution or the PEPUDA.¹⁷⁸

Furthermore, the open-ended nature to its list of prohibited grounds and unlisted grounds of discrimination are any ground that “causes or perpetuates systemic disadvantage; undermines human dignity; or adversely affect the equal enjoyment of a person’s rights and freedoms in a serious manner that is comparable to discrimination on a [listed] ground”¹⁷⁹

3.4.3 Chapter I of the Employment Equity Act: Definitions, Purpose, Interpretation and Application

(a) Purpose of this Act

The major function of the EEA is to correct “the demographic imbalance in the nation’s workforce by compelling employers to remove barriers to advancement of ‘blacks’, ‘coloureds’, ‘Indians’, women and the disabled and actively to advance them in all

¹⁷⁶ Thompson *Labour Law* CC 1 – 1.

¹⁷⁷ Section 4 (3) of the EEA.

¹⁷⁸ Thompson *Labour Law*.

¹⁷⁹ Thompson *Labour Law* CC 1 – 19. The open-ended nature of its list of prohibited grounds also helps to create certainty and uniformity with regards to the analogous grounds.

categories of employment by ‘affirmative action’.”¹⁸⁰ This can clearly be seen as a legislative measure, as required by section 9 (2) of the Constitution¹⁸¹ to achieve the right to equality contained in section 9 (2); the promotion of substantive equality. The goal of setting out to achieve substantive equality and formal equality is declared in the preamble of the EEA which states, that the Act recognises “that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.”

In order to achieve this goal the EEA has two major thrusts. These are to implement measures that “ensure fair treatment of all employees by eliminating unfair discrimination and [to] implement affirmative action measures to redress the disadvantages that occurred in the past.”¹⁸² These two aspects have distinct functions. The first aspect aims at bringing about formal equality and the second aspect aims at bringing about substantive equality. By promoting both forms of equality, the EEA advances the right to equality as set out by section 9 of the Constitution with full effect. The EEA also attempts to advance and further the constitutional right to equality and preventing discrimination by including three further prohibited grounds of discrimination, namely; family responsibility, HIV status and political opinion.¹⁸³

(b) Interpretation of this Act

The EEA clearly sets out the manner in which it should be interpreted:

“(3) Interpretation of this Act.

This Act must be interpreted

- a. in compliance with the Constitution;
- b. so as to give effect to its purpose;

¹⁸⁰ Grogan *Workplace Law* 8th ed (2005) 280.

¹⁸¹ Constitution of the Republic of South Africa, 1996.

¹⁸² Van Eck and Van Jaarsveld *Principles of Labour Law* 3rd ed (2005) 288.

¹⁸³ “Family responsibility” means the responsibility of employees in relation to their spouse or partner, their dependant children or other members of their immediate family who need their care or support; and “HIV” means the Human Immunodeficiency Virus. See Section 1 of the EEA. ‘Political opinion’, on the other hand, is not defined by the EEA.

- c. taking into account any relevant Code of Good Practice issued in terms of this Act or any other employment law; and
- d. in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.”¹⁸⁴

Thus any interpretation of the EEA must be made in light of the Constitution, the purposes of the EEA (as set out in its preamble and section 1), codes of good practices and international law – the International Labour Organisation Conventions discussed in the previous chapter of this work, for example.¹⁸⁵

(c) Application of this Act

The EEA applies to all employees and employers and also binds the State.¹⁸⁶ As stated above under 3.4.2 (d), there are certain bodies that are excluded from the ambit of the EEA.

3.4.4 Chapter II of the Employment Equity Act: Prohibition of Unfair Discrimination

One of the major facets of the EEA is the prohibition of unfair discrimination, in accordance with section 9 (1) of the Constitution. By preventing all unfair discrimination in the employment field, the EEA aims to eliminate inequity and to create a *prima facie* equal opportunity for all people to be employed.

¹⁸⁴ Section 3 of the EEA.

¹⁸⁵ See Rubin ‘International Labour Law and the Law of the New South Africa’ (1998) 115 *SALJ* 685 for a discussion on the influence of the International Labour Organisation on the South African legislation and, in particular, the South African Constitution.

¹⁸⁶ Section 4 of the EEA: Application of this Act—

- (1) Chapter II of this Act applies to all employees and employers.
- (2) Except where Chapter III provides otherwise, Chapter III of this Act applies only to designated employers and people from designated groups.
- (3) This Act does not apply to members of the National Defence Force, the National Intelligence Agency, or the South African Secret Service.

Section 6 of the EEA, as contained in chapter II of the Act, is the main part of the prohibition against unfair discrimination and reads as follows:

“6. Prohibition of unfair discrimination

- 1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”¹⁸⁷

The list includes all the prohibited grounds specified in the Constitution as well as the three new grounds of family responsibility, HIV status and political opinion. This section is, essentially a rewording of section 9 (4) of the Constitution with the inclusion of new grounds of discrimination. Although this seems to be a simply worded section, “locked up in this section is the basic protection of all employees against unfair discrimination.”¹⁸⁸ The section can, therefore, be considered to be the most important protection of all employees regarding unfair discrimination in any legislation in South Africa today.¹⁸⁹

(a) Unfair Discrimination

Meaning of Unfair Discrimination

Although one of the pivotal facets of the EEA is the prohibition of unfair discrimination, the EEA does not define discrimination at any point. It can, therefore, be argued that the “EEA contains no more than the basic structure of a prohibition on unfair discrimination. It is left to the courts to give content to and develop discrimination law. As a result, the context within which the EEA operates becomes important as the courts grapple with some very difficult issues raised under the banner of discrimination.”¹⁹⁰

¹⁸⁷ Section 6 (1) of the EEA.

¹⁸⁸ Thompson *Labour Law* CC 1-22.

¹⁸⁹ This submission is made based on the fact that the EEA is the most important piece of South African legislation governing discrimination in the workplace and employment equity.

¹⁹⁰ Thompson *Labour Law* CC 1-1.

Since 1989 the courts seemed to have adopted the injunction to give content to and develop discrimination law on a case to case basis. In *J v M*¹⁹¹ it was held that the test is a “subjective one, that is, the reactions of the employee rather than the employer determine the effect of its conduct or practice.”¹⁹² Later on, schedule 7 of the 1995 LRA attempted to set a test for unfair discrimination. The test was that the alleged discriminatory act was “measured, rather, against the treatment accorded others ... [and] the distinction [must] be said to be ‘arbitrary’. ‘Arbitrary’ means in turn that the distinction is based on some irrelevant criterion.”¹⁹³ This test can, like the 1989 precedent, be seen to be a subjective one. The LRA leaves the implementation wide open in that it must be on an irrelevant ground. The court is then given a wide discretion of what is or is not an irrelevant ground.

In the case of *NUMSA v Vetsak Co-Operative Ltd & Others*¹⁹⁴ it was held that in “finding an unfair labour practice, the tribunal concerned is expressing a moral or value judgment as to what is fair in all circumstances. The test is too flexible to be reduced to a fixed set of sub-rules. The relevant factors cannot all be captured in a single formula or formulation.”¹⁹⁵

The court came to a similar conclusion in *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others*.¹⁹⁶ In this case, the court maintained its wide discretionary powers in holding that “discrimination is unfair if it is reprehensible in terms of society’s prevailing norms.”¹⁹⁷

¹⁹¹ (1989) 10 ILJ 755 (IC).

¹⁹² Du Plessis *et al A Practical Guide to Labour Law* 5th ed (2001) 80.

¹⁹³ Grogan *Workplace Law* 281.

¹⁹⁴ (1996) 17 ILJ 455 (A). See Du Toit *et al Labour Relations Law* 4th ed (2003) at 441 for further information regarding the case of *NUMSA v Vetsak Co-Operative Ltd & Others*.

¹⁹⁵ Thompson *Labour Law* fn 386.

¹⁹⁶ (1998) 19 ILJ 285 (LC). See Partington and Van Der Walt ‘The Development of Defences in Unfair Discrimination Cases Part 2’ (2005) 26 (3) *Obiter* 595 at 606; Louw ‘Should the Playing Fields be Levelled? Revisiting Affirmative Action in Professional Sport (Part 1)’ (2004) 1 *Stellenbosch Law Review* 120 at 125; and Dupper (2001) *Acta Juridica* 147 at 161 for further discussion on the test put forward by the *Dingler* case.

¹⁹⁷ *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* 295H. On occasion, however, the prevailing norms of society may conflict with the requirements of a job with regards to unfair discrimination and dismissal scenarios. In *FAWU & Others v Rainbow Chicken Farms* (2000) 21 ILJ 615 (LC), for example, the court upheld the dismissal of Muslim employees being absent from work on the day of Eid ul Fitr as they were hired for that position “in accordance with Halaal

Fair and unfair discrimination has already been defined previously in this chapter. Discrimination itself can now be easily defined: It is the differentiation between people on illegitimate grounds. Unfair discrimination, on the other hand, involves a major policy decision.¹⁹⁸ When deciding if discrimination is indeed unfair, it is submitted that the courts must, for stated reasons, have wide discretionary powers in order to promote the *boni mores* of society. This submission is based on the belief that the ‘morals of society’ is such a subjective and constantly evolving concept and, therefore, a finite test cannot be created. The problem with a finite test, it is finally submitted, is that it will become outdated and, therefore, redundant.

The only problem, it is submitted, with this approach is that it takes away from legal certainty. Without a set precedent as to what constitutes *unfair* discrimination, the court’s conclusion may just be based on how the judge feels on the day. It is, however, submitted that this does not deny the need for the wide discretionary powers of the courts to determine what is unfair. The subjectivity of fairness is far too important to have any set standard or test applied to it and, therefore, legal certainty may reasonably be limited in this instance.

Onus of Proof in Discrimination Cases

Section 11 of the EEA contains a provision regarding the onus of proof in unfair discrimination cases. It states that “whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.”¹⁹⁹ This seems to create heavy burden on employers. However, the courts have not taken a literal approach to this section. In *Transport & General Workers Union & Another v Bayete Security Holdings*,²⁰⁰ it was held that the mere claim that discrimination has occurred is not sufficient to shift the onus of proving or disproving that

standards as approved by the Muslim Judicial Council and for the Muslim Market.” See McGregor ‘An Overview of Employment Discrimination Case Law’ (2002) 14 SA Merc LJ 157 at 183.

¹⁹⁸ Convention 111 of the International Labour Organisation, Discrimination (Employment and Occupation) Convention, 1958, Article 1.

¹⁹⁹ Section 11 of the EEA.

²⁰⁰ (1999) 20 ILJ 1117 (LC).

discrimination has occurred. The courts have interpreted section 11 to mean that “the onus of proving discrimination, on a *prima facie* basis, still rests with the employee.”²⁰¹ For this reason, the employee (complainant) must establish that discrimination has occurred before it can be presumed to be unfair.²⁰²

Section 11 would seem to present a further problem. Section 9 (5) of the Constitution provides the presumption of unfairness – a shifting onus – only occurs where it has been established that discrimination has occurred on a listed ground. This presents a quandary. A comparison of the two provisions suggests two completely different approaches to the shifting of onus. The EEA allows for a reverse onus when any discrimination is established and the Constitution allows for a reverse onus when discrimination on a listed ground²⁰³ has occurred. The problem with this is that the Constitution is the supreme law. For this reason, it is submitted that the EEA must be amended²⁰⁴ and that the discrimination must: firstly, be established and secondly, be based on one of the listed grounds (be it the Constitutional list or extended EEA list), for the onus to shift, as per the Constitutional requirement.

Harassment²⁰⁵

In terms of the provisions of the EEA, “harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).”²⁰⁶ According to the EEA, an employer could also be held liable for any harassment occurring in his/her place of business.²⁰⁷ This is based

²⁰¹ Van Eck *Principles* 297.

²⁰² Under section 11 of the EEA, an employee (the complainant) may establish discrimination on any ground, be it listed or not, for the presumption of unfairness to arise.

²⁰³ Although the EEA extends the listed grounds, it still sets a list of grounds which will be presumed to be unfair and so, it is submitted, that no problem would occur if the EEA presumed discrimination on any of the grounds listed in the EEA to be unfair.

²⁰⁴ This amendment must be made in order to bring the EEA in line with the Constitution. If the EEA is not consistent with the Constitution, the supreme law of the land, it will lack validity.

²⁰⁵ See Makinin *Sexual Harassment of Working Women* (1979) for a further discussion on the link between sexual harassment and unfair discrimination. Makinin was one of the first women to have sexual harassment acknowledged as an offence under the category of unfair discrimination. See also Garbers ‘Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems’ (2002) 14 SA Merc LJ 371.

²⁰⁶ Section 6 (3) of the EEA.

²⁰⁷ Basson *Individual Labour*.

on the fact that section 5 requires an employer to be pro-active in preventing unfair discrimination. The Code of Good Practice on Handling of Sexual Harassment Cases, 2005, states “that there is a positive duty on employers to implement the policy – including effective communication to employees, the creation of procedures to deal with sexual harassment and taking disciplinary action against employees who do not comply.”²⁰⁸

(b) Obligation on Employers

Section 6 is not a passive provision. Section 5²⁰⁹ ensures that all employers must act in a positive manner with regards to section 6, to ensure that unfair discrimination does not occur. Employers must also take steps in order to promote equal opportunities in their workplaces. It is submitted that this provision is one of the most vital provisions in the entire EEA. Without this provision, substantive equality could never be achieved. Employers hold the power to ensure that there is no discrimination and to ensure that equal opportunities are given to all employees.

(c) Who is Protected by the Employment Equity Act?

The EEA applies to all employees and employers with the exception of the National Defence Force, the National Intelligence Agency and the South African Secret Service.²¹⁰ The question arises as to what constitutes an ‘employee’. In terms of the provisions of the EEA, the definition of an employee is as follows:

- “employee” means any person other than an independent contractor who—
- a. works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
 - b. in any manner assists in carrying on or conducting the business of an employer,

²⁰⁸ Basson *Individual Labour* 316.

²⁰⁹ Section 5 of the EEA: “Elimination of unfair discrimination.--Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”

²¹⁰ Section 4 of the EEA.

and “employee” and “employment” have corresponding meanings;²¹¹

Section 1 of the EEA must then be read with section 9 in order to glean a full insight into what an ‘employee’ truly is. This section reads as follows:

9. Applicants

For purposes of sections 6, 7 and 8, “employee” includes an applicant for employment.

Employee not only includes persons who are currently employed but also persons who are applying for a position and may be discriminated against. It can be interpreted from the case of *Whitehead v Woolworths*²¹² that in order to be considered an employee, “an applicant has to prove that he or she met the employer’s requirements to be considered for employment but was rejected.”²¹³

The purpose of including applicants for employment, it is submitted, is to ensure that there are equal opportunities for people to become employed.²¹⁴ By not allowing applicants to be protected by the EEA, affirmative action could become circumvented. This is due to the fact that, if a person was denied a job due to the colour of their skin, he or she would have no claim under the EEA. Therefore, the EEA might as well not even have the affirmative action provisions.

(d) Who are ‘Employees’ Protected Against?

In determining who the employees are protected against in terms of the EEA, one must “note that section 6 does not speak of the employer – it provides that ‘no person’ may discriminate.”²¹⁵ This is seemingly an extremely wide provision. It is limited, however, by a further stipulation in section 6 (1) that the discrimination involved must be part of an

²¹¹ Section 1 of the EEA.

²¹² (1999) 20 ILJ 2133 (LC).

²¹³ McGregor ‘An Overview of Employment Discrimination Case Law’ (2002) 14 SA Merc LJ 157 at 160.

²¹⁴ See Basson *Individual Labour* at 95 for a further discussion regarding applicants for employment being regarded as employees.

²¹⁵ Basson *Individual Labour* 306.

‘any employment policy or practice’.²¹⁶ By saying this, it limits ‘no person’ to be people within the place of employment in which the discrimination could take place. It is submitted that the reason that the EEA includes ‘no person’ is that it includes discrimination by one employee against another and gives further effect to section 5 in that the employer must be pro-active in preventing discrimination by other people within his or her business and thus further eradication unfair discrimination.

(e) Inherent Requirements of the Job²¹⁷

One exception to unfair discrimination is when the discrimination is based on an ‘inherent requirement of the job’. “The word ‘inherent’ suggests that possession of a particular personal characteristic must be necessary for effectively carrying out the duties attached to a particular position. The test must of necessity be relative.”²¹⁸ If an applicant lacks an inherent requirement of the job then they may be discriminated against on one of the listed grounds. An example is a role in a film for a female part. Although not hiring a male would be discrimination on the basis of his gender, it would not be considered unfair discrimination as it is an inherent requirement of job that the actor be female.

In the case of *Hoffman v South African Airways*,²¹⁹ South African Airways²²⁰ turned down Hoffman’s job application on the basis that he was Human Immuno-Virus²²¹ positive. SAA argued that in an emergency situation, flight attendants would have to deal with injured passengers and must not have HIV as they could infect the passengers. The Constitutional Court held that being HIV negative, or not having HIV, was not an inherent requirement of the job. SAA’s argument that it was dangerous for passengers to be cared for by an HIV positive person was not important enough to constitute an

²¹⁶ This concept is what it says. The discrimination must be regarding a policy or practice involving the employment. See section 1 of the EEA for a full definition.

²¹⁷ See Dupper *et al Essential Employment Discrimination Law* (2004) at 82 for a further discussion on the concept of ‘inherent requirements of the job’. See also Partington and Van Der Walt ‘The Development of Defences in Unfair Discrimination Cases Part 1’ (2005) 26 (2) *Obiter* 357 at 364 for a comparative study of South Africa, foreign and international law regarding the concept of ‘inherent requirements of the job’.

²¹⁸ Grogan *Workplace Law* 298.

²¹⁹ 2000 ILJ 571 (LAC). See also *Swart v Mr Video (Pty) Ltd* (1998) ILJ 1215 (CCMA), *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC) and *Woolworths (Pty) Ltd v Whitehead* (2000) 21 ILJ 571 (LAC).

²²⁰ Hereinafter referred to as SAA.

²²¹ Hereinafter referred to as HIV.

inherent requirement of the job. For this reason, SAA was found to have unfairly discriminated against Hoffman on the basis of his HIV status.²²²

Essentially, the job requirement must relate to the job or duty. Whether or not a certain requirement is an ‘inherent’ requirement is assessed on a case-to-case basis of each employment position as the factors surrounding it can differ from business to business. One example of differing surrounding circumstances is commercial requirements of the business, for example, customer preference.²²³ A case involving customer preference is that of *Diaz v Pan American World Airways Inc.*²²⁴ *In casu*, it was contended by the employer that only female flight attendants could be employed as a part of a business strategy to “[provide] psychological support for the male passengers involved in the ‘stressful experience’ of flying.”²²⁵ Although the court considered commercial success to be a requirement of an employment position, it held²²⁶ that the business would not suffer by exclusively employing female flight attendants.²²⁷

(f) Affirmative Action

A second exception to unfair discrimination is affirmative action. It has already been argued in this chapter that public policy dictates that affirmative action is not unfair and so this exception to unfair discrimination need not be discussed further. The EEA fulfils the function of section 9 (2) in promoting substantive equality by eliminating “unfair discrimination in the workplace and by providing for affirmative action measures.”²²⁸ Affirmative action measures will be discussed in further detail at a later stage in this chapter.

²²² Although this case was decided before the EEA was enacted, it gives valuable insight into what the courts determine to constitute an inherent requirement of the job.

²²³ *Grogan Workplace Law*.

²²⁴ 311 F.Supp 559.

²²⁵ *Basson Individual Labour* 310.

²²⁶ The court held that at 388 that “discrimination based on sex is valid only when the *essence* of the business would be undermined by not hiring members of one sex exclusively.”

²²⁷ *Basson Individual Labour*.

²²⁸ Kruger ‘Non-Discrimination’ (2004) 18.

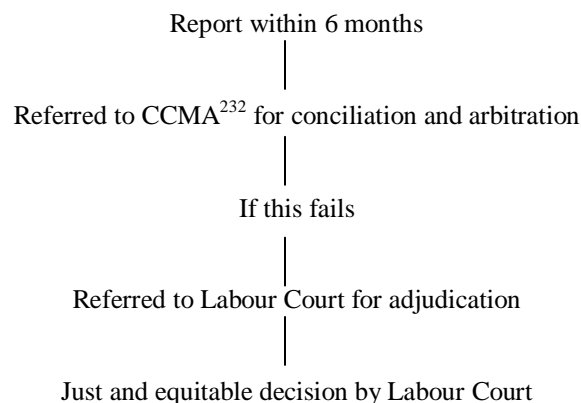
(g) Medical and Psychological Testing

Under the EEA, all medical and psychological testing of employees (including applicants) is deemed unfair “unless legislation permits or requires testing; or such testing is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employment benefits; or the inherent requirements of the job.”²²⁹ Whether or not the testing is fair will be based on a value judgment by the court.

(h) Dispute Resolution²³⁰

The EEA not only sets out provisions that, if contravened, may give grounds for disputation but also sets out the path and procedure that must be followed when such disputes arise. Any dispute about unfair discrimination must be brought in terms of the provisions of section 10 of the EEA. In terms of the Act, unfair discrimination (including harassment) must be reported within six months of the incident.²³¹

The process which must be followed is best presented by means of a diagram:



3.4.5 Chapter III of the Employment Equity Act: Affirmative Action

Chapter III of the EEA is the most important tool in achieving substantive equality and creating equal opportunity for employment within the EEA itself and will be discussed at

²²⁹ Thompson *Labour Law* CC 1-75.

²³⁰ See Du Toit *Labour Relations Law* at 617 for a further discussion on the dispute resolution process.

²³¹ Du Plessis *Practical Guide*.

²³² The CCMA is the Commission for Conciliation and Arbitration.

a later stage in this chapter.

3.4.6 Chapter IV of the Employment Equity Act: Commission for Employment Equity²³³

Chapter IV of the EEA sets about establishing a Commission for Employment Equity. The functions of the Commission for Employment are to establish codes of good practice (to be issued by the Minister of Labour), to create policies concerning the EEA, give employers who further the EEA rewards, research and report on any matter relating to the application of the EEA to the Minister and perform any other function as prescribed by the Minister.²³⁴

3.4.7 Chapter V of the Employment Equity Act: Monitoring, Enforcement and Legal Proceedings²³⁵

Chapter V of the EEA is also essential as it ensures that the EEA has some force and effect. One major problem with this chapter is the wide powers given to labour inspectors “to enter, question and inspect as provided for in sections 65 and 66 of the Basic Conditions of Employment Act.”^{236,237} This section, it is submitted, may have certain problems if put to the constitutional test. This is because section 14 of the Constitution gives all persons the right to privacy, which includes the right not to have:

- (a) their person or home searched;
- (b) their property searched;
- (c) their possessions seized; or
- (d) the privacy of their communications infringed

²³³ See Pretorius *et al Employment Equity Law* (2006) at 11-1 for a further discussion on the Commission for Employment Equity; and Du Toit *Labour Relations* at 360.

²³⁴ Section 30 of the EEA.

²³⁵ “The Act makes provision for a system of monitoring not only by officials of the Labour Department, but by employees and trade unions as well.” See Pretorius *Employment Equity Law* at 11-3 for a further discussion on the Monitoring, Enforcement and Legal Proceedings.

²³⁶ Act 75 of 1997 (Amendment Act 11 of 2002).

²³⁷ Section 35 of the EEA.

This right can be limited in terms of a search warrant. Section 21 of the Criminal Procedure Act²³⁸ allows for the police - and only the police - to enforce a search warrant in order to justifiably infringe section 14 of the Constitution. In the case of *Extra Dimension & Others v Kruger NO & Others*²³⁹, it was held that a search warrant giving power of search and seizure to police and private persons was invalid due to the 'irregular' powers it granted. It may be argued, however, that the EEA extends the Criminal Procedure Act in that it allows for extra powers to justifiably infringe on section 14. On the contrary, however, it is submitted, that by following the precedent as set down in *Mistry v Interim National Medical and Dental Council of South Africa & Others*²⁴⁰, the EEA would fail the constitutional test and that section 35 would be required to be amended.

In the *Mistry* case, section 28 of the Medicines and Related Substances Control Act²⁴¹ was argued to be unconstitutional. Section 28 is extremely similar to section 35 of the EEA and reads as follows:

“inspectors of medicines were given the authority to enter into and inspect any premises, place, vehicle, vessel or aircraft where such inspectors reasonably believed that there are medicines or other substances regulated by the Act, and to seize any medicine or any books, records or documents found in or upon such premises, place, vehicle, vessel or aircraft which appear to afford evidence of a contravention of any provision of the Act.”²⁴²

In casu, the Interim National Medical and Dental Council of South Africa²⁴³ received a complaint against the applicant – a general practitioner. The INMDCSA Council ordered an inspection of the applicant's surgery by two investigating officers. The applicant argued section 28 (1) which conferred these powers was unconstitutional as it unreasonably infringed against his right to privacy. The Constitutional Court struck down

²³⁸ Act 51 of 1977.

²³⁹ 2004 (2) SACR 493 (T). See Du Toit *et al Commentary on the Criminal Procedure Act* (2006) at 21 for a further commentary on search warrants and the *Extra Dimension* case.

²⁴⁰ 1998 (4) SA 1127 (CC).

²⁴¹ Act 101 of 1965.

²⁴² Section 28 (1) of the Medicines and Related Substances Control Act.

²⁴³ Hereinafter referred to as INMDCSA.

this provision as it gave sweeping powers to private individuals and so unreasonably infringed section 14 of the Constitution.

One argument that could be made in favour of the EEA and section 35, it is submitted, is that the labour inspectors are merely an extension of the police and are not a separate body. A second argument is that the promotion of substantive equality is essential in South Africa and the achievement of equal opportunities could allow for a reasonable infringement of the right to privacy. The matter has yet to arise in the Constitutional Court and it will be interesting to see how the Constitutional Court assesses the situation.²⁴⁴

3.4.8 Chapter VI of the Employment Equity Act: General Provisions

The final chapter of the EEA contains twelve further provisions to the EEA. These range from the rules regarding contracting with the State to the issuing of codes of good practice to sanctions for contravening provisions of the EEA.

3.5 Affirmative Action in South Africa

“If well handled, affirmative action will help bind the nation together and produce benefits for everyone. If badly managed, it will simply re-distribute resentment, damage the economy and destroy social peace. If not undertaken at all, the country will remain backward and divided at its heart.”

– ANC Statement on Affirmative Action²⁴⁵

Since an understanding of affirmative action in the South African context is vital to this thesis, it is appropriate to re-visit the concept as related to South African practice.

²⁴⁴ It is in the opinion of the author that section 35 of the EEA will have to be amended to be consistent with section 14 of the Constitution. The wide and sweeping powers conferred on labour inspectors by the EEA are likely to be deemed to be an over-extension of power by the legislature and will have to be amended accordingly.

²⁴⁵ www.anc.org.za.

Affirmative action in South Africa was first proposed by the ANC in the 1980s in order to deal with the inequalities that were created by apartheid.²⁴⁶ When the Constitution Committee had to deal with redressing the inequalities of apartheid, it was faced with three options. First, it could have the government take away the rewards given to people by apartheid and share them out amongst those people who had been dispossessed during apartheid.²⁴⁷ The second option was to “adopt a Constitution and Bill of Rights that would scrap apartheid laws, but establish the constitution as a Chinese wall against any attempt to alter the social and economic status quo.”²⁴⁸ The Constitution Committee went with the third option, which was to adopt measures to allow for the introduction of affirmative action in South African law.²⁴⁹

Affirmative action in South Africa is justified by its purpose.²⁵⁰ “At the end of the apartheid era in 1995 whites accounted for 13% of the population and earned 59% of personal income; Africans, 76% of the population, earned 29%.”²⁵¹ These statistics paint a gory picture of South African society. They show a major disparity between different race groups with the minority race group earning more as a group than the majority race group. For this reason, affirmative action measures were put in place to redress the imbalances of the past and a move a substantively equal society.

Affirmative action in South Africa is, therefore, not merely put in place to promote ‘cosmetic changes’, i.e. changing the colour of employment in South Africa, but also involves “the necessary education and training, and in co-ordination with extra-market reforms designed to reduce the degree of socio-economic disadvantage of the majority.”²⁵² As shown previously in this chapter, the Constitution upholds the value of substantive equality and requires legislative measures to be put in place to enhance this value. In accordance with ILO Conventions, affirmative action measures are “affirmative

²⁴⁶ ANC ‘Affirmative Action and the New Constitution’ at <http://www.anc.org.za/ancdocs/policy/affirm.html> (accessed on 27 April 2006).

²⁴⁷ ANC ‘Affirmative Action’.

²⁴⁸ ANC ‘Affirmative Action’.

²⁴⁹ ANC ‘Affirmative Action’.

²⁵⁰ Currie *The Bill of Rights*.

²⁵¹ Human Development Report ‘*Bringing Multicultural Societies Together*’) 70.

²⁵² Labour Market Commission *Restructuring the South African Labour Market* (1996) para 434.

action is a coherent packet of measures, of a temporary character ... Special attention has to be paid to the temporary nature of the measure taken.”²⁵³ The EEA has neither given a termination clause nor was any structure for its removal envisaged. This creates a serious problem as affirmative action, by its very nature, is a temporary measure. By not creating an end of the EEA, the EEA is given a sense of permanence and, therefore, loses much of its validity. This issue will be dealt with and discussed in further detail in Chapter V of this work.

3.5.1 Chapter III of the Employment equity Act: Affirmative Action

(a) Introduction

The affirmative action measures of the EEA are contained in Chapter III – Affirmative Action - and can be found in section 15 of the Act. Section 15 (1):

15. Affirmative action measures.

Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer

(b) To whom does Affirmative Action Apply?

Designated Employers

The affirmative action measures, unlike the EEA as a whole, apply only to ‘designated employers’.²⁵⁴ According to the definitions section of the EEA, a designated employer is any person who employs fifty or more employees or has a total annual turnover that is equal to or above the applicable annual turnover of a small business, as set out in Schedule 4 of the EEA.²⁵⁵ The term ‘designated employer’ also includes a municipality²⁵⁶

²⁵³ UN ‘Daily Reports of the 54th Session of the United Nations Sub-Commission on the Promotion and Protection of Human Rights’ at <http://www.imadr.org/geneva/2002/SCHR54.Week2.doc> (accessed on 21 August 2006).

²⁵⁴ Section 12 of the EEA.

²⁵⁵ Section 1 (a) of the EEA.

and any organ of state²⁵⁷ as defined in the Constitution.²⁵⁸ A designated employer also includes any employer who is bound to implement affirmative action measures in terms of a collective agreement made in terms of the Labour Relations Act.²⁵⁹ Any employer may also voluntarily comply with the affirmative action measures found in the EEA. The EEA sets out several duties that such designated employers must perform. These duties include: consulting with its employees; conducting an analysis; preparing an employment equity plan; and reporting to the Director-General on the progress made in implementing its employment equity plan.²⁶⁰

Designated Groups

The next concept that must be defined in order to ascertain to whom the affirmative measure apply, is the concept of ‘designated groups’. The term ‘designated groups’, according to the EEA means black people, women and people with disabilities.²⁶¹ ‘Black people’ is also a broader concept and includes Africans, Coloureds and Indians.²⁶² People with disabilities are defined as “people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or

Schedule 4 of the EEA
TURNOVER THRESHOLD APPLICABLE TO DESIGNATED EMPLOYERS

<i>Sector or sub-sectors in accordance with the Standard Industrial Classification</i>	<i>Total annual turnover</i>
Agriculture	R2,00 m
Mining and Quarrying	R7,50 m
Manufacturing	R10,00 m
Electricity, Gas and Water	R10,00 m
Construction	R5,00 m
Retail and Motor Trade and Repair Services	R15,00 m
Wholesale Trade, Commercial Agents and Allied Services	R25,00 m
Catering, Accommodation and other Trade	R5,00 m
Transport, Storage and Communications	R10,00 m
Finance and Business Services	R10,00 m
Community, Special and Personal Services	R5,00 m

²⁵⁶ Section 1 (b) of the EEA.

²⁵⁷ “‘organ of state’ means – (a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution – (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer.” See Section 239 of the Constitution.

²⁵⁸ Section 1 (c) of the EEA.

²⁵⁹ Section 1 (e) of the EEA.

²⁶⁰ Section 13 (2) of the EEA.

²⁶¹ Section 1 of the EEA.

²⁶² *Ibid.*

advancement in, employment.”²⁶³ In order to be a beneficiary of affirmative action, an employee must be a ‘suitably qualified person’, which “means a person contemplated in sections 20 (3) and (4).”²⁶⁴

A number of issues arise from this broad definition of ‘designated groups’. Firstly it allows for an entire group of people, some of whom were never discriminated against in the past, to be beneficiaries of affirmative action even though they may not need the benefits of affirmative action, for example, university graduates. In the United States of America, for example, “one of the main criticisms of affirmative action in the United States has been that it has primarily benefited middle-class women and black people who were well able to look after their own interests and less deserving assistance than those trapped in the under class.”²⁶⁵

Secondly, as the law stands, affirmative action benefits groups rather than individuals, as held in the case of *Stoman v Minister of Safety & Security & others*.²⁶⁶ However, the Court does not give a comprehensive justification²⁶⁷ for allocating groups as beneficiaries. The issue, therefore, needs some commentary in order to give clarification and will be dealt with in *Chapter V* of this work.

Thirdly is the issue of whether or not the beneficiary of affirmative action must be South African. In the case of *Auf der Heyde v University of Cape Town*²⁶⁸ the court considered “the applicant’s submission that a non-South African citizen cannot be a beneficiary of affirmative action. While no authority could be found in South African jurisprudence, the

²⁶³ Section 1 of the EEA.

²⁶⁴ Section 1 of the EEA. The term ‘suitably qualified person’ will be discussed in further detail when section 20 (3) and (4) of the EEA are examined.

²⁶⁵ *George v Liberty Life Association of Africa Ltd* 1007 D – G. See also Johnson ‘The Last Twenty-Five Years of Affirmative Action’ at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=577283 (accessed on 21 August 2006); and Andrews ‘Unfair Discrimination’ at <http://www.wlce.co.za/advocacy/seminar1.php> (accessed on 21 August 2006) for a discussion of the failure of affirmative action in the United States in this respect.

²⁶⁶ (2002) 23 ILJ 1020 (T).

²⁶⁷ See *Stoman v Minister of Safety & Security & others*; and *George v Liberty Life Association of Africa Ltd* in this regard. Both the *George* and *Stoman* cases touch on the issue of group v individuals as beneficiaries but neither provides a comprehensive answer to this important question.

²⁶⁸ (2000) 21 ILJ 1758 (LC).

court accepted that there was merit in the argument.”²⁶⁹ This can define an entire group that will or will not be a beneficiary of affirmative action. A definitive answer was given by the legislature in May 2006, when the Amended Employment Equity Regulations²⁷⁰ limited the category of designated groups to South African citizens.²⁷¹ It can be argued that it was not only South African’s who suffered due to the discrimination of apartheid and that many foreign nationals were subject to the discriminatory practice. This issue will also be dealt with in Chapter V of this work.²⁷²

The fourth problem area regarding the broad concept of ‘designated groups’ revolves around racial classification; more specifically, who falls under the category ‘black person’. This is an important issue as one of the beneficiary groups of affirmative action is ‘black people’ is not given an absolute definition. The problematic part of this is that black people are not a class in South Africa that is finitely defined. This means that one may have to institute a classification of people into different race groups in order to allow for employment equity to be properly implemented. If there is a hierarchy in affirmative action, then these groups need to be defined into the subcategories of black person in order to ensure that the proper people are benefiting from affirmative action. The potential problem of racial classification is that it may have the adverse effect of perpetuating the apartheid ideology. Instead of uniting South Africa and creating one people, affirmative action may have the effect of dividing the country even further

A further aspect of racial classification revolves around racial hierarchy under the defined beneficiaries of affirmative action. The hierarchical nature of affirmative action was prevalent in the case of *Motala v University of Natal*. In this case the University had a lower standard for admissions for black applicants than it did for “Indian” applicants. The argument was that “African pupils were subjected under the ‘four tier’ system of education [which] was significantly greater than that suffered by their Indian

²⁶⁹ Dupper *Essential Discrimination* 269.

²⁷⁰ GN R480, *Government Gazette* 28858 of 26 May 2006.

²⁷¹ Pretorius *Employment Equity Law*.

²⁷² See Partington and Van Der Walt (2005) 26 (3) *Obiter* 595 at 601 who, although they do not provide an answer to this issue, they also raise this unanswered question.

counterparts.”²⁷³ The issue of racial hierarchy also arose more recently in the April 2006 private arbitration award in the case of *Christiaans v Eskom* ²⁷⁴ revolving around the hiring of a black person over a coloured person for similar race hierarchy reasons.²⁷⁵

It is submitted that there are certain problems with this approach. If this affirmative action programme is accepted as fair, people of Indian origin will continue to be discriminated against due to their race. Both black people and people of Indian origin were previously disadvantaged groups under apartheid but now black people seem to be more advantaged than Indian people. There is an argument that black people were more disadvantaged during apartheid than people of Indian origin so that there is a hierarchy of affirmative action in favour of blacks. The case of *Christiaans v Eskom* raises some questions about affirmative action measures yet to be answered. Although the decision effectively brings about a substantive equality by reversing people’s roles until equality is achieved, the issue still remains of whether or not it is fair to do so? Does this still amount to discrimination? Is there enough of a causal connection between the designed measures and objectives? These issues will all be dealt with in further detail Chapter V of this work.

Suitably Qualified Persons

One of the major misconceptions of affirmative action is that a member of a designated group will be employed in preference to a white male even if the white male is far better qualified for the job in question. “The idea of ‘merit’ – that the person with the highest qualifications and the most experience for the job must be appointed – is superficially unassailable.”²⁷⁶ .

Section 15 (1) of the EEA specifically states that the beneficiaries of affirmative action are ‘suitably qualified people from designated groups’. In other words, a person must be suitably qualified for the job in order to be employed in the respective position. If that

²⁷³ *Motala v University of Natal* 383.

²⁷⁴ Private Arbitration Proceedings Held at Bellville: Western Cape.

²⁷⁵ See Mbao ‘The Province of the South African Bill of Rights Determined and Re-determined’ (1996) 113 SALJ 33 at 37 for a further discussion on *Motala v University of Natal*.

²⁷⁶ IDASA *How to Make Affirmative Action Work in South Africa* (1995) 6.

person does not meet up to the standards required of the job, they cannot be employed in that position over a person falling outside the designated groups.

It has been stated that affirmative action measures should over-ride the conventional idea of 'suitably qualified' and changing the formal definition of merit is important in achieving employment equity. "They [the new criteria for merit] ensure that only relevant and appropriate criteria are used for appointments and promotions, and that proper consideration is given to all qualified candidates, regardless of gender and race."²⁷⁷

The provisions of the EEA have, in fact, changed the conventional idea of suitably qualified and merit. 'Suitably qualified' has now become a broader term than an applicant merely having the requisite formal qualifications. It covers persons who have not acquired formal education and now includes the notion of 'the potential to learn on the job'. This important provision aims to remedy a major legacy of apartheid education and training whereby many people are left without the formal qualifications to compete on an equal footing in the employment world.²⁷⁸ A further legacy of apartheid is that people from designated groups have not been able to gain experience in employment. For this reason, "although the Labour Court accepted that candidates from previously disadvantaged would mostly lack the necessary experience, it considered that experience

²⁷⁷ IDASA *How to Make 7*.

²⁷⁸ During apartheid, many black people and women were either denied positions in education facilities or required to attend sub-standard or inferior facilities. The Bantu Education Act 47 of 1953 is a prime example of this. See Maylam *South Africa's Racial Past: The History and Historiography of Racism, Segregation and Apartheid* (2001) for a further discussion on the oppression of these groups with regards to education. See also *IMAWU v Greater Louis Trichardt City Council* 2000 (21) ILJ 1119 (LC) where it was held at 1129 B –D: "For affirmative action to succeed and help achieve the desired objective, merit and experience would remain relevant insofar as the applicants previously disadvantaged by unfair discrimination are concerned in their own group. In other words the successful candidate should be the best out of the group previously disadvantaged by unfair discrimination. I say this for the simple reason that if the playing field is levelled, i.e. where all groups are considered, candidates from groups previously advantaged by unfair discrimination will always come second especially if one considers experience. Candidates previously advantaged by unfair discrimination invariably possess the necessary experience which candidates from groups previously disadvantaged by unfair discrimination would not normally possess. In view of this situation it would be prudent therefore in affirmative action appointment to consider the qualification and potential to develop crucial and successful candidates from previously disadvantaged groups are the best from those groups."

would remain relevant but not decisive.”²⁷⁹ The new criteria for ‘suitably qualified’ are set out in the EEA:

- (3) For purposes of this Act, a person may be suitably qualified for a job as a result of any one of, or any combination of, that person's—
 - a. formal qualifications;
 - b. prior learning;
 - c. relevant experience; or
 - d. capacity to acquire, within a reasonable time, the ability to do the job.²⁸⁰

This implies that if an applicant can show that they have the capacity to carry out the job but cannot yet perform the work required, they could be given the job over a person who has the relevant experience and qualifications. This leaves a number of questions that need answering. Who is to give the on-the-job training? What does ‘reasonable time’ involve and in what employment context? The surrounding factors must be dealt with on a case to case basis as each job is different and it may be dangerous or economically inefficient to employ someone for too long a period without them being able to carry out the position with full effect. This process will be demanding of human and economic resources.

To conclude whether or not an applicant is suitable a prospective employer must review all the factors of section 20 (3), as set out above, and then “determine whether that person has the ability to do the job in terms of any one of, or any combination of those factors.”²⁸¹ In coming to that determination, the individual’s lack of relevant experience cannot be a sole ground for rejection as this would amount to unfair discrimination according to the Act.²⁸²

²⁷⁹ McGregor ‘Affirmative Action: An Account of the Case Law’ (2002) 14 SA Merc LJ 253 at 262.

²⁸⁰ Section 20 (3) of the EEA.

²⁸¹ Section 20 (4) (a) of the EEA.

²⁸² Section 20 (4) (b) of the EEA.

“The Act requires an employer to ensure the appointment of employees who are suitably qualified to perform the inherent requirements of a job. It therefore explicitly rejects tokenism.”²⁸³ The misconception of merit is therefore exactly that – a misconception. An applicant will not be rejected merely because of their race or gender but because someone from the designated groups could do the job as effectively.²⁸⁴ This attempts to ensure a continuation of a high level of performance in the workplace.

An example of a decision relating to this issue is found in the case *Independent Municipal and Allied Workers Union v Greater Louis Trichardt Transitional Local Council*²⁸⁵, the respondent – a local town council – had placed an advertisement for the position of town treasurer. Three candidates were short listed, of whom two were white males and the third was a black male. The Executive Committee was required to convene and appoint one of the three candidates. At the meeting, the Committee could not come to a conclusion and referred the matter to another body. “The majority of the full Council decided that affirmative action should be the only criterion on which to base the selection and [the third applicant] was appointed as town treasurer.”²⁸⁶

The applicant union then challenged the appointment in the Labour Court on the basis that it was unfair discrimination as defined by Schedule 7 item 2 of the Labour Relations Act.²⁸⁷ In this case, the Court considered the fact that the merit of the other two applicants was far higher than that of the third applicant who also lacked the necessary experience. “For these reasons the Court found that the decision to appoint him could not be justified on any other basis. The Court concluded that [the third applicant’s] appointment as town treasurer discriminated unfairly in an arbitrary manner against the other candidates.”²⁸⁸

²⁸³ Thompson *Labour Law* 1-B – 16.

²⁸⁴ See IDASA *How to Make* for a further discussion on the ‘Myth of Merit’.

²⁸⁵ (2000) 21 ILJ 1119 (LC).

²⁸⁶ Cheadle *et al Current Labour Law* (2000) 28.

²⁸⁷ Schedule 7 item 2 of the Labour Relations Act was the predecessor to the current measures governing unfair discrimination as found in the EEA.

²⁸⁸ Cheadle *Current Labour Law* 28.

Although this case was not heard under the current provisions as contained in the EEA, it does illustrate the public policy decision to reject the idea of tokenism.²⁸⁹ Policy requires that a candidate be qualified for the job and for the candidate to be able to perform the job. Any appointment based solely on race or gender will amount to unfair discrimination against unsuccessful applicants.

(c) Affirmative Action Measures

The affirmative action measures designated employers are required to implement are contained in section 15 (2) of the EEA and read as follows:

- (1) Affirmative action measures implemented by a designated employer must include—
 - a. measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;
 - b. measures designed to further diversity in the workplace based on equal dignity and respect of all people;
 - c. making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer; [reasonable accommodation]
 - d. subject to subsection (3), measures to—
 - i. ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and [preference and numerical goals]
 - ii. retain and develop people from designated groups and to implement appropriate training

²⁸⁹ This judgment will not be binding on a Court hearing a similar case in the modern era but, it is submitted that this case will have persuasive value.

measures, including measures in terms of an Act of Parliament providing for skills development.
[retention, development and training measures]

The affirmative action measures have a five pronged attack. They are:

Identification and Removal of Barriers

The identification and removal of barriers in the workplace is set out in section 15 (2) (a). This provision attempts to set out to create a sense of formal equality amongst employees and create a level playing field. This section then goes further by specifically mentioning 'designated groups'. The inclusion of the term 'designated groups' seems to imply that the barrier removal and creation of an equal opportunity workplace requires some extra consideration with regards to the designated groups.

Diversity in the Workplace

Section 15 (2) (b) of the affirmative action measures is the creation of diversity in the workplace. This aims to create a working place where all people can enjoy their constitutional rights in full. People are free to practice their own religions; enjoy freedom of speech, sexual orientation and so on. There is also a requirement that affirmative action measures must be designed to promote the right to dignity. This may be somewhat superfluous as the right to dignity is protected in its fullest by the Constitution and so any provision that is inconsistent with the Constitution would necessarily be unlawful. However, this measure merely gives added protection and so ensures the right to dignity is protected in the workplace.²⁹⁰

Reasonable Accommodation

Section 15 (2) (c) of the EEA measures is aimed at reasonably accommodating persons from designated groups to ensure that they are given the full benefit of affirmative action

²⁹⁰ It is submitted that the inclusion of these provisions in the EEA, even though they are included in the Constitution, ensures that the EEA covers all aspects of employment equity on its own. This enables the EEA to be a stand alone document when it comes to employment equity. This ensures that a dispute arising out of the provisions of the EEA need not involve the Constitution and, therefore, make the matter a constitutional issue but can remain within the boundaries and limits of the EEA.

and to allow for an efficient diversification of the workplace. “‘Reasonable accommodation’ means the modification or adjustment to a job or the working environment that will enable a person from a designated group to have access to, or participate or advance in employment.”²⁹¹ This is an essential affirmative action measure. A designated employer may implement affirmative action measures but these will be ineffective if there is not a reasonable accommodation of designated groups so that they can enjoy the benefits of such affirmative action measures.

Preferential Treatment

Section 15 (2) (d) of the EEA contains the final two affirmative action measures designated employers are required to implement. These, it is submitted, are the two most important affirmative action measures as they are the two measures that require the designated employers to implement measures to create substantive equality through representivity in the workplace. The first measure is found in section 15 (2) (d) (i) and requires the preferential treatment²⁹² of suitably qualified people from designated groups in all occupational categories and levels in the workforce – i.e. for every job possible. This is vital as it ensures an efficient and effective creation of an equitable workplace by enforcing the employment of people from designated groups.

Training and Skills Development

Training and skills development is the second measure found in section 15 (2) (d). This measure²⁹³ requires designated employers to retain people from designated groups and also to implement ‘appropriate’ training measures for skills development. This is also vital as it ensures the creation of skilled labourers and professionals from designated groups and thus ensures a high quality of employee performance. Economic growth is vital to the continued existence of affirmative action and, therefore, employees with the necessary skills must be available to ensure economic growth. This measure is,

²⁹¹ Basson *Individual Labour* 324.

²⁹² The EEA requires the preferential treatment of people from designated groups but specifically excludes the implementation of quotas. See Section 15 (3) of the EEA.

²⁹³ Section 15 (2) (d) (ii) of the EEA.

accordingly, important for the continued existence of affirmative action as well as the creation of substantive equality.

The training and skills development of employees is entrenched further by the Skills Development Act²⁹⁴, which was passed in the same year as the EEA. This Act acts as a direct support for the EEA. The purposes of the Skills Development Act are set out clearly in section 2 of said Act and read as follows:

“(1) The purposes of this Act are –

- (a) To develop the skills of the South African workforce –
 - (i) to improve the quality of life of workers, their prospects of work and labour mobility;
 - (ii) to improve productivity in the workplace and the competitiveness of employers;
 - (iii) to promote self-employment; and
 - (iv) to improve the delivery of social service.
- (b) To increase the level of investment in education and training in the labour market and to improve the return on that investment;
- (c) to encourage employers –
 - (i) to use the workplace as an active learning environment;
 - (ii) to provide employees with the opportunities to acquire new skills;
 - (iii) to provide opportunities for new entrants to the labour market to gain work experience; and
 - (iv) to employ persons who find it difficult to be employed;
- (d) to encourage workers to participate in learnership and other training programmes;

²⁹⁴ Act 97 of 1998.

- (e) to encourage the employment of persons previously disadvantaged by unfair discrimination and to redress those disadvantages through training and education;
- (f) to ensure the quality of education and training in and for the workplace;
- (g) to assist –
 - (i) work-seekers to find work;
 - (ii) retrenched workers to re-enter the labour market;
 - (iii) employers to find qualified employees; and
- (h) to provide and regulate employment services.”

A reading of this section of the Skills Development Act clearly illustrates the policy goal of training and developing the skills of employees. The aim of this Act enhances the EEA, by promoting the training of employees to be of an adequate level to perform in the workplace. This supports and enhances the aim of allowing for the reasonable time to learn ‘on-the-job’ as a facet of suitably qualified. The Skills Development Act, therefore, serves as an essential support for the training and development of skills as required by the EEA.

3.5.2 Consultation

The EEA empowers consultation over employment equity matters. Provision is made for consultation in section 16 and 17 of the Act.

(a) Parties to the Consultation

Upon reading section 16 and 17, the parties to the consultation can be identified as being, essentially, the designated employer and the employees. If there is a representative trade union representing members of the workplace, the consultation must take place with said union and the employees or representatives nominated by them. If there is no

representative trade union in the workplace, the consultation must take place with the employees or representatives nominated by them.

(b) Content of the Consultation

Under the EEA, a designated employer must take reasonable steps to consult with its employees and attempt to reach agreement on certain measures.²⁹⁵ These measures include the conduct of the analysis; the preparation and implementation of the employment equity plan; and the report.²⁹⁶ The consultation must reflect the interests of the workforce, employees from designated groups and employees not from designated groups. This is an important provision as it ensures that the affirmative action measures put in place have the goal of furthering employment equity but also do not discriminate against non-designated groups. This ensures that the affirmative action measures do not result in unfair discrimination. The consultation has no effect on the provisions regarding workplace forums²⁹⁷ as set out in section 86 of the LRA.²⁹⁸

(c) Disclosure of Information

When the designated employer consults with the employees, their unions and / or their representatives; that employer is required to disclose all relevant information that will allow for an effective consultation with the consulting parties.²⁹⁹ Section 18 (2) goes on to state that the provisions of section 163 of the LRA, with the relevant changes applicable in the circumstances, apply to the disclosure of information.

3.5.3 Analysis

The EEA requires all designated employer to analyse their workplace:

²⁹⁵ Section 16 of the EEA.

²⁹⁶ Section 17 of the EEA.

²⁹⁷ Workplace forums are a forum that provides an opportunity for all employees in a workplace (i.e. not just members of the respective union of that workplace) to participate in managerial decisions that may affect them. The workplace forums are established voluntarily. See Basson *Essential Labour Law: Volume 2 – Collective Labour Law* 3rd ed (2002) at 182 for a further discussion on workplace forums.

²⁹⁸ Section 16 (3) of the EEA.

²⁹⁹ Section 18 (1) of the EEA. As of 18 August 2006 and the Amendment to the Employment Equity Regulations contained in GN R8531 Government Gazette 29130 of 18 August 2006, the disclosure of information regarding the consultation must now include “regular meetings and feedback to employees and managements.”

19. Analysis.—

- (1) A designated employer must collect information and conduct an analysis, as prescribed, of its employment policies, practices, procedures and the working environment, in order to identify employment barriers which adversely affect people from designated groups.
- (2) An analysis conducted in terms of subsection (1) must include a profile, as prescribed, of the designated employer's workforce within each occupational category and level in order to determine the degree of under-representation of people from designated groups in various occupational categories and levels in that employer's workforce.³⁰⁰

(a) Analysing the Workplace

Analysis of the workplace is vital in order to develop an effective employment equity plan and to effectively implement affirmative action measures.³⁰¹ In order to make sure that the affirmative action measures have an effect, the designated employer must be aware of and have information about the areas it is required to rectify. If the employer implements employment equity measures on an arbitrary basis, the measures will have no effect as they do not actually rectify the areas that need rectification.

(b) Representivity and Non-Discrimination is More than Merely Hiring and Promoting

The major focus of employers, the courts and academics seems to be on preferential treatment of designated groups with regards to the hiring of applicants and the promotion of employees. However, employers are also required to “identify possible reasons for such under-representation which are within the employer’s control.”³⁰² The EEA sets out a variety of areas that are considered to be part of an ‘employment policy, practice or

³⁰⁰ Section 19 of the EEA.

³⁰¹ See Thompson *South African Labour* at CC-1-B-14 for an extensive examination of analysis in the workplace.

³⁰² Du Toit *Labour Relations Law* 604.

procedure’ that employers are required to analyse when determining whether or not these areas are discriminatory and / or representative. The Act does this by giving a long list of different features that are included under the definition of ‘employment policy or practice’. The definition reads as follows:

“employment policy or practice” includes, but is not limited to—

- (a) recruitment procedures, advertising and selection criteria;
- (b) appointments and the appointment process;
- (c) job classification and grading;
- (d) remuneration, employment benefits and terms and conditions of employment;
- (e) job assignments;
- (f) the working environment and facilities;
- (g) training and development;
- (h) performance evaluation systems;
- (i) promotion;
- (j) transfer;
- (k) demotion;
- (l) disciplinary measures other than dismissal; and
- (m) dismissal.³⁰³

Although the definition is lengthy, the list is not exhaustive and “policies and practices not included in the list which may be implemented in a workplace should likewise be analysed.”³⁰⁴ By looking at this list, one can see that the EEA focuses on a variety of measures that an employer must analyse when determining whether or not his or her employment practices promote representivity and employment equity in the workplace. In other words, representivity and non-discrimination go far beyond the surface colour, gender or ability of the labour force. The concept requires an analysis of the underlying issues, for example, ensuring that the procedure and appointment panel take account of all types of cultures and people.

³⁰³ Section 1 of the EEA.

³⁰⁴ Du Toit *Labour Relations Law* 605.

3.5.4 Employment Equity Plans

The affirmative action measures contained in section 15 of the EEA are not the end of the duties required of designated employers. Designated employers are also required to prepare and implement an employment equity plan.³⁰⁵ The goal of this plan is to achieve reasonable progress towards employment equity in the employer's workforce.

(a) The Goals of an Employment Equity Plan

Employment Equity Plans must be developed, according to the EEA, in order to achieve 'reasonable progress' towards employment equity.

20. Employment equity plan

- (1) A designated employer must prepare and implement an employment equity plan which will achieve reasonable progress towards employment equity in that employer's workforce.³⁰⁶

Unlike the term 'reasonable accommodation', the term 'reasonable progress' is not defined in the provisions of the EEA. If one considers the goal of affirmative action and applies the definition for 'reasonable accommodation' *mutatis mutandis* to the term 'reasonable progress', one could find a definition for this term. 'Reasonable progress' can be defined as: 'Any modification or adjustment to a job or to the working environment that will allow for the progress of a person from a designated group with regards to employment and promotion in the workplace'.

(b) Contents of the Plan

The EEA sets out a long list of provisions and measures in section 20 (2) that a designated employer is required to include in its plan.

³⁰⁵ The designated employer can refer to the Codes of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans and other relevant codes, as per the 18 August 2006 Amendment of the EEA Regulations. The employment equity plan should be created after the consultation and analysis processes have been completed. Hereinafter referred to as the 'plan'.

³⁰⁶ Section 20 (1) of the EEA.

Objectives

The first provision to be included in the plan is the objectives to be achieved in the plan, which must be broken down into yearly objectives.³⁰⁷ This is important since, if the plan has a goal, the plan can then be designed to achieve this goal and can be modified throughout the year in order to ensure the achievement of the goal.

Measures and Strategies

The plan must then set out the affirmative action measures to be implemented in terms of the requirements of section 15 of the EEA, as were discussed previously in this chapter.³⁰⁸ The plan must also include a more specific goal if under representation of people from designated groups has been identified as one of the problems regarding substantive equality in the analysis.³⁰⁹ If this is so, the plan must set a numerical goal³¹⁰ it intends to achieve in order to attain the equitable representation of suitably qualified people from designated groups in the workforce. This goal must also have its own timetable and must include the strategies intended to achieve those goals. “Footnote 4 of the Act states that guidelines regarding the factors to be taken into account in determining numerical goals will be included in a Code of Good Practice, but that the factors listed in section 42 (a) as factors relevant to assessment of compliance by the Director-General of the Department of Labour are relevant to setting numerical goals in each organisation.”³¹¹

Duration

The plan is required to be a minimum of one year in length and a maximum of five years in duration.³¹² It is submitted that a reason for the maximum five year duration is that it is a period of time that is long enough to allow for growth, development and training but not so long to cause the goals to become obsolete and outdated. By keeping the time period to this length, a designated employer can assess its performance over the five year

³⁰⁷ Section 20 (2) (a) of the EEA.

³⁰⁸ Section 20 (2) (b) of the EEA.

³⁰⁹ Section 20 (2) (c) of the EEA.

³¹⁰ See Partington and Van Der Walt (2005) 26 (3) *Obiter* 595 at 597 for a further information regarding the setting of numerical goals.

³¹¹ Thompson *Labour Law* CC 1-B – 15 fn 69.

³¹² Section 20 (2) (e) of the EEA.

period and determine which goals have been achieved. The designated employer can then create a new plan having learned from these past experiences.

The plan must include a timetable for the achievement of any numerical goals. Other than the timetable for the achievement of numerical goals, the plan must set out a timetable for the achievement of all the goals and objectives included in the plan.³¹³

Procedures

As well as setting out employment equity / substantive equality goals and measures and a timetable to achieve said goals, the designated employer must include procedures to monitor and evaluate the implementation of the plan.³¹⁴ These are necessary in order to evaluate whether reasonable progress is being made towards implementing employment equity.³¹⁵ This is a significant provision to include as a rigid plan does not allow for external factors that may influence the plan and its goals. By allowing for assessment, the designated employer is able to modify the plan in order to allow for the most efficient attainment of employment equity. For this reason, the plan must allow for flexibility in order to function properly.

The designated employer must also set out internal dispute resolution procedures when disputes arise regarding the implementation and interpretation of the plan.³¹⁶ The Act also requires that all “persons in the workforce, including senior managers, be responsible for monitoring and implementing the plan.”³¹⁷

Any Other Measure

Section 20 (1) (i) sets out the all inclusive ‘any other measure’ clause found in several pieces of legislation. “This allows the employer to incorporate best practice local and international benchmarks, developed by other employers in the same economic sector.”³¹⁸

³¹³ Section 20 (2) (d) of the EEA.

³¹⁴ Section 20 (2) (f) of the EEA.

³¹⁵ Section 20 (2) (f) of the EEA.

³¹⁶ Section 20 (2) (g) of the EEA.

³¹⁷ Section 20 (2) (h) of the EEA.

³¹⁸ Thompson *Labour Law* CC 1-B-16.

This also allows for innovative measures to be incorporated by one employer and followed by other employers. This helps the advancement of the goals of employment equity and prevents employment equity becoming stagnated by the implementation of the same measures year after year. Instead, the measures can constantly be adapted and changed to be kept in touch with the modern business world.

(c) Successive Employment Equity Plans

Employment equity plans, as stated above, have a minimum duration of one year and a maximum duration of five years. The end of the plan does not mean the designated employer is now free to continue business without regard to affirmative action measures. “Before the end of the term of its current employment equity plan, a designated employer must prepare a subsequent employment equity plan.”³¹⁹ So, in terms of this section, an employer must prepare and have a further plan ready before the initial plan has come to an end. “The Act conceives of employment equity implementation as a long-term process.”³²⁰ This helps to ensure that affirmative action measures are given full effect until it is considered that affirmative action in South Africa is no longer necessary.³²¹

3.5.5 The Report

Under the EEA and, specifically section 21, every designated employer must submit reports to the Director-General

(a) What must be included in the Report?

The EEA does not specifically state what content must be included in the report but merely states under section 13 (2) (d) that one of the duties of designated employers is to “report to the Director-General on progress made in implementing its employment equity plan, as required by section 21.”³²²

³¹⁹ Section 23 of the EEA.

³²⁰ Thompson *Labour Law* CC 1-B-15 footnote 70.

³²¹ The fact that there is no contemplation or provision in the EEA for a time when affirmative action is no longer necessary is problematic due to the necessarily temporary nature of affirmative action. This will be discussed in further detail in chapter V of this work.

³²² Section 13 (2) (d) of the EEA.

(b) Who is required to Submit a Report and When?

A designated employer that employs fewer than one hundred and fifty employees is required to submit its first report within twelve months of the commencement of the Act and must submit a subsequent report every two years on 1 October.³²³ According to the time frame set out, a “designated employer employing less than 150 employees had to file its first report on 1 December 2000 or within 12 months of becoming a designated employer.”³²⁴

Designated employers employing more than one hundred and fifty employees are also required to submit a report. This report is required to be submitted within six months of the implementation of the EEA and every year subsequent to the first report on 1 October.³²⁵ “A designated employer employing 150 or more employees had to file its first report on 1 June 2000 or within 12 months of becoming a designated employer.”³²⁶ However, “a designated employer that submits its first report in the 12-month period preceding the first working day of October, should only submit its second report on the first working day of October in the following year.”³²⁷ Any employer who becomes a designated employer at any time subsequent to the enactment of the EEA must submit a report with the six or twelve month period depending on which category it falls into.³²⁸

(c) Publication of the Reports

The report that the designated employer sends to the Director-General must also publish a summary of said report in its annual financial report.³²⁹ When the designated employer is part of an organ of state, the respective Minister in charge of that organ of state must table the report in Parliament.³³⁰

³²³ Section 21 (1) of the EEA.

³²⁴ Thompson *Labour Law* CC 1-B- 19.

³²⁵ Section 21 (2) of the EEA.

³²⁶ *Ibid.*

³²⁷ Section 21 (3) of the EEA.

³²⁸ Section 21 (4) of the EEA.

³²⁹ Section 22 (1) of the EEA.

³³⁰ Section 22 (2) of the EEA.

3.5.6 Income differentials

“The EEA introduces a new form of legislative inequity - income differentials. This refers to the ratio between the remuneration of employees at different levels and in different occupational categories.”³³¹ Every designated employer must prepare a statement which contains a statement that sets out the remuneration and benefits received in each position and level of the workforce.³³² “Section 27 was introduced into the Act as a result of various submissions, in particular, submissions made by Congress of SA Trade Unions (‘COSATU’) to the Parliamentary Portfolio Committee on the need for mechanisms to remedy the ‘apartheid wage gap’.”³³³

Where there is a disparity between the income differentials of employees from their respective groups, for example, between a black manager and white manager, the employer is required to take measures that will reduce these differentials. This is seen as a vital tool in the attainment of employment equity to ensure that true substantive equality is achieved in the workplace. All groups are on an equal footing and are given an equal pay regardless of race, gender and ability and, therefore, a true sense of employment equity is reached, not merely ‘cosmetic’ employment equity.³³⁴

3.5.7 Duty to Inform

All employers must display a notice in a prominent position in the workplace to inform its employees of the provisions of the EEA.³³⁵ A designated employer is required to display the recent report, any compliance order, arbitration award or order of the Labour Court

³³¹ Grogan *Workplace Law* 311. With regards to international law, the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, of June 1951 of the International Labour Organisation “requires ratifying states to promote and, in so far as it is consistent, with the methods in operation for determining rates of remuneration, to ensure the application to all workers for work of equal value.” See Landman ‘The Anatomy of Disputes About Equal Pay for Equal Work’ (2002) 14 SA Merc LJ 341 at 342.

³³² Section 27 (a) of the EEA.

³³³ Thompson *Labour Law* CC 1-B – 18 fn 84.

³³⁴ See *Louw v Golden Arrows Bus Service* 2000 (3) BCLR 311 (LC); and Pieterse ‘Towards Comparable Worth?’ (2000) 118 SALJ 9 for a further discussion on the topic of Income Differentials and comparable worth.

³³⁵ Section 25 (2) (1) of the EEA.

concerning provisions of the EEA; or any other document concerning the EEA in a prominent position.³³⁶ Designated employers are required to make a copy of its plan available to employees for copying and consultation.³³⁷ This duty to inform allows for all people, not just those implementing the employment equity provisions, to have some idea of what is happening in that workplace. It also allows for employees to know their rights regarding promotion and appointment to certain positions. In addition, the employer has a duty to keep records of the employment equity plan and any other records relevant to compliance with the EEA.³³⁸

3.5.8 Enforcement of Affirmative Action

The implementation of affirmative action and employment equity measures by designated employers would be meaningless if the measures were not enforced. The EEA, therefore, sets out certain provisions that enforce its affirmative action measures.

One such measure is self-regulation. Designated employers must assign a senior manager who is responsible for monitoring and implementing the employment equity plan. This is important in that the Employment Equity Commission, it is submitted, does not have the time or resources to check up on each and every designated employer in South Africa to ensure compliance.

The EEA also provides for a fine for designated employers who fail to comply “ranging from a maximum of R500 000 for the first contravention of the duties related to consultation over, drafting and implementation of, equity plans as well as the failure to publish prescribed details, to a maximum of R900 000 where there have been four previous contraventions of the same provision in three years.”³³⁹ Labour Inspectors may also issue compliance orders and matters may be dealt with by the Labour Court.

³³⁶ Section 25 (2) (2) of the EEA.

³³⁷ Section 25 (2) (3) of the EEA.

³³⁸ Section 26 of the EEA.

³³⁹ Grogan *Workplace Law* 313.

A current on-going case³⁴⁰ in KwaZulu-Natal sees textile companies being given ten days to prepare affidavits against charges of flouting sections of the EEA.³⁴¹ If the companies are prosecuted, this would be the first successful prosecution under the EEA. Although the case is still pending, the Labour Department expects to use the companies as an example.³⁴² The companies will be given “hefty fines of about R500 000 for each company, said department spokesman Mokgadi Pela.”³⁴³

One way in which the EEA encourages compliance by a reward rather than fear of punishment is the awarding of State contracts. In terms of the EEA, State contracts will only be awarded to designated employers if they have complied with the provisions of Chapter II and III of the EEA and to non-designated employers if they have complied with Chapter II of the EEA.³⁴⁴ The designated employer is required to attach its certificate of compliance as issued by the Minister of Labour or attach a statement – which will be verified at a later stage – saying that it complies.³⁴⁵

3.5.9 Limits to Affirmative Action

(a) Rationality

In order for affirmative action measures to be considered *fair* discrimination, they must be rational. In other words, their implementation must have a rational goal. The affirmative action measures cannot be arbitrary. In *Public Servants of South Africa & Another v The Minister of Justice & Another*,³⁴⁶ the High Court emphasised the fact that

³⁴⁰ The following developments have occurred in this case as of printing: “Presiding Judge Themba Sangoni today reserved judgement against Jinghua Garments to an as yet to be announced date, after the company’s attorneys pleaded for a lesser fine, while the Department’s lawyers were arguing for much tougher punishment. The case against Wincool Industrial, on the other hand, has been postponed to 6 February next year. The Labour Department today reiterated its anticipation that the two would be the first to be successfully prosecuted under the country’s equity legislation – a move that could send a strong warning to other would-be law violators.” See www.labour.gov.za (accessed on 12 October 2006).

³⁴¹ Anonymous ‘Reprieve for Equity’ Accused’ *LegalBriefs* 20 April 2006.

³⁴² Anonymous ‘Reprieve for Equity’.

³⁴³ Anonymous ‘Reprieve for Equity’.

³⁴⁴ Section 53 of the EEA.

³⁴⁵ Basson *Individual Labour*.

³⁴⁶ (1997) 18 ILJ 241 (T). See Nel *et al South African Employment Relations Theory and Practice* 5th ed (2005) at 141 and Partington and Van Der Walt (2005) *Obiter* 595 at 602 for a further discussion of *Public Servants of South Africa & Another v The Minister of Justice & Another*.

the word 'promote' in the promotion of achieving equality, "implies that affirmative action programmes should be realistic in the sense that indiscriminate hiring, aimed at achieving equality overnight, will not be tolerated."³⁴⁷

(b) Fair Discrimination – The Ban on Absolute Barriers

In order to pass the discrimination test and be considered as *fair* discrimination, as opposed to *unfair* discrimination, the affirmative action measures must promote employment equity but not to such an extent that it allows for "undue discrimination against fully able white men."³⁴⁸ Section 15 (4) of the EEA creates some protection for persons from non-designated groups. This section states that although an employment policy or practice³⁴⁹ may be implemented to allow for preferential treatment of designated groups, it may not establish an absolute bar for the employment or advancement of persons not in those designated groups.

The case of *Coetzer & Others v Minister of Safety & Security & Others*³⁵⁰ serves as a good example of this. In this case, certain inspectors in the bomb squad applied for available promotional posts. They were denied the positions because they did not fall into the designated groups. The South African Police Services³⁵¹ employment equity plan "entailed reserving 70 per cent of vacant posts for black, female and disabled applicants and 30 per cent for able-bodied white males. White males could not apply for reserved posts, but designated officers were free to apply for non-designated posts."³⁵² The posts then stayed vacant as no appropriate candidates could be found.

The SAPS argued that the inspectors were not unfairly discriminated against as they were merely following a policy implemented in terms of, and in accordance with, the measures

³⁴⁷ Basson *Individual Labour* 325.

³⁴⁸ Cediey 'Getting Equality to Work: The South African Employment Equity Act' (2001) 3 Jan *The Journal of SA and American Comparative Studies* 1 at 9.

³⁴⁹ Refer to 3.5.3 (b) of this work for a discussion of what is included in the concept of employment policy or practice.

³⁵⁰ [2003] 2 BLLR 173 (LC). See Grogan 'Affirmative Action Defused' (2003) *April Employment Law Journal* 17 at 17 for a further discussion on the case of *Coetzer & Others v Minister of Safety & Security & Others*.

³⁵¹ Hereinafter referred to as the SAPS.

³⁵² Grogan (2003) *April Employment Law Journal* 17 at 17.

of the EEA. The applicants argued that the policy was, in fact, inconsistent with the EEA as it contravened section 15 (4) and created an absolute bar to their employment or promotion. The court found in favour of the applicants and held that to allow for understaffing merely on the hope that suitable designated candidates would apply amounted to the creation of an absolute barrier and, therefore, unfair discrimination.

A recent example heard by the Equality Court has seen a judgment given in favour of a white magistrate who took action against the Port Elizabeth Magistrates' Court after the Court appointed a black female candidate.³⁵³ The Equality Court concluded that the Magistrates' Court short-listing procedures were unfairly discriminatory against white male applicants as they "made it impossible for a white male to be promoted over a black female, irrespective of experience or any other non-race factors."³⁵⁴ The judge ordered the criteria used for recruitment to be struck down and the post of Regional Court magistrate was required to be re-advertised.

(c) Suitably Qualified

As discussed in further detail earlier in this chapter, one limit to the appointment of a candidate based on affirmative action is that the individual from a designated group must be suitably qualified. The question, however, "is how far the skills, experience or qualification gap must be extended before the appointment of a less qualified or experienced black candidate becomes 'irrational' and impeachable."³⁵⁵ In the case of *Stoman v Minister of Safety & Security & others*³⁵⁶ case, it was held that the requirement of rationality is essential in determining how big the skill can be.³⁵⁷ Any person who is

³⁵³ Anonymous 'Equality Court Rules in Favour of White Magistrate' *LegalBriefs* 20 April 2006.

³⁵⁴ Anonymous 'Equality Court'.

³⁵⁵ Grogan *Workplace Law* 289.

³⁵⁶ (2002) 23 ILJ 1020 (T).

³⁵⁷ In *Stoman v Minister of Safety & Security & others* it was held that the gap between the skills, experience or qualification of a candidate from a designated group and a white male candidate can be quite large. When considering whether or not candidates should be similarly qualified, it was held at 1033H that: "To allow considerations regarding representivity and affirmative action to play a role only on this very limited level would be too restrictive to give meaningful effect to the constitutional provision for such measures and the ideal of achieving equality. All it would mean is that, for example, race could then be taken into account rather than other preferences which are not related to qualifications or merits." See Grogan *Dismissal, Discrimination & Unfair Labour Practices* (2005) for further commentary on the *Stoman* case and the differences between the qualifications of two applicants for a position.

“wholly unqualified or less than suitably qualified, or incapable in responsible position cannot be justified.”³⁵⁸

(d) Affirmative Action: a Right or Defence?

“South Africa's Constitutional Court has repeatedly affirmed the need for affirmative action to give weight to the country's constitutional guarantees of equality.”³⁵⁹ The issue of whether or not affirmative action measures give the right to preferential treatment to people from designated groups or is merely a defence for employers when a candidate claims they were discriminated against on the basis of race or gender is one that has conflicting court rulings.³⁶⁰

In accordance with the 2003 decision of *Harmse v City of Cape Town*³⁶¹, it would seem that designated employees have both the right not to be unfairly discriminated against as well as the right to be preferred for appointment and promotion if they are suitably qualified person for the post in question. However, the 2004 judgment of *Dudley v City of Cape Town*³⁶² states that a designated employee only has the right not be discriminated against on the basis of race, sex or disability. Designated groups do not have the right to preferential treatment and the right to seek judicial assistance because they are not appointed and a non-designated person is appointed. The problem with the *Dudley* judgment is that it may have the effect of nullifying preferential treatment or, at least, taking away much of its prominence. This issue will be dealt with further in Chapter V of this work.

³⁵⁸ *Stoman v Minister of Safety & Security & others* 1021 D.

³⁵⁹ Global Rights ‘Affirmative Action: A Global Perspective’ at www.globalrights.org/site/DocServer/Affirmative_Action_Global_Perspectives.pdf?docID=2623 (accessed on 13 March 2006) 25.

³⁶⁰ See *Abbott v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 ILJ 330 (LC); *TGWU & Another v Bayete Security Holdings* (1999) 29 ILJ 1117 (LC); *Mahlanyana v Cadbury (Pty) Ltd* (2000) 21 ILJ 2274 (LC); and *Lagadien v University of Cape Town* (2000) 21 ILJ 2469 (LC) for the pre-EEA position on the ‘right’ to preferential treatment. See also *Harmse v City of Cape Town* [2003] 6 BLLR 557 (LC) and *Dudley v City of Cape Town* [2004] JOL 12499 (LC) for such conflicting judgments in the EEA era.

³⁶¹ [2003] 6 BLLR 557 (LC).

³⁶² [2004] JOL 12499 (LC).

CHAPTER IV
EMPLOYMENT EQUITY AROUND THE WORLD:
LESSONS FOR SOUTH AFRICA

- 4.1 Introduction**
- 4.2 Affirmative Action in Brazil**
- 4.3 Employment Equity in Canada**
- 4.4 Affirmative Action in Malaysia**

4.1 Introduction

The previous chapter looked in some detail at the employment equity laws pertaining to South Africa. Chapter IV will be an analysis of three foreign legal systems as they relate to affirmative action. The foreign legal systems that will be discussed will be the affirmative action models of Brazil, Canada and Malaysia. The purpose of the comparison between the South African system and foreign systems is to find both possible areas of weakness in the South African system and strengths in the other systems. The purpose of comparing and contrasting the three systems is to make recommendations that may lead to a more effective affirmative action policy in South Africa.

4.2 Affirmative Action in Brazil

“After insisting for much of the twentieth century that Brazil neither had racial discrimination nor groups occupying subaltern positions, the Brazilian state remarkably reversed itself in September 2001 and adopted over 100 new federal, state and municipal affirmative action policies in higher education and public sector employment during the next two years.”

– Seth Racusen³⁶³

Although Brazil is a multicultural, mixed race community, the nation has “harboured [a] national myth that the country's various races live in harmony and equality - an untruth that has prevented the full incorporation of Afro-descendants, indigenous peoples, and members of other discriminated groups into society at large.”³⁶⁴ Until recently discussion

³⁶³ *Making the Impossible Determination* (2004) at <http://connecticutlawreview.org/archive/vol36/spring/Racusen.pdf> (accessed on 25 April 2006).

³⁶⁴ Global Rights: ‘Affirmative Action: A Global Perspective’ at www.globalrights.org/site/DocServer/Affirmative_Action_Global_Perspectives.pdf?docID=2623 (accessed on 22 March 2006) 18 – 19. “Repulsed by the extremity of Nazi ideology, the elites [wealthy white males] began to embrace the idea that Brazilians were a culture of mixed ethnicity, often contrasting the ‘harmonious race relations’ in Brazil with the racial segregation in the United States. The distorted idea of harmonious race relations of that period was propagated in the research of noted Brazilian sociologist Gilberto Freyre.” See UNESCO ‘Studies on Human Rights 2004: Struggles Against Discrimination’ at <http://unesdoc.unesco.org/images/0013/001397/139712e.pdf> (accessed on 16 August 2006) 159 for a further discussion regarding the illusion of racial harmony in Brazil.

of race was forbidden. For example, Brazil's national security-council "outlawed studies of racial discrimination as subversive"³⁶⁵ in 1969.

4.2.1 Brazil: A Brief Historical Background

Once again it is appropriate to offer a brief history in order to explain where the need for affirmative action arises from. Brazil was conquered and settled by the Portuguese in the sixteenth century and from then until the nineteenth century it was a colony of Portugal, exploited for its resources.³⁶⁶ Brazil was ruled by the Prince of Portugal, Pedro who had grown up in Brazil.³⁶⁷ It was Pedro who, "by May of that year [1822], he was speaking and writing of 'We Brazilians'."³⁶⁸ It was due to pressure in Brazil that, on 8 September 1822, Dom Pedro declared Brazil to be an independent country with its own monarchy.³⁶⁹

"Popular pressure in Brazil compelled his son, Dom Pedro, to declare Brazil independent in 1822, and so Brazil became an Empire with a monarchy, while the rest of North and South American became republics."³⁷⁰ The political situation and the changes that ensued in Brazil in the early part of the nineteenth century were profound.³⁷¹ "A colony became a nation in which the Brazilians by stages took control of their own government."³⁷²

Since gaining independence and moving out from the under the 'protection', of Portugal in 1822 Brazil has suffered a series of military coups and political instability.³⁷³ The country only gained a sense of political stability in 1994, seventy-two years after achieving independence.³⁷⁴ Brazil, until recently, insisted that its people were in a state of substantive equality, regardless of race. After the Third World Conference against

³⁶⁵ Marx *Making Race and Nation* (1998) 172.

³⁶⁶ Burns *A History of Brazil* (1970).

³⁶⁷ Burns *Brazil*.

³⁶⁸ Burns *Brazil* 111.

³⁶⁹ Deal 'Brief History of Brazil' at <http://www.brazilbrazil.com/historia.html> (accessed on 2 October 2006).

³⁷⁰ Deal 'Brief History of Brazil'.

³⁷¹ Burns *Brazil* 132.

³⁷² Burns *Brazil* 132.

³⁷³ Hasler *et al* 'National Human Resource' at <http://adh.sagepub.com/cgi/reprint/8/1/99.pdf> (accessed on 24 April 2006).

³⁷⁴ Hasler 'National Human Resource'.

Racism³⁷⁵, Brazil changed its stance on the equality levels in its country and “the Minister of Agrarian Development, Raul Jungmann, announced a 'Program of Affirmative Action for Black men and Women.’”³⁷⁶

It seemed strange that Brazil maintained an air of equality when the statistics told a different story. The statistics³⁷⁷ showed that that Brazil has a population of one hundred and seventy million people, of whom, 43% are dark skinned.³⁷⁸ The social and economic differences between black and pardo (mixed race) people and white people showed an immense gap between the two groups. Some of the statistics under consideration showed that:

- “More than 60 percent of the people living in poverty in Brazil are black.
- Black men in Brazil earn on average 48 percent less than white men.
- More than one quarter of all adult black Brazilians are illiterate compared to 10 percent of adult whites.
- Blacks in Brazil have on average two fewer years of school than do whites.
- Only 2.2 percent of university students in Brazil are black, 80 percent are white, and 18 percent are of mixed race.
- Not one of Brazil's 21 cabinet ministers or 11 Supreme Court justices is black in the national legislature, there are 12 blacks in the 513-member Chamber of Deputies.”³⁷⁹

³⁷⁵ The Third World Conference against Racial Discrimination was held in Durban during September 2001.

³⁷⁶ Carvalho (ed) ‘Human Rights in Brazil’ at www.global.org.br (accessed on 27 April 2006) 92.

³⁷⁷ These statistics were taken in 2001, when affirmative action policies began to find their way into Brazilian law.

³⁷⁸ The black and pardo (mixed race) people of Brazil are often classed into one group of ‘dark skinned’ people for the ease of referring to the two previously discriminated against and currently disadvantaged groups.

³⁷⁹ Author Unknown ‘Full Steam Ahead for Black Preferences at Brazilian Universities’ (2001) 33 *The Journal of Blacks in Higher Education* 43 at 43.

It is against the background of these kinds of figures that the Brazilian government has instituted its affirmative action policies under the guidance of President Fernando Henrique Cardoso in 2001.

4.2.2 Affirmative Action in Brazil

(a) Objectives of Affirmative Action

The foremost objectives of affirmative action in Brazil are to correct the racial discrimination of the past and to create a Brazilian society that can live up to their harmonious multicultural reputation. Rio de Janeiro's program might have had two possible objectives: "First, it is possible that the Legislature intended to correct existing inequalities, and second, the intention might have been to compensate for past discrimination."³⁸⁰ This is demonstrated by the fact that the programme reserves places for dark skinned people and poor people. By focussing on these two groups, it sets out to achieve a substantive equality not for only people who are dark skinned but also for the poor.³⁸¹

The best answer as to what the principal objective of affirmative action in Brazil is, was proposed by Pedro Kemp, a sponsor of affirmative action legislation in Mato Grosso do Sul. Kemp indicated "that he was 'seeking to invert the structure of opportunity'. A statement that suggests the programme was designed to correct previous discrimination and inequality."³⁸²

(b) Constitutionality of Affirmative Action

As will be shown below, affirmative action in Brazil has been met with several challenges regarding its constitutionality and, as such, has faced many stumbling blocks in being set up. In explaining "the adoption of a twenty percent quota the [Federal

³⁸⁰ Brooks 'Efficient Affirmative Action' at [http://islandia.law.yale.edu/sela/SELA%202005/Richard%20Brooks%20\(Final%20English%20Version\)%20v1.0.pdf](http://islandia.law.yale.edu/sela/SELA%202005/Richard%20Brooks%20(Final%20English%20Version)%20v1.0.pdf) (accessed 24 April 2006) 23.

³⁸¹ Although the Brazilian affirmative action, in effect, focuses on two different groups of people, the statistics show that dark skinned and poor people are more or less the same people. Therefore, it can be argued that Brazilian affirmative action focuses predominantly on dark skinned people.

³⁸² Brooks 'Efficient Affirmative Action' 24.

Supreme Court] President, Marcio Aurelio reasoned that the adoption of affirmative action was not only constitutionally valid, but also necessary to achieve the constitutional principle of equality.”³⁸³ Following the views of Aurelio, it can be seen that affirmative action in Brazil passes the constitutional muster and does not infringe on the Brazilian Constitution.³⁸⁴

(c) Employment Equity Measures

Brazil has slowly been implementing affirmative action policies into the economic and educational sectors since 2001. The majority of these policies set up quota systems that require the target employers or institutions to meet in order to comply with the new laws.³⁸⁵ The implementation of affirmative action in Brazil has been quite staggered and widespread with no real consistency. This can be shown by the following extract:

“In 2000 and 2001, the state legislature of Rio de Janeiro passed laws mandating that two public universities which it had jurisdiction set aside 50 percent of their seats for applicants from public high schools, 40 percent for students who identified themselves as black or pardo (mixed race) and 10 percent for students with disabilities ... Elsewhere, the state of Mato Grosso do Sul has adopted its own affirmative action policy. Other state universities have adopted their own quota systems as well. On January 13, 2005, Brazil adopted a law that will provide private universities tax breaks if they reserve as many as 20 percent of their seats for poor students. In September 2001, Brazil's Minister of Agriculture issued an order mandating that 20 percent of his staff be black and that firms with which his agency had contracts be made up of 20 percent African descendants and another 20 percent women. The federal Supreme Court soon followed, establishing a similar affirmative action hiring target.”³⁸⁶

³⁸³ Brooks ‘Efficient Affirmative Action’ 20.

³⁸⁴ Constitution of the Federative Republic of Brazil, 1988.

³⁸⁵ Global Rights ‘Global Perspective’.

³⁸⁶ Global Rights ‘Global Perspective’ 19 – 20.

Later in the year,³⁸⁷ the then President, Fernando Henrique Cardoso instituted affirmative action measures mandating that twenty percent of positions not requiring a civil service exam were to be made available to dark skinned people only.³⁸⁸

The Labour Ministry's answer to the call for government to institute affirmative action measures within itself was to reserve twenty percent of its job-training budget for dark skinned people. Similarly, the Ministry of Foreign Relations created a scholarship for black students at the Instituto Rio Branco diplomatic training school instead of creating a quota system as with the rest of government.³⁸⁹

It is submitted that the Brazilian implementation of affirmative action in the government is poor one. An analysis of this system shows that it creates no sense of uniformity or consistency. It is submitted that, under this system, no applicant for a position in government can be sure whether or not affirmative action measures would apply to them or not with the non-uniform measures. Finally, "in 2003, President Luiz Inacio Lula da Silva established a National Policy for the Promotion of Racial Equality, which has set out to establish quotas for certain government jobs."³⁹⁰ This helps to create a sense of uniformity and consistency in the application of affirmative action at the government level whereas it had previously been implemented in an *ad hoc* fashion.

³⁸⁷ "On 13 May 2001, President Fernando Henrique Cardoso signed a decree initiating the 'National Programme for Affirmative Action', which promotes diversity in government agencies and federal public administration." See UNESCO 'Studies on Human Rights' 162.

³⁸⁸ "A complicating feature is that in Brazil, there are over 300 different classifications of race, and each of these various shades of brown is used to describe skin colour and ancestry. Because of this, opponents of affirmative action in Brazil say that 'free-riders' or opportunists will exploit the system and reap all benefits from the programme." See UNESCO 'Studies on Human Rights' at 163 for a further discussion on the argument revolving around 'free-riders' in Brazil. The 'free-rider' argument can be compared with a problem in South African affirmative action that has been raised in chapter III. In 3.5.1 (b), it was pointed out that certain parts of the designated groups in South Africa will benefit from affirmative action even though they have no personal history of discrimination and that the Courts have failed to give a satisfactory answer to this question. This potential problem will be discussed in further detail in Chapter 5 of this work.

³⁸⁹ Hasler 'National Human Resource'

³⁹⁰ Global Rights 'Global Perspective' 21.

(d) Education

However, one of the main – and most contentious - arenas of government measures to institute affirmative action was higher education.³⁹¹ In 2001, the Rio de Janeiro state legislature passed affirmative action measures which were applicable to all universities over which it had jurisdiction to be implemented from 2002 onwards.³⁹² These measures required the universities to “set aside 50 percent of their seats for applicants from public high schools, 40 percent for students who identified themselves as black or pardo and 10 percent for students with disabilities.”³⁹³

These measures resulted in widespread unrest and mass law suits. Due to this, and before the cases were decided, in 2003, the legislature amended the quotas to require universities to reserve “20 percent [of its places] for people who identified themselves as black, 20 percent for those who went to public schools and 5 percent for disabled persons or ‘other minorities.’ All students admitted to these seats were further required to have a family income that fell below a certain maximum.”³⁹⁴

Although the quotas were reduced, several groups have already filed challenges to the new laws. However, despite some groups resenting the implementation of affirmative action, several organisations have jointly filed to be *amicus curiae* and are defending the practice of affirmative action.³⁹⁵

It is submitted that the requirement that all students admitted to these seats are required to meet a maximum income criteria is a good requirement. This submission is based on the fact that the requirement it ensures that people who would not normally have access to university are given an equal opportunity to attend university. This aims to ensure that it

³⁹¹ “Ricardo Henriques, Executive Secretary, Brazilian Ministry of Education, underscored the extent to which income gaps reflect levels of education, further asserting that an educational quota system is necessary in Brazil. This is particularly true for Afro-Brazilians, who account for an estimated 45% of Brazil's population but only 2% of its university students.” WWICS ‘Race, Inequality and Education: Challenges for Affirmative Action in Brazil and the United States’ at <http://www.wilsoncenter.org/topics/pubs/Update17.pdf> (accessed on 16 August 2006) at 1.

³⁹² WWICS ‘Race, Inequality and Education’.

³⁹³ Global Rights ‘Global Perspective’ 19.

³⁹⁴ *Ibid.*

³⁹⁵ Global Rights ‘Global Perspective’.

is the poor people from the designated groups who are the recipients of the benefits of affirmative action and not people who do not need the measures.³⁹⁶ It is submitted that this ensures that all people from the designated group benefit from affirmative action measures giving them place in universities.³⁹⁷

The State of Mato Grosso do Sul has also instituted its own affirmative action policies for universities which “sets aside 20 percent of the incoming public university spaces for blacks and 10 percent for Indians.”³⁹⁸ The Mato Grosso do Sul provisions, however, have the requirement that the applicants must prove that they are Black or Indian.³⁹⁹ The problem with this is that it has the potential of causing intra-racial division. Various public universities around the country have implemented similar quota systems around the country, including; the State University of Bahia, the Federal University of Brasilia and the University of Paraná.⁴⁰⁰

Following the implementation of affirmative action quota measures for public universities in 2005, Brazil adopted a law which gave private universities tax concessions if they implemented quotas systems with twenty percent of places being reserved for poor students.⁴⁰¹ The private universities, therefore, have the option whether to implement affirmative action measures or not. This voluntary option, with a tax concession incentive, avoids further dissatisfaction and challenges to the measures.⁴⁰² Thus universities are increasingly absorbing the remaining students, although their education comes at a price many cannot afford.⁴⁰³

³⁹⁶ Global Rights ‘Global Perspective’.

³⁹⁷ The one problem that can be noted regarding this approach is that the standard of university graduates may drop if people from low quality educational backgrounds who would not otherwise qualify for university are the only people benefiting from affirmative action.

³⁹⁸ Global Rights ‘Global Perspective’ 19.

³⁹⁹ Indian in this context implies person’s native to South America.

⁴⁰⁰ Global Rights ‘Global Perspective’.

⁴⁰¹ Global Rights ‘Global Perspective’.

⁴⁰² Paschel ‘Experts Discuss Affirmative Action in Brazil’ at <http://thedialogue.org/summaries/sept04/affirmative.asp> (accessed on 27 July 2006).

⁴⁰³ Paschel *Affirmative Action in Brazil*.

It has been claimed that the Brazilian government focused on education out of the widely-held, mistaken belief that educational differences explain income gaps (for everyone, not just blacks and whites).⁴⁰⁴ Mala Htun of the New School for Social Research and Notre Dame University questions whether quotas are the correct solution to closing the racial gap, given that educational differences account for less than half of the black-white income gap.⁴⁰⁵ She questions “whether quotas are the correct solution to closing the racial gap, given that educational differences account for less than half of the black-white income gap ... Htun hypothesized that quotas may be a temporary solution to avoid the more costly and risky undertaking of overhauling secondary and higher education.”⁴⁰⁶

4.2.3 Lessons for South Africa

It is probably too early in its operation to consider whether or not affirmative action in Brazil has been successful or not. However, there are certain issues that are relevant to how South Africa might amend or develop its own affirmative action policies.

(a) Inconsistency

It is submitted that the most glaring deficiency of affirmative action in Brazil is its inconsistency and patchy implementation created by the different systems in the respective states. This submission is based on the fact that it seems a strong likelihood that anything will be achieved on a national scale is low. What seems to be needed is a consistent and strong national initiative implemented at macro-level. This would operate as an initial, starter programme that can then be adopted and implemented at state level.

It is therefore submitted that the present Brazilian system should be reconstructed in order to achieve far-reaching national success. However, South Africa could adopt the

⁴⁰⁴ Paschel ‘Affirmative Action in Brazil’.

⁴⁰⁵ Paschel ‘Affirmative Action in Brazil’.

⁴⁰⁶ Paschel ‘Affirmative Action in Brazil’.

state / provincial structures once national affirmative action measures have made a significant difference nation-wide.⁴⁰⁷

(b) Quotas

The issue of quotas has proved to be a very contentious one in Brazil, especially as they relate to education measures. The South African measures have specifically excluded any quota system and for good reason.⁴⁰⁸ The quota system is not an *active* implementation of affirmative action; it merely sets up a required number and leaves it at that. It is, as demonstrated in Brazil potentially provocative. It is submitted that this system merely creates a cosmetic equality and will have a detrimental effect on the economy. This submission is made on the belief that it is likely that the standard of performance in all arenas will be low since there may be a tendency for people to be used as tokens to make up the quotas.

As an example of how the Brazilian quota system fails to achieve true educational equality, “in 2002, of the 20 scholarship recipients, only one student, a black woman, passed the last of the three-stage selection process.”⁴⁰⁹ Nor does it necessarily improve the overall capacity of undergraduates and graduates thus improving their value to the economy. This illustrates well how quotas can end up having an adverse effect. It is,

⁴⁰⁷ After affirmative action has run its course in South Africa, the South African government can analyse the effectiveness of the Employment Equity Act 55 of 1998. The government can then implement a new policy aimed at achieving the goals that were not achieved under the EEA. They could use the state / provincial model, for example. In Malaysia, for example, the New Economic Policy was used as a nation wide policy to bring about substantive equality with specific goals. At the end of this policy, the Malaysian government analysed the success of the policy and created a new policy aimed at achieving those goals that were not achieved under the first policy. See Emsley *The Malaysian Experience* (1997).

⁴⁰⁸ In the United States of America for example, in *California Regents v Bakke* 438 US 265 (1978) “The Supreme Court issued its decision in 1978 that ruled out the use of quotas in admissions.” See Deshpande ‘Equity and Development: World Development Report 2006’ at http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/Affirmative_Action_India_Ashwini.pdf#search=%22Affirmative%20Action%20in%20India%20and%20the%20United%20States%22 (accessed on 7 May 2006) 17 for a further discussion of the *Bakke* case. More recently, in the USA, in 1995, “In *Adarand Constructors, Inc v Pena* [515 US 200, 217 (1995)], the Court held that all federal affirmative action policies will now be examined under the same level of strict scrutiny as their state and local counterparts. To pass judicial muster, benign racial legislation must now be ‘narrowly tailored’ to address ‘compelling governmental interests’. Specifically set aside quotas, set-asides, or other rigid numerical requirements must be avoided.” See Torys *Effect of Supreme Court's Ruling on Affirmative Action Policies* at www.torys.com (accessed on 7 May 2006) for a further discussion of the *Adarand* case.

⁴⁰⁹ Global A ‘Global Perspective’ 21.

therefore, submitted that the South African system of achieving substantive equality and employment equity far outweighs the Brazilian system and the Brazilian system could learn a lot from South Africa.

(c) Private Education

It is submitted that the system in Brazil of offering rewards to private schools could be adopted with success in South Africa. If the government were to offer an incentive to private schools and colleges with *effective* transformation policies – beyond the Brazilian quota system – this would encourage higher enrolment of people from designated groups to schools around the country. South Africa offers State contracts⁴¹⁰ and other such rewards to businesses for compliance with affirmative action measures with regards to employment equity, be they required to or not. At present, however, unlike voluntary employers, there is no incentive system for private educational institutions to make an effort to transform with regards to educational equity.

4.3 Employment Equity in Canada

“The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity program is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forbears.”

– Mr. Justice Dिल्s⁴¹¹

4.3.1 The Right to Equality: Formal and Substantive Equality

The Canadian model and experience of employment equity⁴¹² serves as a good example

⁴¹⁰ Section 53 of the Employment Equity Act 55 of 1998. The South African Employment Equity Act will hereinafter be referred to as the SAEAA.

⁴¹¹ *Action Travail des Femmes v Canadian National Railways Co* [1987] 1 SCR 1114 at 1143

⁴¹² Although the Canadian model of ‘affirmative action’ never explicitly uses the term affirmative action, employment equity and affirmative action synonymous terms. This will be discussed in further detail at a later stage in 4.3.

for South Africa with regards to the implementation of affirmative action. This is due to the strong similarity between the Canadian Employment Equity Act⁴¹³ and the South African Employment Equity Act. The Canadian Charter of Human Rights⁴¹⁴ and the South African Constitution⁴¹⁵ also have much in common. A comparison of the right to equality in section 15 of the Canadian Constitution and the right to equality in section 9 (1) and (2) of the South African Constitution shows identical provisions. “Section 15 guarantees equality of rights, and also deals with affirmative action programs to help reverse the discrimination process”⁴¹⁶ and reads as follows:

- (1) Every individual is equal before the and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

Section 15 (1) of the Canadian Constitution is a combination of section 9 (1) of the South African Constitution - the right to formal equality - and section 9 (3) of the South African Constitution - the grounds of prohibition of discrimination. The only difference is that the Canadian Constitution prohibits *all* forms of discrimination whereas the South African Constitution prohibits *unfair* discrimination. It is submitted that the South African approach is better in that it prevents the possibility of section 9 (2) contradicting section 9 (1), as discussed in chapter III under 3.2.4 of this work. Section 15 (2) promotes the right to substantive equality and, in the Canadian case, seems to contradict section 15 (1) and seems to be merely an exception to section 15 (1). This is in contrast to section 9 (2),

⁴¹³ Act c44 of 1995. The Canadian Employment Equity Act will hereinafter be referred to as the CEEA.

⁴¹⁴ Act c H-6 of 1985.

⁴¹⁵ Constitution of the Republic of South Africa, 1996.

⁴¹⁶ Mooney and Moffatt (eds) *Discrimination Law* (2005) 237.

which is part of the holistic approach to the right to equality. The goal of section 15 (2) is to allow for legislation that will create measures that can bring about employment equity.

4.3.2 The Constitutionality of Employment Equity⁴¹⁷

“By protecting affirmative action programs in this way, the Charter closes off an important avenue of attack used with considerable success by opponents of affirmative action elsewhere.”⁴¹⁸ This protection aims to prevent situations such as happened in the United States of America. In the case of *University of California Regents v Bakke*,⁴¹⁹ it was held that affirmative action violated the constitutional right to equality as there was no exception clause as in the Canadian Constitution. Affirmative action, in this case, was held to violate the equal rights provisions of the United States constitution.

By contrast, the Canadian courts have held that section 15 (2) of the Canadian Charter of Human Rights validates any affirmative action measures and grants them constitutionality. In the case of *Canadian National Railways v Canadian Human Rights Commission* (sometimes cited as *Montreal Women's Group (Action Travail des Femmes) v Canadian National Railways*)⁴²⁰, the tribunal before whom the case was heard ordered that one in four of the blue collar positions that were filled in the future were to be filled by women until the workforce was representative and thirteen per cent of the blue collar positions were filled by women. Although the Federal Court of Appeal overturned this ruling, “the Supreme Court of Canada in an 8 - 0 decision reversed the ruling by the Appeal Court, and affirmed the tribunal's order that CNR institute quotas in its hiring.”⁴²¹

⁴¹⁷ See Hogg *Constitutional Law of Canada Student Edition* (2002) for a further discussion of constitutional law in Canada.

⁴¹⁸ Fletcher and Chalmers ‘Attitudes of Canadians toward Affirmative Action: Opposition, Value Pluralism, and Non-Attitudes’ (1991) 13 *Political Behaviour* 67 at 68.

⁴¹⁹ 438 US 298.

⁴²⁰ (1984) 5 CHRR D/2327 (Can HR Trib).

⁴²¹ Fletcher ‘Attitudes of Canadians’ 69 – 70. Some confusion may arise due to the back and forth nature of the decisions of the different courts. The first judgment (held by the tribunal) held and the third and final judgment (held by the Supreme Court) set the precedent with the order that one in four of the blue collar positions that were filled in the future were to be filled by women until the workforce was representative and thirteen per cent of the blue collar positions were filled by women. The dissenting judgment by the Federal Court of Appeal (the second judgment) was overturned by the third judgment and, therefore, has no effect on the case.

4.3.3 Canada: A Brief Historical Background

(a) Inequality in Canada⁴²²

“As of 1996, people of aboriginal ancestry made up two percent of Canada’s population, and visible minorities comprised another 11 percent.”⁴²³ The Canadian government has responded to inequity with regards to these groups in three major ways. The first was the removal of all forms of unfair discrimination in the Canadian Human Rights Act (formal equality). The second was the enactment of employment equity legislation in 1986, amended in October 1995 contained in the CEEA (formal and substantive equality). The third was “introduction of administrative policy (as opposed to legislation) that requires organisations with 100 or more employees who bid on federal government contracts of \$200,000 or more to effect employment equity programmes”⁴²⁴ (formal and substantive equality). Although the CEEA is the legislation governing the entire country, most provinces and territories have their own forms of human rights legislation which prevent discrimination and promote preferential treatment of designated groups.⁴²⁵

(b) Development of the Employment Equity Act

The Employment Equity Act is an Act based on a thirty year history of experience with anti-discrimination programmes.⁴²⁶ Although the current Act promotes preferential

⁴²² In Canada, visible minorities earn about 9% less than the white population and have a 16% earnings disadvantage. See Hum and Simpson ‘Revisiting Visible Minorities and Immigration Adjustment in Canada’s Labour Markets’ at <http://www.umanitoba.ca/faculties/arts/economics/simpson/CERF%20Paper%20Montreal.pdf> (accessed on 14 August 2006) at 4.

⁴²³ Global Rights ‘Global Perspective’ at 26.

⁴²⁴ Thomas ‘Employment Equity in South Africa: Lessons from the Global School’ (2002) 3 *International Journal of Manpower* at 248.

⁴²⁵ PSAC ‘Employment Equity Legislation’ at http://www.psa-afpc.org/what/empequity/EE_Employment_Equity_Legislation-e.shtml#3.%20What%20Are%20the%20Main%20Steps%20of%20Employment%20Equity%20Work.

⁴²⁶ “Issues surrounding employment equity became prominent in Canadian public policy discussions during the late 1970s and early 1980s, at the same time that affirmative action issues were established in the United States. Canada’s official response was the Royal Commission on Equality in Employment, established in 1983 with Judge Rosalie Abella as Commissioner.” See Bakan and Kobayashi ‘Employment Equity Policy in Canada: An Interprovincial Comparison’ at <http://www.swc-cfc.gc.ca/> (accessed on 14 August 2006) at 13-15 for further details on the Abella Commission.

treatment and the notion of substantive equality or employment equity, the initial aims of employment equity was merely to remove all barriers to employment.⁴²⁷ However, it soon “became apparent that exclusion could result not only from conscious bias, but also from unintentional practices or systems.”⁴²⁸

For this reason, in 1978, a voluntary affirmative action program began that focused on the private industry, federal contractors and Crown Corporations.⁴²⁹ In 1984, this was extended to all departments of the federal public service. “At this time the program was directed at women, Aboriginal peoples and persons with disabilities. Members of visible minorities were included in 1985.”⁴³⁰ The legal basis for these programmes was the equality provisions contained in the Canadian Human Rights Act as it is today.⁴³¹

Although affirmative action measures were being put in place, “the status of the designated groups in the labour force continued to be poor. So in 1983, the federal government created a Royal Commission whose mandate was to study equal employment opportunities.”⁴³² The commission suggested the Employment Equity Act, which came into force in 1986.⁴³³ This Act required a review of the Act after five years and this review found that progress was being made very slowly.⁴³⁴ Despite the findings of the review, it was only after the 1993 elections that the CEEA was re-visited.⁴³⁵ Finally, in 1995, the current CEEA was developed and the Act came into force in 1996.⁴³⁶

⁴²⁷ Lamarche ‘Retaining Employment Equity Measures in Trade Agreements’ at http://www.swc-cfc.gc.ca/pubs/pubspr/066238931X/200502_066238931X_e.pdf (accessed on 14 August 2006).

⁴²⁸ Human Resources Development Canada (HRDC), ‘Overview of Employment Equity’ at <http://www.hrsdc.gc.ca/en/lp/lo/lsw/we/legislation/guidelines/doc1.doc> (accessed on 7 May 2006) 12.

⁴²⁹ Global Rights ‘Global Perspective’.

⁴³⁰ Global Rights ‘Global Perspective’.

⁴³¹ Marleau ‘The Role of the Law in Achieving Equality: A Canadian Point of View’ at <http://www.canadanet.or.jp/political/marleau24jun03.pdf> (accessed on 14 August 2006).

⁴³² HRDC ‘Overview of Employment Equity’ 13 – 14.

⁴³³ Bakan and Kobayashi ‘Affirmative Action and Employment Equity: Policy and Ideology in Canadian Context’ at <http://www.cpsa-acsp.ca/papers-2005/Bakan.pdf> (accessed 7 May 2006) 5.

⁴³⁴ Bakan ‘Policy in Canada’.

⁴³⁵ Bakan ‘Policy in Canada’.

⁴³⁶ “Revision of the Act had been part of the Liberal Party platform stated in their Red Book, although plans for revision were already well under way before the 1993 election.” See Bakan *Policy in Canada* at 20 for further details in this regard.

The 1995 Act does not refer to the term ‘affirmative action’ in its text preferring to use the term ‘employment equity practice or policies’. Although the terms are different, the CEEA does indeed contain affirmative action provisions. “The [Royal] Commission [on Equality] was told again and again that the phrase ‘affirmative action’ was ambiguous and confusing ... The Commission notes this in order to propose that a new term, ‘employment equity’, be adopted to describe programmes of positive remedy for discrimination in the Canadian workplace.”⁴³⁷

(c) Differences between the 1986 and 1995 Act

Although the purpose of the 1986 CEEA is carried through to the 1995 Act, the 1995 Act is far more detailed in its approach, especially with regards to the obligations imposed employers to ensure employment equity. One of the two most significant differences between the two Acts is the inclusion of ‘seniority rights’ as a relevant characteristic when considering persons for a position in the workforce, as will be discussed further later in this chapter. The second major change is that “the federal public service is included in the *Act* and so is subject to the equivalent program requirements as private sector employers.”⁴³⁸

The new Act also contains some changes which help clarify certain points, for example, the “new *Act* clearly provides the Canadian Human Rights Commission with the mandate to conduct on-site compliance reviews in order to monitor compliance.”⁴³⁹ A second example of clarification is the attempt to clarify the myth that employment equity is detrimental to all people from non-designated groups by stipulating that no employment equity measure should be implemented if the effects are detrimental.⁴⁴⁰ The Act then stipulates that quotas are not part of the Act and process of employment equity.⁴⁴¹

⁴³⁷ Bakan and Kobayashi ‘Policy in Canada’.

⁴³⁸ HRDC ‘Overview of Employment Equity’ 16.

⁴³⁹ HRDC ‘Overview of Employment Equity’ 16.

⁴⁴⁰ Section 5 and 6 of the CEEA list certain grounds that are detrimental and will be discussed in 3.2.5 (c).

⁴⁴¹ HRDC ‘Overview of Employment Equity’.

4.3.4 The Purpose of the Canadian Employment Equity Act

The function of the CEEA is set out in the Act as follows:

“The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal peoples, persons with disabilities and members of visible minorities by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences.”⁴⁴²

As can be seen, the purpose of the CEEA parallels the SAEAA. Whereas South African affirmative action aims to achieve equality in the workplace for black people, women and people with disabilities; the Canadian model is for women, aboriginal people, people from visible minorities and people who have disabilities. “In Canada, affirmative action programs have become an important policy tool for governments in promoting greater equality for women and minorities in both the public and private sectors of the economy.”⁴⁴³ It is for this reason that the CEEA serves as such a good example to South Africa.

4.3.5 The Canadian Employment Equity Act Part 1: Employment Equity

(a) Beneficiaries of the Employment Equity Act

The CEEA bestows benefits on people falling into ‘designated groups’. ‘Designated groups’ includes women, aboriginal peoples, people with disabilities and people who are members of visible minorities.⁴⁴⁴ The concept ‘members of visible minorities’ includes any person who is ‘non-Caucasian’ in race or non-white in colour other than aboriginal

⁴⁴² Section 2 of the CEEA. See Lamarche ‘Retaining Employment Equity’ at 9 for an in depth discussion on the purpose of Employment Equity in Canada.

⁴⁴³ Fletcher ‘Attitudes of Canadians’ 67.

⁴⁴⁴ Section 1 of the CEEA.

peoples.⁴⁴⁵ The term ‘aboriginal people’ refers to Indians, Inuit or Métis people (these people are now referred to as the First People).⁴⁴⁶

A person with a disability, according to the Act, is a person who has a long-term or recurring disability, be it physical, mental, sensory, psychological or a learning impairment.⁴⁴⁷ That person must “(a) consider themselves to be disadvantaged in employment by reason of that impairment; or (b) believe that a employer or potential employer is likely to consider them to be disadvantaged in employment by reason of that impairment.”⁴⁴⁸ This also includes people who have functional limitations due to their disability and have been accommodated at their current place of work. The one additional requirement to be a beneficiary of affirmative action in Canada is, according to section 9 (2), only employees who identify themselves or agree to be identified by an employer as a person falling into the category of ‘designated group’ will be considered as members of that designated group.

(b) Deemed Employer

The CEEA does not apply to all employers in Canada. It is focused on imposing obligations regarding employment equity on ‘deemed employers’. The applicability of the CEEA and its employment equity provisions is set out in the Act as follows:

(4) (1) This Act applies to:

- (a) Private sector employers;
- (b) The portions of the federal public administration set out in Schedule I or IV to the Financial Administration Act;
- (c) The portions of the federal public administration set out in of Schedule V to the Financial Administration Act that employ one hundred or more employees; and

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.* See Americans.net ‘Native Americans’ at <http://www.nativeamericans.com/> (accessed on 29 August 2006) for a discussion on the history of the First People.

⁴⁴⁷ Section 1 of the CEEA.

⁴⁴⁸ Section 3 of the CEEA.

- (d) Such other portion of the public sector employing one hundred or more employees, including the Canadian Forces and the Royal Canadian Mounted Police, as may be specified by order of the Governor in Council on the recommendation of the Treasury Board, in consultation with the minister responsible for the specified portion.⁴⁴⁹

Private Sector Employers

The application of the Act to the ‘private’ sector means, firstly, any person who employs one hundred or more employees and, secondly, any person “in connection with a federal work, undertaking or business as defined in section 2 of the Canada Labour Code and includes any corporation established to perform any function or duty on behalf of the Government of Canada that employs one hundred or more employees.”⁴⁵⁰ The definition also excludes any departmental corporation.⁴⁵¹

Public Administration

The CEEA applies to certain specific areas of the public sector, as set out in the Financial Administration Act.⁴⁵² The definition of public sector excludes employees employed in an area for which the Public Service Commission “exercises any power or performs any function under the Public Service Employment Act⁴⁵³, the Public Service Commission and that portion are responsible for carrying out the obligations of an employer under this Act.”⁴⁵⁴ The ‘public sector deemed employers’ also incorporates any other portion of the public sector which employs one hundred or more employees.⁴⁵⁵ In creating these provisions, the “federal public service joined approximately 350 federally regulated

⁴⁴⁹ Section 4 of the CEEA.

⁴⁵⁰ Section 3 of the CEEA. Section 3 (a): “The definition of ‘private sector’ excludes employers with businesses of a local or private nature in the districts of Yukon, the Northwest Territories or Nunavut.”

⁴⁵¹ “departmental corporation” means a corporation named in Schedule II. See Canadian Financial Administration Act CF – 11 of 1985.

⁴⁵² See Schedule 4 of the Financial Administration Act.

⁴⁵³ Act c. 22 of 2003.

⁴⁵⁴ Section 3 of the CEEA.

⁴⁵⁵ PSAC ‘Employment Equity Legislation’.

employers with 100 or more employees who have been covered since 1986.”⁴⁵⁶ The CEEA also applies to the Canadian Forces and the Royal Canadian Mounted Police.

(c) Employment Equity Measures

Section 5 of the CEEA sets out the duty’s of ‘every employer’ with regards to employment equity. By reading the text as a whole, one can interpret this to mean that only deemed employers are obliged to follow the duties of ‘every employer’ as set out in Part 1 of the Act. Accordingly, this work will proceed in the understanding that the term ‘every employer’ is intended to mean deemed employers only.

Section 5 of the Act requires every employer (deemed employers) to implement employment equity in two main ways. The first is by identifying and eliminating employment barriers against persons in designated groups that are caused by employment practices, policies and systems not authorised by law.⁴⁵⁷ This is very much like the requirement for South African employers to remove all formal barriers to equality in the workplace. The second measure required by the CEEA is that “employers [must] take positive steps to ensure that people in the designated groups are represented in the workplace in proportion to their representation in the Canadian workforce.”⁴⁵⁸ The employer is required to implement ‘positive policies and practices’ to ensure that a designated group’s members are reasonably accommodated in the workplace as well as ensuring that these groups attain a measures of representation at all levels in the respective employer’s workforce.⁴⁵⁹ This section, rather superfluously, goes on to say that all levels of the workplace includes the entire Canadian workforce and, even more superfluously, skilled jobs in the Canadian workforce.

The Act then makes specific stipulations that the employer need not implement the above mentioned employment equity measures if it were to cause the employer undue

⁴⁵⁶ PSAC ‘Employment Equity Legislation’.

⁴⁵⁷ Section 5 (a) of the CEEA.

⁴⁵⁸ Global rights ‘Global Perspective’ 27.

⁴⁵⁹ Section 5 (b) of the CEEA.

hardship;⁴⁶⁰ if the applicant does not have the requisite qualifications to perform the job;⁴⁶¹ or, in the public sector, where the Public Service Employment Act requires hiring or promotion to be based on merit.⁴⁶²

It is submitted that employers not needing to implement employment equity measures if those measures cause the employer undue hardship is an essential provision to include. Although the measures are unconstitutional if they are more detrimental than beneficial as they fail the proportionality test; it is important to emphasise that the employment equity measures cannot be detrimental to non-designated group members. This gives people not falling into the designated groups some comfort and, therefore, will help the CEEA gain more support. As the majority of the country does not fall into the 'designated groups' category, their support is needed for the CEEA to be accepted. Without majority support, the affirmative action measures can never truly and efficiently be implemented.

An additional preferential treatment section in the CEEA is that a private sector person who is engaged in promoting or serving the interests of aboriginal peoples may give preference to aboriginal peoples or employ only aboriginal peoples over all other peoples.⁴⁶³ The exception to this practice is that the preference or employment is not allowed to constitute a practice that would be considered discriminatory under the Canadian Human Rights Act.⁴⁶⁴ This can be interpreted to mean that the aboriginal peoples are now at the top of the hierarchy in the designated group if the employer is engaged in promoting or serving the interests of aboriginal peoples.

⁴⁶⁰ Section 6 (a) of the CEEA.

⁴⁶¹ Section 6 (b) of the CEEA.

⁴⁶² Section 6 (c) of the CEEA.

⁴⁶³ Section 7 of the CEEA: "Notwithstanding any other provision of this Act, where a private sector employer is engaged primarily in promoting or serving the interests of aboriginal peoples, the employer may give preference in employment to aboriginal peoples or employ only aboriginal peoples, unless that preference or employment would constitute a discriminatory practice under the *Canadian Human Rights Act*."

⁴⁶⁴ Section 7 of the CEEA.

The CEEA deems the consideration of seniority rights to not amount to discrimination if a person from a non-designated group is preferred for a position over a person from a designated group, even if the unsuccessful applicant is better qualified.⁴⁶⁵ The preference of senior employees or granting of seniority rights must be part of a collective agreement or an established practice of the employer. This situation applies to the CEEA, only if a collective agreement or established practice of the employer is to layoff or recall employees by seniority. This will not be considered discriminatory if non-designated group members are favoured.⁴⁶⁶ Seniority rights are also not employment barriers within the meaning of the CEEA if the employer is downsizing or restructuring and the collective agreement or established practice exists.⁴⁶⁷

4.3.6 Analysis and Review

The CEEA requires every employer to collect information and conduct a workforce analysis to determine the degree of under-representation of people from designated groups in all areas of its workforce.⁴⁶⁸ This analysis “compares the numbers of each designated group in each occupational group of the employer’s workforce to the Canadian workforce.”⁴⁶⁹ The employer is also required to review employment systems, policies and practices to identify any employment barriers against persons from designated groups.⁴⁷⁰ The review “refers to both existing and new systems, policies, practices. The employment systems review (ESR) is to examine the following in order to identify employment barriers against the designated groups: recruitment, selection & hiring; development & training; promotion; retention & termination; and reasonable accommodation of the designated groups.”⁴⁷¹

It is submitted that the conducting of both the analysis and review is an essential first step if one intends to implement measures to rectify any problems identified and implement

⁴⁶⁵ Section 8 of the CEEA.

⁴⁶⁶ Section 8 (1) of the CEEA.

⁴⁶⁷ Section 8 (2) of the CEEA.

⁴⁶⁸ Section 9 (1) (a) of the CEEA.

⁴⁶⁹ PSAC ‘Employment Equity Legislation’.

⁴⁷⁰ Section 9 (1) (b) of the CEEA.

⁴⁷¹ PSAC ‘Employment Equity Legislation’.

an employment equity plan according to those weaknesses. This ensures the most effective employment equity plan possible. All information obtained in the analysis and review is strictly confidential.⁴⁷²

4.3.7 Consultation

The CEEA requires a deemed employer to consult with employees in order to ensure the best possible implementation of employment equity measures.⁴⁷³ A reading of the CEEA shows that the provisions regarding consultation are situated after the employment equity plan provisions. Although the provisions are ordered in this manner – the employment equity plan before consultation, – one can only assume that deemed employers carry out the consultation before creating their employment equity plan.

The purpose of the consultation⁴⁷⁴ with employees' representatives is to invite them to provide their views on certain issues⁴⁷⁵ and to collaborate in the preparation, implementation and revision of the employment equity plan.⁴⁷⁶ If the employees are represented by a bargaining agent, then that bargaining agent is required to participate in the consultation. The views provided by the employees' representatives include:

- (a) The assistance that the representatives could provide to the employer to facilitate the implementation of employment equity in its workplace and the communication to its employees of matters relating to employment equity; and
- (b) The preparation, implementation and revision of the employer's employment equity plan.⁴⁷⁷

⁴⁷² Section 9 (3) of the CEEA.

⁴⁷³ Section 15 of the CEEA.

⁴⁷⁴ In accordance with section 15 (4) of the CEEA, "Consultation under subsection (1) and collaboration under subsection (3) are not forms of co-management."

⁴⁷⁵ Section 15 (1) of the CEEA.

⁴⁷⁶ Section 15 (3) of the CEEA.

⁴⁷⁷ Section 15 (1) of the CEEA.

4.3.8 Employment Equity Plans

The CEEA contains several provisions relating to the implementation of employment equity plans⁴⁷⁸ by the deemed employers. The first measure that the plan must implement is to specify the positive policies and practices (affirmative action measures) that it will implement in the short term⁴⁷⁹ with regards to hiring, training, promoting and retaining persons from designated groups as well as making reasonable accommodations.⁴⁸⁰ This measure causes deemed employers to implement active measures in the pursuance of substantive equality.

The second measure to be included in the plan is aimed at pursuing formal equality.⁴⁸¹ The plan must set out a timetable for the implementation of these two goals (the implementation of formal and equality and employment equity).⁴⁸² An employer is required to set out and longer term goals that have the goal of increasing representation in the workforce. Furthermore, any “finding [made during the analysis stage] that certain groups are underrepresented should lead to the use of ‘short term numerical goals for the hiring and promotion of persons in designated groups in order to increase their representation in each occupational group in the workforce.’”⁴⁸³ An employer is required to set out and longer term goals that have the goal of increasing representation in the workforce.⁴⁸⁴ The employer can also include any other matter that may be prescribed.⁴⁸⁵

The mere creation of the plan does not achieve employment equity. “The employer must make all reasonable efforts to implement the employment equity plan and monitor the

⁴⁷⁸ Employment equity plans will hereinafter be referred to as ‘the plan’ or ‘a plan’.

⁴⁷⁹ In this section, “short term” means a period of not less than one year and not more than three years, and “longer term” means a period of more than three years. See Section 10 (3) of the CEEA.

⁴⁸⁰ Section 10 (a) of the CEEA.

⁴⁸¹ Section 10 (1) of the CEEA: “The employer shall prepare an employment equity plan that (b) Specifies the measures to be taken by the employer in the short term for the elimination of any employment barriers identified by the review under paragraph 9(1)(b).”

⁴⁸² Section 10 (c) of the CEEA.

⁴⁸³ Global Rights A ‘Global Perspective’ 27.

⁴⁸⁴ Section 10 (e) of the CEEA.

⁴⁸⁵ Section 10 (f) of the CEEA.

implementation on a regular basis.”⁴⁸⁶ The employer is also required to review the employment equity plan at least once during ‘short term’ period if numerical goals have been set.⁴⁸⁷ If the numerical goals are not being achieved or the measures being used to achieve the numerical goals are not efficient and effective enough, they can be changed during the short term period.⁴⁸⁸ It is submitted that this provision is an effective one as it allows for flexibility. By including such a provision, allowance is made for the best use of employment equity measures that have been put into operation and a deemed employer is able to institute employment equity measures that work within its workforce.

4.3.9 The Report

The provisions of the CEEA require deemed employers to submit reports on their implementation and to establish and maintain ‘employment equity records’ regarding its workforce, the plan and the implementation of the plan. With regards to the actual report itself, all private sector employers are required to make their report on or before 1 June each year.⁴⁸⁹ “Private sector employers are to provide yearly statistical reports to Human Resources Development Canada (HRDC) which compare the representation of designated group employees to the workplace population in the areas of representation, hires, promotions and terminations.”⁴⁹⁰

4.3.10 The Duty to Inform

Under the CEEA, every employer has a duty to inform employees about certain aspects of employment equity.⁴⁹¹ These include the purpose of employment equity; any measures taken or plans to take to implement employment equity as well as the progress made in implementing such employment equity measures.

⁴⁸⁶ PSAC ‘Employment Equity Legislation’.

⁴⁸⁷ Section 13 of the CEEA.

⁴⁸⁸ Bakan ‘Policy in Canada’.

⁴⁸⁹ Global Rights ‘Global Perspective’.

⁴⁹⁰ PSAC *Employment Equity Legislation*.

⁴⁹¹ Section 14 of the CEEA.

4.3.11 Enforcement of Employment Equity Measures

Part II and III of the CEEA contain provisions for the policing of employment equity measures. “The Canadian Human Rights Commission⁴⁹², established under section 26 of the Canadian Human Rights Act, is charged with enforcing the Employment Equity Act.”⁴⁹³ In ensuring compliance, the CHRC carries out ‘compliance audits’ to ensure that the obligations imposed on a deemed employer by sections 5, 9 to 15 and 17 of the CEEA are being carried out.⁴⁹⁴ “In cases of non-compliance (which is specifically defined in the [Canadian] Employment Equity Act) and where the CHRC is unable to obtain a written undertaking to remedy the non-compliance, the CHRC may issue a direction requiring the employer to take actions to remedy the non-compliance and may subsequently apply to the President of the Canadian Human Rights Tribunal for a further order.”⁴⁹⁵ However, one can only assume that no order can be made if it causes the employer to take any action that would contradict section 5 and 6 of the CEEA, as discussed earlier in this section.⁴⁹⁶

4.3.12 Lessons for South Africa

The CEEA accepts the fact, like the SAEAA, that merely removing all discriminatory boundaries is insufficient to bring about a state where people are substantively equal. It accepts that the law must go beyond merely giving formal equality and be proactive in achieving substantive equality. The only difference between the two Acts, the EEA and the South African CEEA, is that the SAEAA also sets out to remove all formal boundaries to the right to equality. The main legislation requiring the removal of formal boundaries to equality in the workplace (discrimination in the workplace) in Canada can

⁴⁹² Hereinafter referred to as the CHRC.

⁴⁹³ Global Rights ‘Global Perspective’ 27.

⁴⁹⁴ Section 22 (1) of the CEEA. In terms of section 34 (1) (c) of the CEEA, all information obtained during the compliance audit is considered privileged, unless the written consent is given by the person from whom the information was obtained.

⁴⁹⁵ PSAC ‘Employment Equity Legislation’.

⁴⁹⁶ “The Act then goes on to stipulate specifically that the employer need not implement the above mentioned employment equity measures if it were to cause the employer undue hardship; if the applicant does not have the requisite qualifications to perform the job; or, in the public sector, where the Publics Service Employment Act requires hiring or promotion to be based on merit.” See 4.2.5 (c) of this work.

be found in Part I of the Canadian Human Rights Act. However, the employer's duties under the CEEA also require the removal of such barriers to equality, as discussed in further detail earlier in this section.

The CEEA, as it stands, is very similar to the SAEAA and may well have been used as a model. It would therefore be a learning experience for the implementation of affirmative action in South Africa to monitor the Canadian system in action. Any weaknesses that show up in the Canadian system, for example, may be a signal to South African legislators to amend the South African system. Despite the strong similarity between the two Acts, a number of differences are worthy of comment.

(a) General

The CEEA has one weakness compared with the SAEAA. This weakness does not apply to any specific provision, but in the Act as a whole. This weakness is that the CEEA does not flow as well as the SAEAA. It is as though the Canadian EEA was released as the first draft and then the South African drafters took the Act, polished it and released a second, 'cleaner' version. This submission is based on the manner in which several of the provisions of the Act are written.

An example of this is the use of the term 'designated employee' and 'deemed employer'. This lack of consistency creates a sense of dis-ease. By using two different terms, the Act almost distinguishes between the two groups and creating a hierarchy. It makes the two unequal. The consistent use of 'designated' in South Africa makes the Act read better and the consistency brings about a sense of equality between the two parties. It creates a sense of sameness and togetherness rather than creating a sense of adversary.

A second example of this relates to the ordering of the provisions and the structure of the CEAA. The provisions regarding consultation are situated after the provisions regarding the employment equity plan. This seems a strange ordering as it is necessary to consult and investigate all possible information about the workforce and the employees *before*

making a plan that will impact on said workforce and employees. It is submitted that the SAEEA is more logically structured and therefore easier to implement.

A further example of the loose wording is in section 5 of the CEEA, which sets out the duties of ‘every employer’ with regards to employment equity. This section is ambiguous as to whether or not the affirmative action measures contained under Part 1: Employment Equity – Employer’s Obligations, refers to *every* employer in Canada or merely the *deemed employers* as per the application provisions of the Act. In reading the Act as a whole for interpretation purposes, it is possible to interpret this to mean that these provisions apply to deemed employers only. Having to read the entire Act in order to understand one provision, serves to illustrate that the CEEA is loosely worded compared with the SAEEA.

A final example of the SAEEA being a more tightly constructed version of the CEEA relates to the provisions of the CEEA specifying that employment equity measures may be disregarded if they are likely to cause the employer undue hardship;⁴⁹⁷ if the applicant does not have the requisite qualifications to perform the job;⁴⁹⁸ or, in the public sector, where the Public Service Employment Act requires hiring or promotion to be based on merit.⁴⁹⁹ These are similar to the exceptions in the South African CEEA. In the SAEEA, the applicant must be a ‘suitably qualified from a designated group’. Instead of saying that the beneficiaries are a ‘suitably qualified person from a designated group’, the CEEA states that all persons fall into the designated group regardless of qualification but then includes of an exception clause stating that the preferential treatment of designated groups only needs to occur of those persons are suitably qualified. Having an exception clause makes the process somewhat superfluous.⁵⁰⁰ It is submitted that the South African approach is preferable as it states exactly who is part of a designated group straight away.

⁴⁹⁷ Section 6 (a) of the CEEA.

⁴⁹⁸ Section 6 (b) of the CEEA.

⁴⁹⁹ Section 6 (c) of the CEEA.

⁵⁰⁰ A simple example can be used to illustrate this point. The CEEA would read: ‘You may paint the house your favourite colour, except if that colour is not yellow,’ whereas the SAEEA would read: ‘You must paint the house yellow’.

(b) Armed Forces

Both the SAEAA and the CEEA apply to both the public and private sectors. The provisions of the CEEA also apply to the Canadian Forces and the Royal Canadian Mounted Police. The provisions of the SAEAA, on the other hand, do not apply to the National Defence Force, the National Intelligence Agency and the South African Secret Service. It is submitted that the South African army and police services should not need any transformation at a lower level and, so, are rightfully excluded from employment equity provisions at this level. However, it is the higher levels of seniority that should require employment equity appointments to be used.⁵⁰¹

(c) Enforcement

The CEEA contains two rather long and explicit parts on penalising those deemed employers who do not comply with the provisions of the Act. However, the CEEA contains no incentives or rewards for deemed employers or even voluntary employers to comply with employment equity. If the Canadian government wants to ensure the best possible or even better than expected compliance with the Act, they should offer rewards as South Africa does. There is no better way in getting a business to comply with the CEEA than by offering it the chance of earning money by doing so. By having State contracts as an incentive to comply with the CEEA, it causes not only the party who wins the State contract but also those who are unsuccessful in the bid for the State contract to implement good employment equity practices. By not offering incentives, voluntary employers have no reason to implement employment equity measures in their workplace. However, if they were rewarded for voluntary compliance, these employers would probably implement employment equity procedures in the hopes of earning a reward.

It is submitted that the Canadian system of the ‘stick’ may not be as effective as South Africa’s system of ‘the stick *and* the carrot’. Punitive measures may force all employers to implement the sub-minimum required by the SAEAA. However, by offering incentives, employers implementing minimal affirmative action measures may be

⁵⁰¹ It is submitted that this will ensure that it is not white males that are in the upper echelons of these forces but they are led by a body that is representative of the country they are protecting.

encouraged to increase their implementation. The carrot also encourages voluntary compliance with the SAEAA. A further benefit of incentives and rewards is that people may engage with employment equity voluntarily and positively rather than complying unwillingly and negatively.

This submission is supported by the effectiveness of the Canadian employment equity measures. At the current stage, data shows that the number of people from designated groups that have been employed has increased during the period of 1987 to the year 2000.⁵⁰² However, the majority of employer's who took part in a survey "indicated that while they did not believe they met the Act's requirements when it was enacted, 36 percent say they now feel that they do and 5 percent say they have come to exceed the set standards. Despite these positive reports, 59 percent of employers surveyed said improvement in this area was still needed."⁵⁰³

(d) Seniority rights

The one provision of the CEEA that the SAEAA does not include is the concept preferential treatment of senior members, i.e. seniority rights.⁵⁰⁴ The inclusion of seniority rights gives protection for senior employees. These employees should be valued members of the workplace and deserve some preferential treatment. A second reason that this provision validates affirmative action is that it demonstrates that affirmative action is not merely helping designated groups to the detriment of everyone else but also makes measures for the protection of people from non-designated groups. This helps create support for affirmative action so that people will accept it more readily.

(e) Conclusion

As a result of the above submissions, it would appear that South Africa has very little to learn from the present CEEA with the exception of the seniority rights issue referred to above. When one compares the two Acts the South African system is a better, more

⁵⁰² Global Rights 'Global Perspective'.

⁵⁰³ Global Rights 'Global Perspective' 27.

⁵⁰⁴ This does not mean that people cannot be dismissed due to their senior status. It means that if a black, female or disabled candidate and white male candidate with ten-years of service in the company apply for the same job, for example, the white male should be given preferential treatment due to his senior status.

polished version of employment equity or affirmative action than the Canadian version. It is submitted; therefore that South Africa has learned its lesson from Canada. Overall, Canadian affirmative action has been shown to be working.⁵⁰⁵ This is a good sign for South Africa and employment equity legislation. However, this does not mean that South Africa has nothing left to learn from the Canadian model. Since both Acts are compatible, any amendments made by Canada or any areas where Canadian affirmative action excels should be considered by South Africa law makers.

4.4 Affirmative Action in Malaysia

“The Malaysian case brings into clear focus the fact that dispossessed status is not consonant with minority status.”

– William Darity Jr.⁵⁰⁶

4.4.1 Introduction

This section will examine the Malaysian experiences of affirmative action. A comparison will also be made between the Malaysian affirmative action system and the South African model. This comparison will attempt to show how South Africa can learn from the Malaysian system to ensure the best possible affirmative action system in South Africa.

4.4.2 Malaysia: A Brief Historical Background

In order to understand affirmative action in Malaysia, it is appropriate to offer a brief history of the country. This will serve to explain both the necessity of affirmative action in Malaysia and why the particular measures were put in place. As will be shown in the

⁵⁰⁵ See Ng, Burke and Jain ‘Legislation, Contract Compliance and Diversity Practices: Do these Matter?’ at http://luxor.acadiau.ca/library/ASAC/v26/11/26_11_p108.pdf (accessed on 14 August 2006) at 118. A survey was conducted in the writing of this article and it was concluded by the authors that: “The study demonstrated that to a large extent, employment equity remains to be the most effective tool at promoting equity and diversity in Canadian organisations.”

⁵⁰⁶ ‘Affirmative Action in Comparative Perspective: Strategies to Combat Ethnic and Racial Exclusion Internationally’ at http://pubpol.duke.edu/centers/upv/readings/sandy_darity.pdf (accessed on 1 August 2006).

discussion in this section, Malaysia suffered under an oppressive system where a minority government oppressed a majority on the basis of race.⁵⁰⁷

Since the nineteenth century the majority of Malaya⁵⁰⁸ was a British colony with all states of Malaya falling under British control by 1909.⁵⁰⁹ Under the British rule, there was a mass immigration of Chinese and Indian peoples to such an extent that the Malay people became a minority in their own country.⁵¹⁰ The Malay remained a minority until the mid 1960s. “In the 1963 state elections the pro-Malaysia Sabah (North Borneo) Alliance and Sarawak Alliance won decisively, giving them the mandate to negotiate terms of entry into the Federation [of Malaysia].”⁵¹¹ Furthermore, on 19 August 1965, Singapore, with its majority Chinese population, was excluded from Malaysia.⁵¹² This significantly altered population ratios in the country with Malay people to becoming the majority.⁵¹³

The British dominance of Malaya ended in 1942 during World War II when the Japanese invaded and overturned the British government, seizing control for themselves.⁵¹⁴ “The Japanese occupation of Malaya, Singapore, and the British Borneo territories lasted for 3½ years.”⁵¹⁵ The British regained temporary power after the allies were victorious and, after regaining power, the British government proposed a constitution to the people of Malaya.⁵¹⁶ Although this seemed like a grand gesture from a now benevolent former ruler, it was an attempt to prevent the spread of communism which, at that point in time, seemed to be an attractive option due to power of communist China.⁵¹⁷ It was, in fact,

⁵⁰⁷ Abdullah ‘Affirmative Action Policy in Malaysia: To Restructure Society, to Eradicate Poverty’ (1997) XV (2) *Ethnic Studies Report* 190.

⁵⁰⁸ Malaya was the predecessor of Malaysia. The country was known as Malaya until independence, at which point the country was renamed Malaysia.

⁵⁰⁹ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵¹⁰ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵¹¹ Andaya and Andaya *A History of Malaysia* (1987) 272

⁵¹² Kaur and Metcalfe (eds) *The Shaping of Malaysia* (1999). See UNDP ‘Malaysia International Trade, Growth, Poverty Reduction and Human Development’ at <http://www.undp.org.my/uploads/UNDP%20Booklet%20PDF%20FORMAT%20.pdf> (accessed 14 August 2006) for further information on the changes in the borders and boundaries of Malaysia.

⁵¹³ Global Rights ‘Global Perspective’.

⁵¹⁴ Miller *The Story of Malaysia* (1965).

⁵¹⁵ Miller *The Story of Malaysia* 155.

⁵¹⁶ Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1997).

⁵¹⁷ Emsley *Malaysian Experience*.

“only the presence of three divisions of Allied troops stopped the Malayan Communist party from launching an immediate revolt against the British.”⁵¹⁸

After the British had handed over administration of Malaysia, the three major factions making up the Alliance Party formed a coalition, and so began the period under which the Alliance Party ruled Malaya under what was known as ‘the bargain’.⁵¹⁹ This bargain was only an informal agreement between the Malay elites and Chinese businessmen in Malaysia.⁵²⁰ Under the terms of the bargain, “the non-Malay parties accepted Malay political hegemony in exchange for citizenship rights.”⁵²¹

“This agreement was encapsulated in a consociational agreement and formalised in the Alliance Party.”⁵²² The Alliance Party began when the United Malays National Organisation, the Malaysian Chinese Association and the Malaysian Indian Congress struck a bargain in 1955.⁵²³ As stated earlier, the Malay people were a minority in their own country until the mid 1960s.⁵²⁴ Even after the leadership was decided democratically the Malay people were forced to share the governing of their country in order to have some power say.⁵²⁵ The Alliance party was successful in the 1955 elections and took control of Malaysia.⁵²⁶

“On the morning of 31st August the Duke of Gloucester, as the Queen’s representative, presented Tunku Abdul Rahman, the first Prime Minister of independent Malaya, with the constitutional instruments that made the Federation a free country.”⁵²⁷ At

⁵¹⁸ Miller *The Story of Malaysia* 160.

⁵¹⁹ Kaur *Shaping of Malaysia*.

⁵²⁰ Boikhutso ‘Qualitative Analysis of the Perceptions of Affirmative Action Beneficiaries in South African Parastatals’ at <http://upetd.up.ac.za/thesis/available/etd-03162005-143810/unrestricted/00dissertation.pdf> (accessed on 14 August 2006).

⁵²¹ Kaur *Shaping of Malaysia* 105. “The Malays were granted control of government, Islam would be the national religion, the national language would be Malay and the Malays would dominate the military and senior civil service [in return,] non-Malays would be awarded citizenship and that the Chinese business community would be assured freedom of enterprise.” See Esman ‘Contrary Consequences’ 27.

⁵²² Esman ‘Contrary Consequences’ 27.

⁵²³ Kaur *Shaping of Malaysia*. These parties will be referred to as the UMNO, MCA and MIC respectively.

⁵²⁴ UNDP ‘Malaysia’.

⁵²⁵ Esman ‘Contrary Consequences’.

⁵²⁶ Esman ‘Contrary Consequences’.

⁵²⁷ Miller *The Story of Malaysia* 201.

independence on 31 August 1957, the Bumiputera⁵²⁸ were not very well off in their homeland and were economically far behind the Chinese only owning about 10% of businesses registered in Malaysia and 1.5% of invested capital in the country.⁵²⁹ “In general, prior to 1969, the economic conditions of the Malays were backward. To observe this, one only needs to travel to the rural areas and see the standard of living and life style of the Malays. The contrast with the Chinese was overwhelming.”⁵³⁰

After reviewing the history of Malaysia and South Africa, it is submitted that the two nation’s respective histories can be seen in a similar light. The extreme social and economic disparities and imbalances in Malaysia were based along racial differences.⁵³¹ As shown in the discussion earlier in this section, like South Africa, the minority in Malaysia who had come into the country were the privileged whilst the indigenous people suffered and were left behind. This created tension and instabilities that could only be resolved by revolution.⁵³²

Although the first elections in Malaya had been held in 1951, the first elections to be held in the independent nation of Malaysia were held in 1959.⁵³³ The Alliance Party was victorious in these elections. The bargain struck between these three parties and their power over Malaysia continued until 1969 “when in a general election the Alliance Party suffered a setback and the system broke down. The collapse resulted in civil violence ... and a dictatorship was temporarily established by the Malay elite.”⁵³⁴

Social and economic disparities between the Bumiputera and non-Bumiputera became disproportionately high by the late 1960s and this development “of social and economic imbalances along racial lines, as brought about by colonialism, became an increasingly

⁵²⁸ The indigenous people of Malaysia were known as the Bumiputera and the Chinese and Indians were referred to as the non-Bumiputera.

⁵²⁹ Human Development Report ‘Bringing Multicultural Societies Together’ 70.

⁵³⁰ Abdullah (1997) XV (2) *Ethnic Studies Report* 190 at 198.

⁵³¹ Emsley *Malaysian Experience*.

⁵³² Ghee ‘Social and Economic Integration of Different Ethnic Groups in South-East Asia, with Special Reference to Malaysia: A Review of the Literature and Empirical Matter’ at <http://www.ilo.org/public/english/bureau/inst/download/dp8295.pdf> (accessed on 23 March 2006).

⁵³³ Abdullah (1997) XV (2) *Ethnic Studies Report* 190 at 198.

⁵³⁴ Esman ‘Contrary Consequences’.

potential explosive phenomenon.”⁵³⁵ This untenable situation eventually erupted on 13 May 1969.⁵³⁶ On this day, riots along racial lines broke out in Malaysia, specifically in Kuala Lumpur and resulted in over two hundred deaths and left six thousand people homeless.⁵³⁷ “The response of the government was to declare a state of emergency and to prorogue Parliament. The country was governed through a National Operations Council (NOC) composed of the heads of security forces, the domestic and foreign civil service and the heads of UMNO, the MCA and the MIC.”⁵³⁸

4.4.3 Affirmative Action in Malaysia: The New Economic Policy

It is probably more appropriate to compare Malaysia and South Africa in a social and economic context than South Africa and Canada. This is because, when it began its affirmative action policies, Malaysia was a developing economy and, like South Africa, did not have the resources of first world countries to rely on in order to implement an effective, practical and functional.⁵³⁹

(a) Establishing Affirmative Action

“It was against this background that Malaysia's ambitious ‘affirmative action’ policy was promulgated in 1971. It was called the New Economic Policy⁵⁴⁰.”⁵⁴¹ Esman⁵⁴² describes three alternatives that faced the Malay elite looking for a solution:

“First, it could have simply confiscated foreign and non-Malay properties and nationalised them or distributed them among the Malays ... Secondly, other groups argued for a policy of uplifting the 'have-nots' of all Malaysian ethnic

⁵³⁵ FW de Klerk Foundation ‘Affirmative Action in Malaysia’ at www.fwdklerk.org.za/ 1.

⁵³⁶ De Klerk ‘Affirmative Action in Malaysia’.

⁵³⁷ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵³⁸ Emsley *Malaysian Experience* 20.

⁵³⁹ Emsley *Malaysian Experience*.

⁵⁴⁰ The New Economic Policy is called the Dasar Ekonomi Baru (DEB) in Malay. Hereinafter referred to as the NEP.

⁵⁴¹ Abdullah (1997) XV (2) *Ethnic Studies Report* 190 at 201.

⁵⁴² Esman ‘Contrary Consequences of ‘Affirmative Action In Malaysia in Conflict: Policy Interactions in the Pacific Basin CSIA Discussion Paper, Harvard’ (1991) at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/disc_paper_91_08.pdf (accessed on 21 March 2006).

groups by reaching out to the poorest regardless of 'race' to insure that their basic needs were met.

A third alternative that was finally decided upon and implemented was to emphasise overall economic growth, but to use the increments of economic growth to address inter-ethnic inequities by distributing these increments differentially among the various ethnic communities.”⁵⁴³

In September 1970, Tan Razak was appointed Prime Minister of Malaysia and he played a major role in setting up two of the most important institutions⁵⁴⁴ facilitating the creation of the NEP.⁵⁴⁵ “All the major opposition parties, except the DAP (Democratic Action Party), were persuaded to become partners in the grand national coalition, and the ‘National Alliance’ became the ‘National Front’.”⁵⁴⁶ This large political base, like the large party support of South African affirmative action, gave Malaysia the power and legitimacy to start the NEP.

The non-Bumiputera were encouraged to support the NEP by amendments to the Constitution which gave them citizenship as shown by the fact that, “although the UMNO leadership kept Chinese input in the formulation of the NEP to a minimum, the EUP (the Economic Planning Unit) allowed senior Chinese bureaucrats to make changes to the original NEP document.”⁵⁴⁷

This was another important step to ensure support for the legitimacy of the NEP amongst the non-Bumiputera. Thus, the New Economic Policy and affirmative action measures were established in Malaysian law. Unlike the South African EEA, the NEP had a set time in which it would operate. The NEP was put in place in 1970 and would continue to function until 1990, as stipulated by the Second Malaysia Plan.⁵⁴⁸

⁵⁴³ Esman ‘Contrary Consequences’ 26.

⁵⁴⁴ “These institutions were the National Consultative Council, which was a ‘substitute’ to the suspended Parliament although it was consultative (not legislative) in functions and the National Consultative Council, which was a ‘substitute’ to the suspended Parliament although it was consultative (not legislative) in functions.” See Abdullah (1997) XV (2) *Ethnic Studies Report* 190 at 201.

⁵⁴⁵ De Klerk ‘Affirmative Action in Malaysia’.

⁵⁴⁶ De Klerk ‘Affirmative Action in Malaysia’ 3.

⁵⁴⁷ De Klerk ‘Affirmative Action in Malaysia’ 2.

⁵⁴⁸ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

(b) The Function of the New Economic Policy

Like the South African Employment Equity Act, the NEP had two major goals.⁵⁴⁹ The first goal “aimed at reducing and eventually [eradicating] poverty by raising income levels and increasing employment opportunities for all Malaysians, irrespective of race.”⁵⁵⁰ The second goal was to bring about a sense of substantive equality for the Bumiputera people.⁵⁵¹ The second goal of the NEP is completely in line with the second goal of the SAEAA – to bring about a sense of substantive equality for the respective designated groups.⁵⁵² It is the first goal, however, that contrasts with the SAEAA. The first goal of the SAEAA is “ensure fair treatment of all employees by eliminating unfair discrimination”⁵⁵³ and, thus, aims at treating all people equally in the formal sense.

(c) Affirmative Action Measures under the NEP

The NEP set out very stringent and well articulated goals for its aim to bring about substantive equality in commercial and industrial activities. “Specifically, the goal was to increase Malay share ownership from 3 per cent in 1971 to 30 percent over a 20-year period; decrease the foreign share from 63 per cent to 30 per cent; and increase the non-Malay share from 34 per cent to 40 per cent.”⁵⁵⁴ In addition to these commercial requirements, 30% of all government construction contracts were required to be given to firms owned by Bumiputera people.⁵⁵⁵ Banks were also required to increase their loans to the Bumiputera population of Malaysia.⁵⁵⁶

The Malaysian system is flexible since it sets out specific goals at the outset.⁵⁵⁷ Thus, when the goal is achieved, the success of the NEP can be measured and that goal can be

⁵⁴⁹ “The NEP targets were to be attained under the Second to Fifth Malaysia Plans.” See Drabble *An Economic History of Malaysia, c. 1800 – 1990: The transition to Modern Economic Growth* (2000) 197.

⁵⁵⁰ Abdullah (1997) XV (2) *Ethnic Studies Report* 190201.

⁵⁵¹ Ghee ‘Social and Economic Integration’.

⁵⁵² Ghee ‘Social and Economic Integration’.

⁵⁵³ Van Eck and Van Jaarsveld *Principles of Labour Law* (2005) 288.

⁵⁵⁴ Ghee ‘Social and Economic Integration’ 3.

⁵⁵⁵ Global Rights ‘Global Perspective’.

⁵⁵⁶ Global Rights ‘Global Perspective’.

⁵⁵⁷ Emsley *Policy in Malaysia*.

removed from the agenda. The focus of the NEP can then be moved elsewhere rather than be distracted by unnecessary, already fulfilled goals.

To achieve these goals, the Malaysian government began acquiring economic assets in the modern sectors of the economy by means of negotiation or stock purchase⁵⁵⁸ in order to reserve such assets for the Bumiputera people. The government acted as a trustee for the Bumiputera people until these assets could be privatised.⁵⁵⁹ To increase loans to the Bumiputera people, the Malaysian government set up financial institutions, most notably the Bank of Bumiputera. The government established and operated “a series of public sector enterprises, the leading one being the National Petroleum Corporation ... these government enterprises provided that opportunity and ethnic Malays were given preference in hiring for positions within these public sector firms.”⁵⁶⁰ These measures that aimed at greater ownership in business, “appear to have been quite successful in at least ensuring a Bumiputera business presence ... with Bumiputera employers [rising] from 14.2% in 1973 to 32.7% in 1987.”⁵⁶¹

The government also set out specific education and health goals.⁵⁶² One of the major drives to achieve this was the establishment of clinics for the rural population as well as providing them with safe drinking water.⁵⁶³ The Malaysian government was extremely successful in these goals. “In 1970 the IMR (Infant Mortality Rate) stood at 45 per thousand, which was not particularly good even by developing country standards. By 1988 the IMR had fallen to 14.2 in 1970 only six countries in the world had a rate lower than 14.2.”⁵⁶⁴ The safe drinking water provision was achieved for two-thirds of people in the rural areas by 1987.

Government involvement and the aim of bringing about substantive equality for the Bumiputera people can also be seen in the education sector: Before the advent of the

⁵⁵⁸ Esman ‘Contrary Consequences’ .

⁵⁵⁹ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵⁶⁰ Esman ‘Contrary Consequences’ 28.

⁵⁶¹ Emsley *Policy in Malaysia* 64.

⁵⁶² Emsley *Policy in Malaysia*.

⁵⁶³ Emsley *Policy in Malaysia*.

⁵⁶⁴ Emsley *Policy in Malaysia* 28.

NEP, the Bumiputera “suffered a relative disadvantage in access to education that the [first goal of the NEP] would not rectify. As a result of their regional and rural location and family background and constraints, Malays obtained a shorter and inferior education than the Chinese and Indians.”⁵⁶⁵

In order to promote substantive equality in the education sector, the government began by providing a higher number and a better standard of teachers in the rural areas⁵⁶⁶ with the aim of promoting a far better education, and thus employment opportunities, for the rural population. The Malaysian government also set about a successful campaign for secondary school education. During the 1960s, “secondary school enrolment was only 34 percent [and] great efforts were made in the course of the 70s and 80s to bring this closer to universal coverage ... Enrolment increased to 72 per cent in 1985, which is higher than in nearly any other comparable middle-income country.”⁵⁶⁷

Another aspect of the education reform for the Bumiputera people “was the enforcement of the indigenous language, Bahasa Malaysia, as the medium of instruction ... permission was refused to the Chinese community when they attempted to set up their own Chinese language Merdeka University.”⁵⁶⁸ The NEP also implemented a policy which gave a substantial preference to Bumiputera applicants to universities. Although this achieved good results in allowing for better education for the Bumiputera people, it also resulted in about sixty thousand Chinese students being forced to study overseas by 1985.⁵⁶⁹ Malaysia did rectify this at a later stage by offering university education in a more languages than Malay.⁵⁷⁰

A problem that arose from the education reforms was that it was claimed that the education standards dropped as a result of reducing requirement standards for admission to university. “Three years ago, Malaysia's affirmative action came under attack when the

⁵⁶⁵ Emsley *Policy in Malaysia* 38.

⁵⁶⁶ Emsley *Policy in Malaysia*.

⁵⁶⁷ Emsley *Policy in Malaysia* 39.

⁵⁶⁸ Emsley *Policy in Malaysia* 40.

⁵⁶⁹ Global Rights ‘Global Perspective’.

⁵⁷⁰ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

country's minister of education announced that few ethnic Malays had met the minimum academic standards needed to gain university admission, a claim he would later take back.”⁵⁷¹ Despite this claim being refuted, Malaysian universities stopped the affirmative action programmes in 2003 and admissions are no longer considered on ethnic lines⁵⁷²

4.4.4 Affirmative Action and Economic Growth

The key to the continued existence and prosperity of any economy in the world is economic growth.⁵⁷³ The continued existence and success of affirmative action measures go hand in hand with economic growth.⁵⁷⁴ If the affirmative action measures cause the economy to decline, they are, obviously, having a detrimental effect and need to be changed. The links between affirmative action and economic growth are multi-factorial:⁵⁷⁵ Firstly, that the reduction of poverty is impossible in the absence of a growing income since incomes, overall, can only grow in a buoyant economy.⁵⁷⁶ Secondly, in order to achieve equity ownership, government revenues had to be high in order to pay for the assets to distribute to the Bumiputera people.⁵⁷⁷ The third and final factor is that one needs growth in order to gain the resources to increase educational and health care levels and opportunities.⁵⁷⁸

“Malaysia inherited, as did other ex-colonies, a stable macroeconomic position at independence. Unlike most ex-colonies, it maintained this stability.”⁵⁷⁹ This was achieved despite the implementation of wide-reaching affirmative action policies for two major reasons. Firstly, although affirmative action was aimed at specific groups, they were not detrimental to the rest of the population. Secondly, flexibility was built into the programmes. Although the NEP implemented stringent affirmative action measures, the

⁵⁷¹ Global Rights ‘Global Perspective’ 27.

⁵⁷² Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵⁷³ Boikhutso ‘Qualitative Analysis’.

⁵⁷⁴ UNDP ‘Malaysia’.

⁵⁷⁵ Emsley *Policy in Malaysia*.

⁵⁷⁶ UNDP ‘Malaysia’.

⁵⁷⁷ UNDP ‘Malaysia’.

⁵⁷⁸ UNDP ‘Malaysia’.

⁵⁷⁹ Emsley *Policy in Malaysia* 74.

government was flexible in the enforcement of these measures when it saw that they were not working.⁵⁸⁰ A good example of this was the ‘growth pause’ suffered by the Malaysian economy in the early 1980s.⁵⁸¹ “The government confronted this situation realistically, and modified Malay preference policies in such a way as to emphasise the overall priority of promoting economic growth.”⁵⁸² Thus the government put economic growth, which is important for the whole population, above helping one group to the detriment of others.

The influence of the NEP on the Malaysian economy during the 1980s can be divided into three periods as shown by the following table:⁵⁸³

Period	Growth Rate	NEP
1980 – 84	High Growth (6.7 per cent p.a.)	Strong NEP
1985 – 87	Low Growth (1.8 per cent p.a.)	Reduced NEP
1988 – 91	High Growth (8.8 per cent p.a.)	Reformed NEP

As can be seen, the government responded to certain problems in the economy and acted by amending their affirmative action measures in order to ensure that the beneficial effects affirmative action had on the Bumiputera people were not detrimental to the economy as a whole. Even though “the bases of the NEP, strong economic growth combined with redistribution, contained a potential conflict, since the first required a high degree of allocative efficiency ... and the second a distribution of wealth and employment .. which could slow growth,”⁵⁸⁴ the Malaysian economy managed to grow during the period in which affirmative action was in place. As a result the Malaysian economy experienced an average of 7% growth during the NEP period of 1970 – 1990.⁵⁸⁵

⁵⁸⁰ Esman ‘Contrary Consequences’ .

⁵⁸¹ Emsley *Policy in Malaysia*.

⁵⁸² Esman ‘Contrary Consequences’ 29.

⁵⁸³ Emsley *Policy in Malaysia*.

⁵⁸⁴ Drabble *An Economic History of Malaysia* 197.

⁵⁸⁵ Emsley *Policy in Malaysia*.

4.4.5 Success of the New Economic Policy

If South Africa is to base itself on the Malaysian model of affirmative action or even just be influenced by the Malaysian model, then the Malaysian model would have to be successful. For this reason, the success of the Malaysian affirmative action system and the NEP must be addressed. In 1970, the NEP was instituted with two major goals. The first goal was to eradicate poverty and increase education levels.⁵⁸⁶ The second was to bring about a sense of substantive equality between the Bumiputera and non-Bumiputera people.⁵⁸⁷

(a) Substantive Equality

The achievement of the second goal of the NEP was the true success story of the programme. This was to achieve a 30% ownership of economic assets by the Bumiputera people.⁵⁸⁸ At the end of the twenty year period, 22% of the economic assets in the modern sectors of the economy were owned by the Bumiputera peoples.⁵⁸⁹ Although this falls short of the target of 30% by nearly one-third, it is submitted that this is a significant achievement for a twenty year period. The only problem with this is that the “the largest block of assets nominally in the hands of Malays, in fact remains under government control. The state is having difficulty attracting Malays to invest in these assets.”⁵⁹⁰ Although these assets are in the control of the government and not the people, it is submitted that it is merely a matter of time before these assets can be transferred as the Malays are the only ones who are entitled to purchase them.⁵⁹¹

A second goal was to have more Bumiputera people involved in management roles. This has also been successful.⁵⁹² A good example is that of the National Petroleum Corporation. “The National Petroleum Corporation is in the hands of Malays, and its

⁵⁸⁶ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵⁸⁷ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵⁸⁸ Emsley *Policy in Malaysia*.

⁵⁸⁹ Esman ‘Contrary Consequences’.

⁵⁹⁰ Esman ‘Contrary Consequences’ 29.

⁵⁹¹ Emsley *Policy in Malaysia*.

⁵⁹² Esman ‘Contrary Consequences’.

officers and staff are comfortable and competent as managers - nearly impossible to imagine twenty years ago.”⁵⁹³

The NEP has also successfully improved the socio-economic position of the Bumiputera people as a whole and has eliminated the “identification of ethnic groups with economic function.”⁵⁹⁴ Political stability has also been achieved through the NEP – something that seemed a foreign concept during the ethnic riots of 1969 only twenty-one years earlier.⁵⁹⁵ One needs only look at the statistic discussed quoted earlier in this section, of 70% of the Bumiputera people now having qualified with undergraduate degrees to see the success of NEP in education – and by extrapolation – employment opportunities.

One major problem remains. Although the Bumiputera as a whole seem to now be substantially equal, “income inequality within groups has risen the late 1980s, especially among the Bumiputera, where the gap between rich and poor has widened substantially.”⁵⁹⁶ Although one may say that this is a failure of the NEP, it is submitted that the NEP has in fact succeeded and that this is necessary side effect. This will be discussed below.

The NEP has achieved its overall goals. Substantive equality is well on its way to being achieved.⁵⁹⁷ The Malaysian government has now undertaken the task of bringing about substantive equality for all people, regardless of race with a new policy - the National Development Policy – which replaced the NEP in 1991. This places “a larger focus on eradicating hardcore poverty, rather than on poverty between races, as undertaken by the NDP.”⁵⁹⁸

⁵⁹³ Esman ‘Contrary Consequences’ 28.

⁵⁹⁴ De Klerk *Affirmative Action in Malaysia* 4.

⁵⁹⁵ Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

⁵⁹⁶ Human Development *Bringing Multicultural*.

⁵⁹⁷ Emsley *Policy in Malaysia*.

⁵⁹⁸ De Klerk *Affirmative Action in Malaysia* 4.

(b) Eradication of Poverty

As mentioned earlier in this section, the first goal of the NEP was the eradication of poverty in Malaysia as a whole. Although the access to health care and water has been significantly increased, the NEP has not completely achieved its goal in these areas.⁵⁹⁹ The Malaysian government set itself a twenty year time table to achieve the goals of the NEP.⁶⁰⁰ At the end of this period the NEP's performance was audited.⁶⁰¹ This audit revealed a shortfall in this goal and, therefore, the government has drafted and is implementing the National Development Policy as mentioned above.⁶⁰²

(c) Public Sentiment

Although public sentiment and public approval were not a goal of the NEP, it is arguable that public sentiment and public approval helped the NEP to be established and continue its existence.⁶⁰³ It was strong public feeling that caused the 1969 ethnic riots and a similar response could have hijacked the NEP.⁶⁰⁴ It is therefore appropriate to examine public response to the NEP in the twenty years during which the programme was implemented and enforced.

Under the NEP, no assets were forcefully taken away from non-Bumiputera.⁶⁰⁵ They were taken by negotiation and a fair and reasonable price was paid.⁶⁰⁶ The income and wealth of the non-Bumiputera people of Malaysia have also benefited from the prosperity of the Malaysian economy.⁶⁰⁷ However, despite the fact that the non-Bumiputera people of Malaysia have been rewarded by the success of the NEP, "many non-Malays feel that they are now politically powerless, second-class citizens."⁶⁰⁸ There is a sense of dissatisfaction and dis-ease amongst these groups.⁶⁰⁹ They feel they have been unfairly

⁵⁹⁹ UNDP 'Malaysia'.

⁶⁰⁰ The NEP began in 1970 and had an end date in 1990.

⁶⁰¹ UNDP 'Malaysia'.

⁶⁰² UNDP 'Malaysia'.

⁶⁰³ Emsley *Policy in Malaysia*.

⁶⁰⁴ Ghee 'Social and Economic Integration'.

⁶⁰⁵ Emsley *Policy in Malaysia*.

⁶⁰⁶ Emsley *Policy in Malaysia*.

⁶⁰⁷ Esman 'Contrary Consequences'.

⁶⁰⁸ Esman 'Contrary Consequences' 30.

⁶⁰⁹ Ghee 'Social and Economic Integration'.

discriminated against and that they are now obliged to compete against the government to achieve anything in the economy rather than work with the government to attain economic growth.⁶¹⁰ Although the NEP was an overall success, “the same success, however, cannot be claimed for the objective of creating a harmonious and unified society.”⁶¹¹ The disintegration of ethnic disparities has brought about a sense of ethnic resentment and suspicion between the Bumiputera and non-Bumiputera people.⁶¹²

4.4.6 Lessons for South Africa

The overall success of the Malaysian NEP, as well as similarities between the historical and economic backgrounds of both countries, makes it an interesting model for South African legislators to study. There are a number of issues that are worthy of further comment in this section.

(a) Goals of the New Economic Policy

It is submitted that the Malaysian approach is far too wide and ambitious. The NEP aimed to achieve substantive equality for all people within its country through focussing on one group of people. It is submitted that this optimistic goal was not entirely successful.⁶¹³ South Africa, on the other hand, aims to bring about substantive equality for a limited group of people.⁶¹⁴ It is submitted that South Africa has taken a more focused and manageable approach by aiming to bring about formal equality.

(b) Health, Water and Education

Given its limited economic and human resources the Malaysian government was very successful in this aspect of the NEP. The South African Constitution grants all people the right to sufficient health care services and water.⁶¹⁵ Malaysia has managed to improve its

⁶¹⁰ Ghee ‘Social and Economic Integration’.

⁶¹¹ Ghee ‘Social and Economic Integration’ 16.

⁶¹² Human Development Report ‘Bringing Multicultural’.

⁶¹³ The failure of the NEP to achieve its goal of eradicating poverty for all people in Malaysia was discussed under 4.4.5 (b) of this work.

⁶¹⁴ The NEP was successful in its goal to achieve substantive equality for a limited, designated group of people – the Bumiputera people.

⁶¹⁵ Section 27 (1) (a) and (b) of the South African Constitution.

IMR dramatically over a period of ten years and to provide two-thirds of the people in the rural area with water in a period of seventeen years.⁶¹⁶ Accordingly, it is submitted that South Africa should take cognisance of the Malaysian approach and implement it in order to give full effect to rights in the Constitution. Although this form of development does not fall under the current ambit of the EEA, the Malaysian model serves as a good example for South Africa in eradicating poverty amongst all people.

It is certainly arguable that education is highly relevant to employment equity – as Malaysia has demonstrated.⁶¹⁷ Many rural communities throughout South Africa still lack satisfactory educational facilities.⁶¹⁸ The professed goal of bringing about a sense of substantive equality for black people – the predominant group in the rural areas – cannot be achieved if the majority of this designated group is under-educated and thus cannot take on skilled or professional jobs.

The educational reforms in Malaysia were not without problems. The mass exit of Chinese people in Malaysia caused a huge drain on the economy. Although the designated group is being educated therefore, the NEP was – to a degree - successful, but valuable human resources left the country. It is submitted that if applicants to universities are forced to study overseas, it is likely they will not return and, therefore, the skills they have to offer and the investment in the country they have to offer will be lost. This is a salutary lesson for South African education reformers. Although Malaysia suffered several problems in the implementation of affirmative action measures in education, “fewer than 10 percent of university undergraduates in the 1970s were ethnic Malay and approximately 70 percent were Chinese; today the percentages are reversed.”⁶¹⁹ This serves as a lesson to South Africa as it demonstrates shows that one can turn around the education statistics. The statistics quoted above are taken from 2005 and it is therefore

⁶¹⁶ Emsley *Policy in Malaysia*.

⁶¹⁷ “Secondary school enrolment was only 34 percent [and] great efforts were made in the course of the 70s and 80s to bring this closer to universal coverage ... Enrolment increased to 72 per cent in 1985, which is higher than in nearly any other comparable middle-income country.” See Emsley *Policy in Malaysia* 39.

⁶¹⁸ “The conditions under which hundreds of thousands of rural children are expected to learn.” See Furlonger ‘Ignorance Is No Bliss For SA's ‘Afterthought’ Children’ at <http://free.financialmail.co.za/rallytoread/rally2006/mar06.htm> (accessed on 24 August 2006).

⁶¹⁹ Global Rights ‘Global Perspective’ 28.

possible that - in a period of thirty five years - 70 percent of black people in South Africa could be qualified with degrees.

(c) Flexibility

It is submitted that the most vital lesson South Africa should learn from the Malaysian experience of affirmative action is its flexibility. In this regard the NEP is far stronger system than the EEA which does not set out goals as well articulated as the NEP and, therefore, has no set goal or time table that must be met. The South African government affirmative action measures need a degree of flexibility built in so that if the affirmative action measures or any other measures of the EEA are having a detrimental effect on the economic growth rate, the government can respond. Built into the NEP was the establishment of specific and time-related goals, which included an auditing system and a mechanism for the removal of systems once the goals were achieved.⁶²⁰ This allowed for a review of successes and failures and for further reforms in the shape of the National Development Policy. As a result of the flexible and responsive nature of the NEP, the Malaysian economy experienced an average of 7% growth during the NEP period of 1970 – 1990.⁶²¹ South Africa can take a valuable lesson from this in the hope of achieving employment equity as well as economic growth.

(d) Conclusion

Although post-apartheid South Africa was a potential powder keg of inequality, no explosion took place. It is submitted that speedy establishment of a Constitution and the affirmative action measures was a pre-emptive strike against this very real possibility. The Malaysian government's reform programme was a reaction to the 1960 riots and bloodshed.⁶²² It is submitted that the South African leaders saw the possible outcome if people were left in a society with such immense social and economic imbalances and learned from the Malaysian experience. For this reason, affirmative action measures were implemented four years after 'independence' in an attempt to redress the imbalances as speedily as possible. Nevertheless, there are lessons to learn.

⁶²⁰ Emsley *Policy in Malaysia*.

⁶²¹ Emsley *Policy in Malaysia*.

⁶²² Abdullah (1997) XV (2) *Ethnic Studies Report* 190.

The Malaysian model of affirmative action and the NEP is a fine example for South Africa. One can only hope that the EEA is to achieve as much as the NEP. In summary, the South African government can learn three important lessons from Malaysia. Firstly, it must be flexible in its implementation of the EEA. If the EEA is not as successful as it should be, then it must be amended appropriately. Secondly, that economic growth is vital to the continued existence of not only affirmative action, but the economy as a whole. Thirdly, many South Africans have an extremely negative – and uninformed – view of affirmative action and employment equity. It is recommended that the South African programmes should be accompanied by propaganda that will win public support. This can only be effective if all sections of the public perceive that the policies benefit them. If growth in the economy is linked to government policies without such perceptions public morale and trust in the policies will diminish and suspicion and pain along racial lines may resurface. Although affirmative action policies are necessary, they must be imposed in such a way that all sections of society feel empowered rather than disadvantaged.

CHAPTER V
EMPLOYMENT EQUITY IN SOUTH AFRICA:
THE FUTURE

- 5.1 Introduction**
- 5.2 Beneficiaries of Affirmative Action**
- 5.3 The Shield and the Sword: The Dudley – Harmse Debate**
- 5.4 Race Classification and Racial Hierarchy**
- 5.5 The Continued Existence of the Employment Equity Act**

5.1 Introduction

Chapter III of this work examined the employment equity measures in South Africa. The chapter also highlighted certain inadequacies and / or unanswered questions revolving around these problematic areas. These problems were:

- Problems regarding the beneficiaries of affirmative action in South Africa
 - (a) Should affirmative action benefit groups or individuals?
 - (b) Is confining affirmative action measures to South African citizens fair?
- Is there a right to preferential treatment?
- Is there, or should there be a race classification and racial hierarchy of designated groups? and
- Does affirmative action require an end clause to be valid and what manner of end clause should be included?

Chapter V will examine these questions in further detail and propose solutions to these problems.

5.2 Beneficiaries of Affirmative Action

“What would the situation be if the applicant is a black women who grew up in another African country and who was not subject to South African policies and practices? Would it make any difference if the last mentioned fictitious candidate was also subjected to discriminatory practices because of the colonial history of that country? These and more examples may well show that intention of the legislature with the constitutional recognition of measures designed to protect and advance previously disadvantaged persons or categories of persons could not have been to make such measures dependent on the individual circumstance of each particular case.”

- Van der Westhuizen J⁶²³

⁶²³ (2002) 23 *ILJ* 1020 (T) at 1035E.

In the case of *George v Liberty Life Association of Africa Ltd*,⁶²⁴ the court considered who the beneficiaries of affirmative action should be. They determined that the beneficiaries of affirmative action are determined by the purpose of affirmative action. As the purpose of affirmative action is to redress the imbalances of the past, the beneficiaries should be those people who were disadvantaged in the past. The court concluded that disadvantaged groups were linked to the categories of race (black people), gender (women) and the ability of people (disabled people).

The court, however, found this approach somewhat problematic:

“One of the main criticisms of affirmative action in the United States has been that it has primarily benefited middle-class women and black people who were well able to look after their own interests and less deserving assistance than those trapped in the under class.

It is considerations like these which have promoted some to debate the question whether affirmative action programmes should not be based on racial criteria, but on other, temporary and non-racial criteria, for example aimed at persons who were educated under the segregated educational system.”⁶²⁵

The extract above shows the courts analysis of the problems of the American approach to affirmative action and the American group based system. This shows that the court accepted the problems of the American approach. However, when answering the question whether or not these problems would make their way into South African law, the courts gave a somewhat nebulous answer:

⁶²⁴ [1996] 8 BLLR 985 (IC).

⁶²⁵ *George v Liberty Life Association of Africa Ltd* 1007 D – G. See also Johnson ‘The Last Twenty-Five Years of Affirmative Action’ at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=577283 (accessed on 21 August 2006); and Andrews ‘Unfair Discrimination’ at <http://www.wlce.co.za/advocacy/seminar1.php> (accessed on 21 August 2006), where it is stated that “there have been limited gains for women through affirmative action in the States. The States has not achieved race and gender intersectionality in affirmative action programmes. White middle class women are still the major beneficiaries of affirmative action.”

“In my opinion this court would accept that an employer who applies affirmative action i.e. by preferring in the case of a transfer or promotion a candidate who has personally been historically unfairly discriminated against does not commit an unfair labour practice as regards a person who has not suffered such a deprivation.”⁶²⁶

As can be seen, this statement by the Court does not answer the question at all. In this response, the court has limited itself to answering the issue at hand in the case alone and not the larger question. ⁶²⁷The larger question is: should previous disadvantage be a requirement? The answer currently available is that preferring someone who was previously disadvantaged in a personal capacity does not amount to discrimination. The court is, therefore, only saying that it is not unfair to prefer *that individual*. It gives no opinion on whether preferring people with no personal previous disadvantage does or does not amount to unfair discrimination.

This question was finally answered in South Africa eight years later in the 2002 judgment of *Stoman v Minister of Safety & Security & others*. In this case, Van der Westhuizen J concluded that:

“The emphasis is certainly on the group or category of persons, of which the particular individual happens to be a member, or more starkly put in the negative, of which specific person such as the applicant in this case is not a member. This group has been disadvantaged by unfair discrimination.”⁶²⁸

The Court highlighted a number of examples of when the approach of benefiting groups rather than individuals would, in fact, defeat the aim of achieving substantive equality for all people. Nevertheless, the Court did not give any recommendations of what could be done to resolve this. Instead the Van der Westhuizen J merely reiterated the point that:

⁶²⁶ *George v Liberty Life Association of Africa Ltd* 1007 G – H.

⁶²⁷ When referring to this judgment, it has been said that “the notion of ‘individual disadvantage’ as a prerequisite for affirmative action has received scant judicial or arbitral support.” See Dupper ‘Affirmative Action and Substantive Equality’ (2002) 14 SA Merc LJ 275 at 286.

⁶²⁸ *Stoman v Minister of Safety & Security & others* 1035 E.

“The aim [of affirmative action] is not to punish or otherwise prejudice the applicant as an individual, but to diminish the over-representation which his group has been enjoying as a result of previous unfair discrimination.”⁶²⁹

A second issue that has been left open by the courts regarding the beneficiaries of affirmative action is the question of whether affirmative action criteria apply to non-South African citizens. In the case of *Auf der Heyde v University of Cape Town*⁶³⁰ the court touched on the issue of whether or not affirmative action should be focused on people who are black, female or disabled or whether it should just focus on black, female or disabled regardless of nationality. The court, however, did not give a definitive answer to this issue. A definitive answer was only given by the passing of the Amended Employment Equity Regulations⁶³¹ which limited the category of “designated groups” to South African citizens. It can be argued, however, that many foreign nationals suffered under apartheid and should, therefore, be included as beneficiaries of affirmative action.

These two issues remain unresolved. The purpose of this 5.2, therefore, is to attempt to answer these two points of law that the courts have left unanswered. These are: firstly, 5.2.1 which will address the issue left open by the *George and Stoman*⁶³² decisions; and secondly, 5.2.2 which will address the issue left open by the *Auf der Heyde v University of Cape Town*⁶³³ judgment and the Amended Employment Equity Regulations.

⁶²⁹ *Stoman v Minister of Safety & Security & others* 1035 I – J.

⁶³⁰ (2000) 21 *ILJ* 1758 (LC).

⁶³¹ GN R480, *Government Gazette* 28858 of 26 May 2006.

⁶³² “In *George v Liberty Life* the Court touched on, without deciding, the issue whether the individual who benefits from affirmative action should have been personally disadvantaged, or whether it is sufficient for the individual to belong to a previously disadvantaged group.” See R & W Traders ‘Equality Goes to the Root of the South African Interim and Final Constitutions’ at <http://www.roothwessels.co.za/affirmativeaction-south-africa.html> (accessed on 18 August 2006).

⁶³³ (2000) 21 *ILJ* 1758 (LC). Although they provide no answer to this issue, this issue is commented on briefly in Partington and Van Der Walt ‘The Development of Defences in Unfair Discrimination Cases Part 2’ (2005) 26 (3) *Obiter* 595.

5.2.1 Groups v Individuals

(a) The Problem

The purpose of affirmative action is section 9 (2) of the Constitution⁶³⁴, the Employment Equity Act⁶³⁵ and, in particular, affirmative action, is:

“Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”⁶³⁶

One can interpret this to mean that affirmative action sets out to redress the discrimination of the past and to give those people who have been disadvantaged an equal opportunity. This creates possible a loophole in the law. In specified groups there are individuals who, by virtue of their personal history, have never been disadvantaged. If they belong to a group that has been identified as disadvantaged it would be unfair of the individual to claim advantage by virtue of his or her group identity. A good demonstration of the problem of addressing affirmative action at groups can be shown by the following example:

Person X is a black male who was born in England after his father moved to England in 1970, studied at an English university and became a successful doctor. He obtained South African citizenship through his father. His father returned to South Africa in 1993 after making a considerable amount of money. Person X started high school in South Africa at the most expensive and prestigious high school in the country. When starting university, he was given a house and a car; all his textbooks and all his needs were catered for. He then qualified

⁶³⁴ Constitution of the Republic of South Africa, 1996.

⁶³⁵ Act 55 of 1998. Hereinafter referred to as the EEA.

⁶³⁶ Section 9 (2) (b) of the EEA.

from university with reasonably good results and applied for a job.

Person Y, a white male, has taken out a student loan and is now in debt. He has qualified with results no different to those of person X.

Person Z's father was arrested during apartheid without trial and killed in prison. Z's mother could not inherit any money from his late father or obtain money for maintenance as they were married under customary law and, therefore, the marriage was not recognised. His mother raised him and his three siblings in a single room of the home in which she was a maid. Z travelled thirty kilometres to a school ravaged by the effects of the Bantu Education Act everyday as he was not allowed to attend the whites' only school nearer to him. He managed to earn himself a place at university. Z took out a student loan to pay for his studies and working in the evenings to pay for his living expenses. By working, he reduces the time available for studying. He is also not able to afford any of his textbooks and needs to borrow from friends when he gets the chance. He then qualified with semi-decent results but not as good as person X or Y.

Person X, Y and Z all apply for the same job. On paper, Person X and Y are very similar. On paper, however, they both stand out when compared to person Z who has not done nearly as well in the same degree as person X and Y. Person Z is, therefore, automatically disqualified from the job application as he does not meet the requirements. Person X, on paper, is completely equal

to person Y yet as a black male; person X would be preferred over person Y.

By looking at this example, one can see that preferring person X over person Y is the equitable solution when comparing two candidates of equal merit. This is because the appointment follows the purpose of affirmative action: to make jobs available to black males with the aim of bringing about substantive equality. However, a certain amount of concern must rise about the disqualification of person Z. This is a person who has actually suffered from the oppression of the past. He is a previously disadvantaged person.⁶³⁷ Person A has never been disadvantaged but is preferred as he falls within the group that qualifies for affirmative action according to South African laws.

Themba Sono gives a real example of the hypothetical problem that has been put forward above.⁶³⁸ He discusses the priority of empowering black women and the fact that it was not always disadvantaged black women who succeeded from the priority to employ black women. “In no time, socially prominent and well-connected black women became extremely wealthy – if only on paper. In one instance, barely 24 months after they had established a company, a handful of such women raised more than R500m from big business.”⁶³⁹

He argues further that the “it is not enterprising individuals such as [wealthy black women] who should win empowerment support; it is the chosen groups ... Businesses

⁶³⁷ “In the Western Cape, for example, the overwhelming majority of shack dwellers - with no running water, poor sanitation, no electricity - are Africans. Equally, the principal beneficiaries of affirmative action have been the coloured working class and white women.” See ANC ‘Unity And Diversity In The ANC Overview Of The ANC’s Experience’ at www.anc.org.za (accessed on 21 August 2006). See also Habib ‘State-Civil Society Relations in Post-Apartheid South Africa’ at <http://www.sangonet.org.za/snsite/images/stories/AdamHabibPresentation.doc> (accessed on 21 August 2006), where it is stated that “economic liberalization has benefited the upper classes of all racial groups, and in particular, the black political, economic and professional elites who are the primary beneficiaries of affirmative action policies and black economic empowerment deals. But GEAR has had a devastating effect on the lives of millions of poor and low-income families.”

⁶³⁸ Sono ‘Empower Individuals, Not Groups’ (15 January 1999) *Finance Week* 21.

⁶³⁹ Sono ‘Empower Individuals’ 21.

say: 'We do not want to empower individuals, only communities or groups.' But only if these groups are black, of course.'⁶⁴⁰

This highlights a problem. Affirmative action is deemed to be *fair* discrimination and, therefore, constitutional. It passes the constitutional muster only because the end goal is to redress the imbalances of the past and to give those people disadvantaged by apartheid. The problem is that affirmative action has a side effect – as exemplified in the scenario above – in promoting job reservation for women and black people who do not, in fact, require assistance. The question must then be posed, should affirmative action have a second criterion – should a person from the designated group also actually have been discriminated against or disadvantaged by practices of the past in order for affirmative action to be truly constitutional?

As Sono points out, affirmative action also has the side effect of creating a greater economic disparity between members within the designated groups.⁶⁴¹ In other words, part of the black and female group become richer while the rest remain in poverty. This is not a situation which is unique to South Africa, as “studies of countries with extensive recorded data and a long history of affirmative action - India, Malaysia and the United States and, over a shorter period, South Africa - show that inequalities between individuals (vertical inequalities) as opposed to inequalities between groups (horizontal inequalities) have either increased or remained stable.”⁶⁴²

(b) Current Commentary on the Issue

It has been argued that affirmative action is not compensating black people or women *per se* but compensating people who have been discriminated against on the basis of the fact that they were black or female. “For if [benefit] in the form of extra opportunities is extended to a black man on the basis of past discrimination against blacks, the basis for this [benefit] is not that he is a black man, but that he was previously subject to unfair

⁶⁴⁰ Sono ‘Empower Individuals’ 21.

⁶⁴¹ Sono ‘Empower Individuals’.

⁶⁴² Human Development Report ‘Building Multicultural Democracies’ (2004) at http://hdr.undp.org/reports/global/2004/pdf/hdr04_chapter_3.pdf at 69.

treatment because he was black.”⁶⁴³ Nickel, it would seem, is attempting to argue that all black people (which would include women and people with disabilities in the South African context) should be given compensatory treatment due to their race but they are not, in fact, being given special dispensation due to their race.

Nickel, it is submitted, does not put forward any justification for his argument and his argument is merely based in semantics and circular reasoning to argue his point. Cowan concludes similarly and states that “special advantages to them as a group are both out of the question, since in the moral context there is no such group.”⁶⁴⁴ However, Cowan gives no justification for the conclusion at which he arrives. It is merely a statement that giving benefits to a group would amount to injustice as it allows for discrimination to continue based on a ‘morally irrelevant’ characteristic and, thus, continue the type of discrimination that happened in the past.

Taylor puts forward an argument which seems to have far better reasoning.⁶⁴⁵ He argues that being discriminated against on the basis of a human characteristic was discrimination on a ‘morally irrelevant’ basis. However, that characteristic has now become a ‘morally relevant’ characteristic in order to redress the imbalances of the past. Accordingly, in terms of the principle of compensatory justice, that characteristic (the one previously used to discriminate) is morally relevant at the current time.

This posits that it is not unfair to give a group of people special dispensation due to one of their characteristics. Having said this, Taylor still does not answer the question of whether giving special dispensation to a group - which would allow for people who had never been discriminated against to be favoured - is a practical and fair way of dispensing affirmative action measures. This opinion can be found in his argument regarding ‘institutionalised injustice’ found in the following extract:

⁶⁴³ Nickel ‘Discrimination and Morally Relevant Characteristics’ in Beckwith and Jones *Affirmative Action: Social Justice or Reverse Discrimination?* (1997) 3.

⁶⁴⁴ Cowan ‘Inverse Discrimination’ 7.

⁶⁴⁵ Taylor ‘Reverse Discrimination and Compensatory Justice’ in Beckwith and Jones *Affirmative Action: Social Justice or Reverse Discrimination?* (1997).

“For even if the individual C-person who now enjoys the favourable compensatory treatment was not himself one of those who suffered injustice as result of the past social practice, he nevertheless has a right (based on his being a member of the class of C-persons) to receive the benefits extended to all C-persons as such. This follows from our premise that the policy of reverse discrimination, directed toward anyone who is C because he is C, is justified by the principle of compensatory justice.”⁶⁴⁶

Taylor, it is submitted, puts forward the best argument so far. By applying his work to the South African context, he has pointed that apartheid was not an individual discriminatory programme.⁶⁴⁷ Apartheid was focused on groups of people due to certain characteristics and, therefore, to redress the policies of apartheid, one needs to turn them round. To redress discrimination aimed at a collective target – black people, women and people with disabilities – it is necessary to give special dispensation to the same targets in order to be completely just. The argument put forward by Taylor has found support from Bayles when she states that “by using the characteristic of being black as an identifying characteristic to discriminate against people, a person has wronged the group, blacks. He thus has an obligation to make reparations to the group.”⁶⁴⁸

A further problem with targeting individuals rather than groups is, it is submitted, that it would be an infringement of the right to dignity.⁶⁴⁹ A person’s dignity would be infringed if, when completing a job application, an individual has to completely lay bare his or her past to prove a history of discrimination. This would not only be a degrading experience but it would also be painful one. It would be up to each individual to prove their worth to be regarded as ‘previously disadvantaged’. At this point in time, a conclusion can be drawn that directing affirmative action measures to a group is not only the constitutional method but also the humane method. It was as groups that blacks and women were discriminated against. It is therefore as groups that they should receive the benefits of affirmative action and employment equity measures.

⁶⁴⁶ Taylor ‘Reverse Discrimination’ 13.

⁶⁴⁷ Taylor ‘Reverse Discrimination’.

⁶⁴⁸ Bayles ‘Reparations to Wronged Groups’ in Beckwith and Jones *Affirmative Action: Social Justice or Reverse Discrimination?* (1997) at 15.

⁶⁴⁹ Section 10 of the Constitution.

(c) Poverty Indicators

One justification for deciding whether or not affirmative action should benefit groups or individuals is to look at the different groups' standing in society as a whole. By analysing the groups' situations as a whole, one can glean an insight as to which groups in South Africa require assistance as a whole. In order to do this, one needs to assess the poverty indicators as shown in the following table:

“The Human Sciences Research Council [HSRC] has used the Gini coefficient⁶⁵⁰ to measure inequality. In the case of a highly even distribution of income this can vary from 0 to 1. South Africa's Gini coefficient rose from 0.69 in 1996 to 0.77 in 2001. While historically South Africa has had one of the most unequal distributions of income in the world, this rise is likely to place it at the top of the world rankings.”⁶⁵¹

GINI COEFFICIENT⁶⁵²

TABLE 1

Province	No. of poor persons (million)	% of population in poverty	Poverty gap (R billion)	Share of poverty gap
Eastern Cape	4.6	72%	14.8	18.2%
Free State	1.8	68%	5.9	7.2%
Gauteng	3.7	42%	12.1	14.9%
KwaZulu-Natal	5.7	61%	18.3	22.5%
Limpopo	4.1	77%	11.5	14.1%
Mpumalanga	1.8	57%	7.1	8.7%
North West	1.9	52%	6.1	7.5%
Northern Cape	0.5	61%	1.5	1.8%
Western Cape	1.4	32%	4.1	5.0%
South Africa	25.7	57%	81.3	100.0%

⁶⁵⁰ “The ‘Gini coefficient’ is a measurement of inequality in society. A coefficient of nought means that everyone is equal and a coefficient of one represents complete inequality. Therefore, the lower the Gini coefficient, the better.” See Ziehl *Introduction to Sociology: Population Studies* (2002) at 64. See also Haralambos and Holborn *Sociology: Themes and Perspectives* 5th ed (2000) at 305 for a further discussion on poverty statistics of foreign nations.

⁶⁵¹ Human Sciences Research Council ‘Fact Sheet: Poverty in South Africa’ at <http://www.sarpn.org.za/documents/d0000990/index.php> (accessed 18 May 2006).

⁶⁵² Human Sciences ‘Fact Sheet’.

“The poverty gap measures the difference between each poor household’s income and the poverty line. Thus, it measures the depth of poverty of each poor household. The aggregate poverty gap is calculated by summing the poverty gaps of each poor household. Therefore, it is equivalent to the total amount by which the incomes of poor households need to be raised each year to bring all households up to the poverty line and, hence, out of poverty.

The poverty line varies according to household size, the larger the household the larger the income required to keep its members out of poverty. The poverty lines used were based on the Bureau of Market Research’s Minimum Living Level.”⁶⁵³

POVERTY GAP⁶⁵⁴

TABLE 2

	1991	1996	2001
African	0.62	0.66	0.72
White	0.46	0.50	0.60
Coloured	0.52	0.56	0.64
Asian	0.49	0.52	0.60
Total	0.68	0.69	0.77

These statistics are included to highlight the disparity between the white population and the ‘black’⁶⁵⁵ population. As can be seen from Table 2, the black population as a whole is worse off than the white population.⁶⁵⁶ For this reason, it would seem that in order to bring about a balance, it is the entire group that must be the focus of measures to reduce poverty. If the whole group is the focus there is the risk that those people who are already

⁶⁵³ Human Sciences ‘Fact Sheet’.

⁶⁵⁴ Human Sciences ‘Fact Sheet’.

⁶⁵⁵ ‘Black’ refers to African, coloured and Asian people as per the EEA. See Section 1 of the EEA.

⁶⁵⁶ It was pointed out in the discussion on affirmative action in Brazil that an argument has been put forward that many people in Brazil may become ‘free-riders’ due to affirmative action. “Proponents of affirmative action dismiss the argument ... because Afro-Brazilians make up more than 70% of those below the poverty line.” See UNESCO ‘Studies on Human Rights 2004: Struggles Against Discrimination’ at <http://unesdoc.unesco.org/images/0013/001397/139712e.pdf> (accessed on 16 August 2006) at 164. This argument can be used in a South African context as the majority of people below the poverty line with regards to race are also black people.

poverty stricken may not gain any significant rise in affluence whilst the benefits accrue to those who are currently advantaged.

(d) A Solution

It can hardly be disputable that there should be a solution for those people who have been discriminated against in the past. It is submitted, however, that the EEA should remain directed at groups, following the argument put forward by Taylor that when the discrimination (apartheid in South Africa) was directed at groups as a whole, to balance this out, special dispensation should be given to groups as a whole.⁶⁵⁷ Although the argument could then be raised that individuals can open actions against the government for past discrimination but this could open the flood gates for litigation. It would have too far reaching consequences in that the majority of the black, female and disabled population of the country could probably prove some form of discrimination and, therefore, the courts would be constantly blocked and bogged down with these actions.

One side effect of the group approach is that it may result in intra-racial or gender inequality as has been identified in Malaysia: “Intra-ethnic inequality, particularly intra-Malay inequality, has emerged as a new dimension of inequality in Malaysia. Intra-Malay inequality can therefore only be addressed by a larger focus on eradicating hardcore poverty, rather than on poverty between races, as undertaken by the NDP.”⁶⁵⁸ A similar ‘larger focus’ can be adopted in South Africa by further legislation to eliminate the anomalous intra-group inequalities after the EEA has run its course in its current form.

Although the group model may result in some people benefiting from affirmative action when they should not, the statistics themselves show that the black population, women and people with disabilities as a whole are still worse off than the white population as a whole. Thus it remains the designated groups *as a whole* that needs assistance. This may

⁶⁵⁷ See *Sheet Metal Workers v EEOC* 478 US 421 (1986), an American case where it was held by Justice Brennan AJ at para 44 that: “The purpose of affirmative action is not to make identified victims whole, but rather to dismantle prior patterns of employment discrimination and to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and beneficiaries need not show that they were themselves victims of discrimination.”

⁶⁵⁸ FW de Klerk Foundation ‘Affirmative Action in Malaysia’ (2004) at www.fwdklerk.org.za/ 3 (accessed on 26 March 2006).

be a problem in the mean time but, it is submitted, that people benefiting from affirmative action when they need no benefits are merely ‘casualties of war’ (or, in this instance, casualties of *peace*). They are the unavoidable side effect of the goal of bringing about substantive equality for black people, women and people with disabilities.⁶⁵⁹

This does not mean that no special provisions should be made to individuals who were disadvantaged by the previous regime. If that disadvantage can be demonstrated to be present, that individual is deserving of special consideration. This means giving individuals within a designated preference over other people from the same group. In other words, the person who has a history of personal discrimination must be given further consideration in the other facets of ‘suitably qualified’ contained in the EEA and should not merely be disregarded because their formal qualifications are lower than other applicants.

5.2.2 South African Citizens or All Disadvantaged Peoples?

If the group model of affirmative action is validated, the answer to the question left open by the case of *Auf der Heyde* must now be considered. In this case, the court touched on the issue of whether or not affirmative action should be focused on South African citizens who are black, female or disabled or whether it should just focus on black, female or disabled regardless of nationality.⁶⁶⁰ Despite touching on the issue, the court at no point gave a definitive answer to the issue. The Amended Employment Equity Regulations, however, limited the concept of ‘designated groups’ to South African citizens in 2006.⁶⁶¹

⁶⁵⁹ If the legislature were to include a provision requiring that the beneficiaries of affirmative action have suffered in individual disadvantage, this work agrees with Partington and Van der Walt that, “disadvantage should be presumed with rebuttal strictly limited to cases where the suppressive consequences of apartheid have no relevance (for example, in the case of a black South African born after the end of the apartheid struggle).” See Partington and Van Der Walt (2005) 26 (3) *Obiter* 595 at 600.

⁶⁶⁰ Before the Amended Employment Equity Regulations, the Department of Labour allowed designated employers to include foreign nationals as part of the designated groups in the reports these employers are required to submit in terms of section 21 of the EEA. See Partington and Van Der Walt (2005) 26 (3) *Obiter* 595 at 601.

⁶⁶¹ “In terms of the Amended Employment Equity Regulations (GN R480, *Government Gazette* 28858 of 26 May 2006), ‘designated groups’ are restricted to natural persons who are citizens of the Republic of South Africa by birth or descent; or are citizens of the Republic of South Africa by naturalisation before the commencement date of the 1993 Constitution; or became citizens after that date and would have been

In response to this limitation on designated groups is the argument that it was not just South African people who were discriminated against during apartheid. In terms of the group model argued above, it would seem that if one wishes to focus affirmative action on as a group model, one cannot bring in the individual focus of nationality or citizenship. However, this, it is submitted, is a separate and distinct argument. South Africa needs to focus on helping its own people for the time being. Once South Africa is a substantively equal society, then the government can attempt to help all peoples in South Africa, regardless of their country of origin. This may seem harsh, but, I would submit, the government is elected to represent the people of South Africa and must, therefore, ensure that the interests of South African people are looked after as a priority. Therefore, it is submitted that the Amended Employment Equity Regulations are a good inclusion in the EEA and the concept of ‘designated groups’ should only include South African citizens for the time being.

5.3 Race Classification and Racial Hierarchy: Apartheid Revisited?

“One of the gravest omissions of the EE Act was the failure to provide guidelines on how to approach the various designated groups when it comes to recruitment; selection; promotion and so on. The EE Act gives indirect guidelines in the form of section 42 which refers, among others, to the demographic profile of the national and regional economically active population.”

– Loyiso Mbabane⁶⁶²

5.3.1 Introduction

“On 17 June 1991, the South African government introduced the Population Registration Repeal Act⁶⁶³, which finally abolished the 1950 Population Registration Act⁶⁶⁴. The

entitled to acquire such citizenship by naturalisation before that date had it not been for the apartheid policy then in place.” See Pretorius *et al Employment Equity Law* (2006) 8-7.

⁶⁶² Black Economic Empowerment, The Lifeline For Employment Equity (2005) at <http://www.lexisnexis.co.za/ServicesProducts/presentations/17th/LoyisoMbabane.doc> (accessed on 30 May 2006).

move was heralded by the press as removing the last vestiges of apartheid.”⁶⁶⁵ This statement was extremely optimistic about the prospect of race and racial classification no longer being used in South Africa in the post-apartheid era. Unfortunately, this has not proved to be the case. Not only does South Africa continue to classify people into race groups, the courts have determined that creating affirmative action policies that allow for the implementation of a racial hierarchy is a legitimate process.⁶⁶⁶ In other words, under affirmative action measures, there is now a recurrence of the racial hierarchy of apartheid, though this time the hierarchy has been reversed to: Africans, Indians, Coloureds and then Whites.

5.3.2 Race Classification: Who is Black?

The issue of race classification will be dealt with first, since without specific classes there can be no question of a racial hierarchy. The EEA designates groups which consist of black people, women and people with disabilities as the beneficiaries of affirmative action.⁶⁶⁷ The EEA loosely defines a black person as being a person who is African, Coloured or Indian. The EEA does not, however, set out the criteria for such classifications. This means that an employer may find it genuinely difficult to include certain employees in its EEP as it may have a problem ascertaining which race they come from. In practice, the employer is likely to ask the employee which race they come from and put that into their report on employment equity transformation. However, this leaves certain grey areas that can be exploited since the EEA and Courts seem to have accepted that a racial hierarchy exists in affirmative action.⁶⁶⁸ Accordingly the EEA, it can be

⁶⁶³ Act 114 of 1991.

⁶⁶⁴ Act 30 of 1950.

⁶⁶⁵ Smythe *Race Classification: The ‘Implications of the Repeal of the Population Registration Act’* (1992) 3 *South African Human Rights Yearbook* 241 at 241.

⁶⁶⁶ See *Motala v University of Natal* 1995 (3) BCLR 374 (D); *Public Service Association – Gerhard Koorts v Free State Provincial Administration* Unreported CCMA FS3915 21 May 1998; *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC); *NEHAWU on behalf of Thomas v Department of Justice* (2001) 22 ILJ 306 (BCA) and *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA) for examples of affirmative action hierarchies based both on race and gender.

⁶⁶⁷ Section 1 of the EEA.

⁶⁶⁸ Although the majority of court decisions support racial hierarchies, the courts have not always accepted this to be the correct. See *IMAWU v Greater Louis Trichardt City Council* 2000 (21) ILJ 1119 (LC) for example.

argued, has left a serious gap in the provisions relating to the identification of who the beneficiaries of affirmative action are. Racial classification criteria have still to be decided but with classification comes the assumption of giving priority to one group over another as demonstrated in the case law examples in 5.3.3 below.

5.3.3 The Concept of a Racial Hierarchy

(a) Racial Hierarchy in Education

The hierarchical nature of affirmative action first arose in the of *Motala v University of Natal*. The case revolved around a dispute about applications to the University of Natal medical school. *In casu*, a female Indian applicant (F) was denied admission into the school of medicine at the University of Natal despite the fact that she met all the requirements for entry into the school. Despite rejecting the applicant, the University accepted African applicants who were not as suitable for acceptance as F. The university argued that as apartheid allowed for a racial hierarchy when it discriminated, so affirmative action should allow for a racial hierarchy to rectify that discrimination and redress the disadvantage of the past.

Due to the legacy of apartheid, the University set a lower standard for admissions of black applicants than it did for Indian applicants. In terms of its affirmative action policy, the University had reserved a certain number of places for different race groups.⁶⁶⁹ The

⁶⁶⁹ “The Dean of the respondent's Faculty of Medicine stated that the respondent endeavoured to circumvent this difficulty by means of an ‘affirmative-action programme’ to the following effect –

- (a) The programme is an attempt to take into account the educational disadvantages to which certain students have been subjected and is directed at determining the true potential of each aspirant student.
- (b) The faculty evaluates the performance at school of African students in a way which is different from that employed in relation to students schooled under other education departments.
- (c) The matriculation results of accepted African applicants will in almost all cases be lower than those of other applicants who are accepted, and indeed lower than those of other applicants who are not accepted.
- (d) By these means it is possible to identify a pool of African students who satisfy the University's requirements for admission to the Medical Faculty.
- (e) The principal difficulty then becomes a matter of comparing students who have been assessed on different bases, and it is almost impossible to do this. A policy decision has to be made.
- (f) It is safe for the respondent to assume that there is no question of the selection process being unfair for so long as the numbers chosen from a particular cultural group, expressed as a

forty places reserved for Indians students had been filled and, therefore, F could not be accepted even though students who did not have as strong an application as F could be accepted as they were African. The applicants (the parents of F) contended that F had been unfairly discriminated against and that the University's affirmative action policy was unconstitutional.

The court, however, gave the following answer in its rejection of the applicant's contention:

"The contention by the counsel for the applicants appears to be based upon the premise that there were no degrees of disadvantage. While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the 'four tier' system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of section 8 (1)."⁶⁷⁰

(b) Racial Hierarchy in Employment

In the case of *Public Service Association – Gerhard Koorts v Free State Provincial Administration*⁶⁷¹, it was claimed by the applicant that she - a white woman - should also enjoy the benefits bestowed upon designated groups by affirmative action. The case arose as the respondent had been unsuccessful in an application to a position which was given to a black person. In this case, the Court agreed with the contention put forward by the employer that "white women did not suffer discrimination 'nearly to the same extent' as that experienced by blacks."⁶⁷² Although this case revolves around a hierarchy between gender and race, it still serves to illustrate the hierarchical nature of affirmative action.

percentage of the total admission, did not exceed the representation that cultural groups has in society."

Motala v University of Natal 375G-J. See also Mbao 'The Province of the South African Bill of Rights Determined and Re-determined' (1996) 113 *SALJ* 33 at 37 for a further discussion in this on the University of Natal's admissions policy and the *Motala* case.

⁶⁷⁰ *Motala v University of Natal* 283 C-E.

⁶⁷¹ Unreported CCMA Ruling FS3915 21 May 1998.

⁶⁷² Dupper *et al Essential Employment Discrimination Law* (2004) 265.

It was similarly held in the case of *McInnes v Technikon Natal* by Penzhorn AJ that:

“The Technikon defines affirmative action as the upliftment and advancement of all previously disadvantaged communities by seeking to redress the imbalances of the past. The *first* disadvantaged community to be considered at Technikon Natal is the African community (indigenous people who were here before European colonisation). Other disadvantaged communities include, amongst others, Indians, coloureds, women and disabled people.”⁶⁷³

A third relevant case arose in the April 2006 private arbitration award in the case of *Christiaans v Eskom*.⁶⁷⁴ The Applicant *in casu* was a Coloured male (Christiaans) who applied for a post advertised by Eskom (the Respondent). Although nine applications were received for the post only two of the applicants were shortlisted and interviewed. The two applicants shortlisted and interviewed were Christiaans and Mashigo, an African male. Both applicants were subjected to the same test and Christiaans scored far higher than Mashigo.⁶⁷⁵ Despite being recommended for the available post by the interview and assessment panel, Christiaans was not appointed to the position. Instead, senior management preferred Mashigo because he was African and Christiaans was Coloured. Christiaans’ first contention was that the Respondent unfairly discriminated against him and that the Respondent had committed an unfair labour practice.

On reference to the issue of unfair discrimination, the arbitrator responded as follows:

“Evidence reflected that although Coloured and Black [African] employees were underrepresented within Respondent on the particular level, the level of under representation of Africans were markedly higher than that of Coloured. Hence [the] decision to appoint Mashigo... I am of the view that the Applicant failed to show any *prima facie* discrimination. Even if I am wrong in that assessment, Respondent’s evidence showed that the appointment of

⁶⁷³ *McInnes v Technikon Natal* 1148 D–E. Emphasis on the word *first* put in by author.

⁶⁷⁴ Private Arbitration Proceedings held at Bellville: Western Cape. A full report of the ruling is available at www.sunsite.wits.ac.za/osall/docs/hotdocs/SOLIDARITY_OBO_CHRISTIAANS_V_ESKOM.pdf.

⁶⁷⁵ “Christiaans attained the highest score according to the key dimensions set by the panel. He attained a total mark of 73.6 against the 61 of Mashigo.” *Christiaans v Eskom* 2.

Mashigo was contemplated by Section 9 (2) of the Constitution in that it targeted a person that was disadvantaged by unfair... discrimination, that it was designed to advance such person and that it promoted the achievement of equality, as is mandated by the EEA... The undisputed evidence was that African males were the second priority for appointment in the Respondent's Western Region, whilst coloured males were the fourth priority. On evidence submitted and assessed against the prevailing legal standards, I cannot find that Respondent was discriminated against Applicant.⁶⁷⁶

Similarly, on the issue of whether or not an unfair labour practice had occurred, the arbitrator dismissed the Applicant's contention. It was decided that there was no evidence of frivolous, capricious or unreasonable action on the part of senior management in appointing Mashigo and, therefore, it was impossible to come to a finding that Respondent had committed an unfair labour practice.

5.3.4 Racial Hierarchies and Race Classification: A Pernicious Practice

(a) The Problem of Racial Classification

Race classification is an important issue that has not really been addressed. One beneficiary group of affirmative action is 'black people' and that term has not been given an absolute definition. The problem here is that black people are not a people in South Africa that are finitely defined. This has left it up to the courts on a case by case basis to make judgments and, as can be seen, most of these judgements have broken down the designated group and established a racial hierarchy. In order to avoid these seemingly random precedents, it might be necessary to institute a classification of people into different race groups. This can be done to allow for employment equity to be properly implemented. A racial classification could be done by following one of two approaches. A *general approach* would be to place people into a certain race class by the circumstances and facts of their life. The *specific approach* could be a medical test to classify each person into their own race.

⁶⁷⁶ *Christiaans v Eskom* 17 – 24.

This raises enormous political and social problems. Using either the general or specific approach, two people from one family may end up being considered to be of a different race – as happened during apartheid.⁶⁷⁷ Race classification, and the two tests, also bring up an extremely sensitive and contentious topic and digs up the grave of apartheid. Race classification and segregation was a major ideal in apartheid and by allowing for race classification, one merely perpetuates the cycle of compartmentalising people rather than bringing them together. Not only does race testing invoke the horrors of the past but, it is submitted, that being forced to endure such a test will infringe on a person's right to dignity.

(b) Racial Hierarchies

Having a racial classification system can only be for one reason – to allow for prioritisation of one race over another – another legacy from South Africa's history.

As can be seen, in the cases described previously,⁶⁷⁸ a racial hierarchy was used in the implementation of affirmative action policies. Such a reading of the EEA opens the door to the reintroduction of racial hierarchy in South Africa. The question now arises as to whether or not judicial precedent should be followed to allow for the continuation of racial hierarchies and the inevitable comparisons with an apartheid ideology. On the surface, the allowing of racial hierarchies seems to be valid in terms of the justification

⁶⁷⁷ Using either the general or specific approach, two people from one family may end up being considered to be of a different race – as happened during apartheid. Desmond Tutu puts the infringement on dignity and the disgrace caused by race classification tests well in a speech at the Nelson Mandela Foundation Lecture on 23 November 2004: “And oh the humiliation and awfulness of race classification with its crude tests – sticking a pin suddenly into one and depending on whether you yelped, ‘Aina’ or ‘Aitsho’ you were classified ‘coloured’ or ‘Bantu’ and the havoc it all played with family life when siblings could be assigned to different race groups because some were more swarthy than others and do you remember that people committed suicide because of race classification; others played white and would avoid members of their families who were less Caucasian-looking.” See <http://www.safm.co.za/webfeatures/featureItemDetail.jsp?featureID=12&itemID=23> for the full text of the speech by Desmond Tutu.

⁶⁷⁸ *Motala v University of Natal*; *Public Service Association – Gerhard Koorts v Free State Provincial Administration*; and *McInnes v Technikon Natal* have been cited as examples. See *MWU obo Van Coller v Eskom* [1999] 9 BLLR 1089 (IMSSA); *Department of Correctional Services v Van Vuuren* (1999) 20 ILJ 2297 (LAC) *Eskom v Hiemstra NO & others* (1999) 20 ILJ 2362 (LC); *Walters v Transitional Local Council of Port Elizabeth & Another* (2000) 21 ILJ 2723 (LC); *Germishuys v Upington Municipality* (2000) 21 ILJ 2439 (LC); *NEHAWU on behalf of Thomas v Department of Justice* (2001) 22 ILJ 306 (BCA); *Crotz v Worcester Transitional Local Council* (2001) 22 ILJ 750 (CCMA); and *Fourie v Provincial Commissioner, SAPS (North West Province)* [2004] 9 BLLR 895 (LC) for further examples of actions arising out of one designated group being ranked higher than another.

given for allowing affirmative action to be focused on groups rather than individuals above under 5.2.1 If one wishes to validate the group model of affirmative action by attempting to rectify the past group discrimination⁶⁷⁹, then one would assume that the group affirmative action necessarily includes a racial hierarchy.

The problem with this approach, however, is that it proliferates the differentiation between groups in South Africa. This segregation defeats the purpose of the South African concept of the value of equality as it has the effect of dividing groups rather than bringing them together to be one people, one nation.⁶⁸⁰ The re-introduction of racial hierarchy inevitably conflicts with this oft-stated ideal of the new democratic South Africa.

5.3.5 Possible Solutions

The questions remain: how far will affirmative action go on the road of racial classification and racial hierarchy? How can this be justified as bringing about substantive equality? Is it acceptable to reverse the apartheid hierarchy until equality is achieved? Is it more important to rectify the effects of apartheid than to treat South Africans as people, regardless of race, gender or ability? I would submit that there are incipient dangers for the stability and harmony of the country if this cycle is perpetuated.

As can be seen from 5.3, there are arguments for and against race classification and a racial hierarchy. So then, the issue still remains open as to whether or not race classification and race hierarchies should be accepted into employment equity law in

⁶⁷⁹ It was argued earlier in this chapter under 5.2.1 that the group model of affirmative action was justified due to the fact that it was groups who were discriminated against during apartheid. If one were to follow this line of reasoning, the only conclusion that can be drawn regarding racial hierarchies is that they should exist in affirmative action because they existed in apartheid. However, this is a problematic approach as will be discussed in further detail.

⁶⁸⁰ The distaste for racial hierarchies can be shown by the following statement made by a male Indian constable: "All of a sudden we have become too white because Indians are completely discriminated against. In terms of equity, Indians and coloureds are supposed to benefit, but it seems only blacks are considered for promotion. I have been at this station for four years and I am still doing what I was doing four years ago." See Newham *et al* 'Diversity and Transformation in the South African Police Service' at <http://www.csvr.org.za/papers/papgntm.pdf#search=%22%22Beneficiaries%20of%20Affirmative%20Action%22%22> (accessed on 21 August 2006).

South Africa. The problem with finding a solution to this issue is that there cannot be a compromise, there has to be either a racial classification and racial hierarchy system or not. If a race classification and hierarchy system are used, it is a full measure and not a half measure.

(a) Race Classification

Despite the fact several arguments have been put forward criticising race classification⁶⁸¹ in this work, there is still an important need for race classification in South Africa. This classification is necessary in order to allow for a true implementation of the EEA. It will enable designated employers to be able to be able to correctly define the representivity of its workforce rather than merely guess as to who would be included as 'black' for affirmative action purposes.

The proposed solution to this problem is to follow the Canadian model of race classification. The Canadian Employment Equity Act⁶⁸² bestows benefits on people falling into 'designated groups'. According to the CEEA, the designated group includes women, aboriginal peoples, people with disabilities and people who are members of visible minorities. There is, however, one additional requirement to be a beneficiary of affirmative action in Canada. According to section 9 (2) of the CEEA, only employees who identify themselves or agree to be identified by an employer as a person falling into the category of 'designated group' will be considered as members of that designated group.

⁶⁸¹ An example of anti-race classification sentiment is the legal campaign being waged by AfriForum: "In the first campaign, AfriForum will assist senior citizens in residences which receive State subsidies, as well as all other people who make use of State subsidised social services, to refuse on legal grounds to be classified according to race. In addition, AfriForum has already instructed its legal team to explore the viability of a class action, if the State were to continue classifying the people who refuse thereto, according to race." See Kriel 'AfriForum Launches Defiance Campaign Against Racial Classification' at <http://www.solidaritysa.co.za/Home/wmview.php?ArtID=451> (accessed 18 August 2006). A further argument against race classification has arisen around the fact that race classification has been dropped by South Africa's Advertising Research Foundation (SAARF). "'It's a double-edged sword,' says Modise Makhene, MD of advertising agency Creativity. 'Marketers have been asking for it (to be dropped) for some time. I'm not sure it should be dropped for research purposes. But if you use it the way it has often been used up to now, you end up stereotyping people.'" See Mahabane 'A Double Edged Sword' at <http://free.financialmail.co.za/report/adfocus2002/marketing/mark1.htm> (accessed 20 August 2006).

⁶⁸² Act c44 of 1995.

Although this approach allows for the separation of different people into different categories and perpetuates the labelling of people. South Africa will not have a governmentally implemented race classification scheme but a voluntary system that allows individuals to assign themselves to a race group. This gives the people of South Africa a choice and the chance to choose their own destiny.⁶⁸³ This approach may have the unfortunate effect of perpetuating race classification in South Africa but it is submitted that for the purposes of employment equity, it is arguably necessary for the time being.⁶⁸⁴

(b) Racial Hierarchies

I submit that a formal racial hierarchy is fundamentally pernicious and cannot be justified. It invalidates affirmative action when the stated goal of the EEA is to bring about substantive equality. This is because it perpetuates inequality between groups by allowing discrimination on the basis of race to continue. However, this does not mean that there should not be any notion of preferring one race over another within the generic 'black' umbrella. The approach that should be followed, it is submitted, is the approach used in the *Christiaans* case with regards to representivity.⁶⁸⁵

Although the *Christiaans* case cited the *Motala* case in its judgment, one interpretation of the case, it can be argued, is that it does not establish a precedent for a blanket racial hierarchy on a national level. Instead, it proposes the creation of priorities at a local level. In other words, there must be an analysis of each region and market sector at a micro

⁶⁸³ A further problem with a third party race classification and not a 'self-classification system' is that: "Personnel at institutions as diverse as hospitals recording births and universities recording admissions, as well as equity and line managers in companies, often 'classify' individuals on the basis of surnames, language spoken, appearance, accent, place of residence and the like." See Lehohla 'Race is Just One Variable in Monitoring Change' at http://www.statssa.gov.za/news_archive/12may2005_1.asp (accessed on 18 August 2006) for a further discussion on the concept of 'self-classification' and the prejudices involved with 'third-party classification' systems.

⁶⁸⁴ This seems to happen in everyday practical examples when a person fills in their race on an application form, for example, without having to give proof of their race group. Obviously this cannot be an arbitrary choice with no substantial reason for choosing a particular race group. A person must have some substantial reason to be part of that race group. For example, an individual with an African mother and Coloured father could choose to be African or Coloured but could not choose to be White or Indian.

⁶⁸⁵ *Christiaans v Eskom* 22.

level. This may create a heavy administrative burden but it will help create a fully functional, just and more efficient employment equity scheme.

Although the *Christiaans* case was the first case to propose and support the idea of proportionate representivity and prioritising under the provisions of the EEA, the *Durban City Council (Electricity Department) v Kalichuran*⁶⁸⁶ proposed the idea in 1995 under the respective provisions of the time.⁶⁸⁷ In *Durban City Council*, the court held that due to the fact 23% of the positions available in middle management were held by Indian people, “a percentage corresponding to their representation in the labour market ... the specific job category in question (manager area construction electricity) could therefore not be one in respect of which affirmative action in favour of Indian candidates should apply.”⁶⁸⁸ This case serves as a good example of the use of prioritising and proportionate representivity even though it was not decided under the provisions of the EEA. It is submitted that this case has the important function of providing persuasive value to any rulings or interpretations of the EEA.

The EEA in fact, fully supports the notion of drawing up a profile of the workforce in the employment equity plan creation. “The purpose of drawing up a profile is to establish whether people from designated groups are under-represented in any occupational category or at any level within the organisation.”⁶⁸⁹ This means that an employer should be aware of the levels of representivity in his or her workplace.⁶⁹⁰ Accordingly, it would be a fairly simple task to assess which group of people are underrepresented and, therefore, create a priority to employ women for example, rather than black people.

⁶⁸⁶ (1995) 4 ARB 6.9.23 at <http://www.irnet.co.za>.

⁶⁸⁷ Although this case was not decided under the provisions of the EEA as they stand today, it serves as a good example for the courts and may have persuasive value in any decision of the court.

⁶⁸⁸ Pretorius *Employment Equity Law* 9-12 – 9-13.

⁶⁸⁹ Du Toit *et al Labour Relations Law* 4th ed (2003) 604.

⁶⁹⁰ In *NEHAWU on behalf of Thomas v Department of Justice* (2001) 22 ILJ 306 (BCA) it was successfully argued by the Department of Justice that “section 195 (1)(i) of the Constitution, which requires the public administration to be broadly representative of the South African people” allowed for them to prefer a similarly qualified Indian female candidate over a Coloured male candidate.

Although this may seem that the concept of quotas is being adopted, quotas have no place in employment equity. “The reason why the Act does not insist on quotas is, presumably, to enable employers and their consulting partners to take account of market realities and other factors relevant to the employment of persons from designated groups in various occupational areas.”⁶⁹¹ It would seem, therefore, that the Act intends a system that allows for micro-level representivity schemes and the promotion of representivity rather than creating a quota system that is unrealistic and has no real effect. Instead, one should aim to achieve a representative workforce in relation to the representivity of the society in which that workforce is based.

5.4 The Shield and the Sword: The Dudley – Harmse Debate

“But does this mean then that affirmative action is then merely a shield for an enlightened employer or does it serve as a sword for a disadvantaged person?”

– Landman P⁶⁹²

5.4.1 Introduction

This section examines the shield and sword debate⁶⁹³, revolving around the cases of *Harmse v City of Cape Town*⁶⁹⁴, decided in 2003, and *Dudley v City of Cape Town*⁶⁹⁵, decided in 2004. The conflict between the two cases arises between the ‘shield and

⁶⁹¹ Du Toit *Labour Relations Law* 608.

⁶⁹² *Abbot v Bargaining Council for the Motor Industry (Western Cape)* (1999) 20 *ILJ* 330 (LC) 334 A-B.

⁶⁹³ “Affirmative action’s main aim is generally to ensure that the previously disadvantaged groups are fairly represented in the workforce of a particular employer. It must therefore be borne in mind that affirmative action is said to be a shield in the hands of an employer, and not a sword to be used by individuals. This means that as a rule, an applicant for employment or promotion cannot rely on affirmative action in order to compel the employer to appoint or promote him. Affirmative action exists as a justification group for employers against allegations of discrimination.” See Author Unknown ‘The Regulation of Affirmative Action and Discrimination in South Africa’ at [http://etd.unisa.ac.za/ETD-db/theses/available/etd-08112006-](http://etd.unisa.ac.za/ETD-db/theses/available/etd-08112006-145645/unrestricted/07chapter6.pdf#search=%22affirmative%2Baction%2Bsword%2Bshield%22)

145645/unrestricted/07chapter6.pdf#search=%22affirmative%2Baction%2Bsword%2Bshield%22 (accessed on 21 August 2006).

⁶⁹⁴ [2003] 6 *BLLR* 557 (LC).

⁶⁹⁵ [2004] *JOL* 12499 (LC). See also *Ntai & others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC) at 218-219 where it was held that an “‘anti-discrimination clause’ such as item 2(1)(a) of schedule 7 to the LRA can be interpreted as awarding a victim of discrimination the right to affirmative action. On the contrary, a legislative measure such as chapter 2 of the EEA is needed to provide possible remedies in this regard.”

sword' theory.⁶⁹⁶ The sword and the shield debate relates to the issue of whether or not members of designated groups have the right to preferential treatment. The original case of *Harmse* held that there was a right to preferential treatment (a sword) for beneficiaries of affirmative action. In the *Dudley* case, on the other hand, the Court declined to follow the *Harmse* precedent and said that there was no right to preferential treatment and, therefore, no grounds for a cause of action if an application is unsuccessful.

In the case of *Abbott v Bargaining Council for the Motor Industry (Western Cape)*⁶⁹⁷ it was held by Landman P that:

“Affirmative action of persons belonging to disadvantaged groups or categories is a defence against the principal injunction not to discriminate in employment. But does this mean that affirmative action is then merely a shield for an enlightened employer or does it serve as a sword for a disadvantaged person? ... An applicant for employment derives no right from a contractual or negotiated affirmative action policy.”⁶⁹⁸

Although this case, heard in 1999, deals with the issue of whether or not designated groups have a right to affirmative action, the case was decided under the now defunct provisions of the Labour Relations Act⁶⁹⁹, which were repealed to make way for the provisions of the Employment Equity Act. Accordingly, the case does not have a great effect on the law as it stands today. Therefore, the significant decisions revolving around the shield and the sword debate arise from the *Harmse* and *Dudley* cases.

⁶⁹⁶ It was held in *Harmse v City of Cape Town* at para 44 that: “One of the ways in which this issue has been posed by the Respondent is that affirmative action may only serve as a defence. In part this is correct. The real answer, however, lies in the determination of who is making the claim of affirmative action. It may find a cause of action in the hands of one and a defence in the hands of the other. ... However, having regard to the fact that the Act requires an employer to take measures to eliminate discrimination in the workplace, it also serves as a sword.” It was later held in *Dudley v City of Cape Town* at para 75 that: “I regret that I am unable to follow [the *Harmse*] result. In my respectful view the learned Judge has not sufficiently maintained the distinction between Chapters 2 and 3 that the interpretation of the Act requires.”

⁶⁹⁷ See *TGWU & Another v Bayete Security Holdings* (1999) 29 ILJ 1117 (LC); *Mahlanyana v Cadbury (Pty) Ltd* (2000) 21 ILJ 2274 (LC); and *Lagadien v University of Cape Town* (2000) 21 ILJ 2469 (LC) for further examples of cases brought before the existence of the EEA that discuss the issue of whether or not affirmative action acts as a shield or sword. See Grogan *Dismissal, Discrimination & Unfair Labour Practices* (2005) at 93 for a further discussion of these cases and the pre-EEA position regarding the sword and shield debate

⁶⁹⁸ *Abbott v Bargaining Council for the Motor Industry (Western Cape)* 334 A–B.

⁶⁹⁹ Act 66 of 1995.

5.4.2 Harmse v City of Cape Town

The first case to discuss the issue of whether or not persons belonging to designated groups have a right to affirmative action under the law as set down by the EEA was the case of *Harmse v City of Cape Town* in 2003.

(a) The Background

In this case, the applicant, Mr Harmse - a 'black person' in terms of the EEA - applied for three posts with the City of Cape Town. He was not short-listed for any of the posts for which he applied. Following his unsuccessful application, Harmse took the matter to Court as he felt that he had been unfairly denied a place on the shortlists for the posts. Harmse alleged that he had been denied these positions because the employer "had unfairly discriminated against him by not short listing him for three posts for which he had applied ... because he was coloured, lacked relevant experience and because of his political beliefs."⁷⁰⁰

The employer's contentions in this case were: firstly, the statement of the claim submitted by Harmse in support of his action, as per rule 6 of the labour court rules, did not disclose a cause of action. The employer, in essence, argued that affirmative action was a defence (shield) and not a cause of action or right (sword). Secondly, "the employer's exception to the 'lack of relevant experience' claim forced the court to consider the existence of such a claim in law and to enter the realm of affirmative action."⁷⁰¹

(b) The Judgment

The crux of the judgment of the Labour Court in this case was that affirmative action is not just a shield for employers but is also a sword for employees. This is shown by the judgment of Waglay J through the following commentary:

⁷⁰⁰ Michael 'Affirmative Action – Shield or Sword?' at <http://www.wylie.co.za/Site/CMS/Article-Body.asp?articleID=89> (accessed 30 May 2006).

⁷⁰¹ Dupper *et al Essential Employment Discrimination Law* (2004) 279.

“If an employer fails to promote the achievement of equality through taking affirmative action measures, then it may properly be said that the employer has violated the right of an employee who falls within one of the designated groups not to be unfairly discriminated against. Similarly, if an employer discriminates against an employee in the non-designated group by preferring an employee from the designated group who is not ‘suitably qualified’ as contemplated in sections 20 (3) to (5) of the Act, then the employer has violated the right of such an employee not to be discriminated against unfairly. In either case, the issue is whether the employer has violated the employee’s right not to be discriminated against. To this extent, affirmative action can found a basis for a cause of action.

On an analysis of the Constitution and the [EEA] I am satisfied that the Act and specifically sections 20 (3) to (5) read with Chapter II do indeed provide for a right to affirmative action. The exact scope or boundaries of such a right is a matter that will have to be developed out of the facts of each case.”⁷⁰²

The judgment was, therefore, ground breaking in its conclusion.⁷⁰³ This judgment created a strong and pronounced affirmative action system in South Africa. By giving employees ‘the sword’, employees now had the power to litigate if the employer does not correctly implement or carry out affirmative action. One of the key considerations when coming to the conclusion that equated an “absence of affirmative action with unfair discrimination, was the view that ss 20 (3) – (5) of the EEA applied for purposes of the whole of the EEA.”⁷⁰⁴

(c) Commentary on the *Harmse* Judgment

Although the *Harmse* judgment has been met with much criticism and the *Dudley* case

⁷⁰² *Harmse v City of Cape Town* 571 E–J.

⁷⁰³ “The Judge in the *Harmse* case found that the protection and advancement of persons disadvantaged by unfair discrimination is recognised by the Constitution as part of the right to equality. In this sense, The Judge was of the view that affirmative action is more than just a shield otherwise it would only be available to employers.” See Maeso ‘Is Affirmative Action a Right?’ at <http://www.wylie.co.za/%7DUploads/Docs/ir.pdf#search=%22Harmse%2BDudley%22> (accessed on 21 August 2006).

⁷⁰⁴ Garbers ‘Is there a Right to Affirmative Action Appointment?’ (2004) 13 (7) *CLL* 61 at 65.

has been given much credit,⁷⁰⁵ the *Harmse* judgment is still of great importance. The major strength of this judgment is the power it gives to employees. When critiquing the judgment one needs to take note what the Court wanted to achieve when coming to its judgment as well as the ramifications of the judgment. “After all – if our society is serious about substantive equality (inclusive of affirmative action as a measure to contribute to the achievement of substantive equality), it seems to follow logically that the notion of unfair discrimination (as a violation of the right to equality) has to be expanded to include infringements by an employer of substantive equality.”⁷⁰⁶

The greatest strength with this is that employees have the power to ensure that the EEA is given full effect. By giving employees the sword, they can take employers to court if they have not fulfilled their obligations as set out by the EEA. Essentially, it ensures that employers do not have a lacklustre attitude toward preferential treatment and the implementation of affirmative action as they may suffer litigation. It can be compared to the right to strike and the recourse to lock-out.⁷⁰⁷ These two processes give the employer and employee a certain amount of power over each other to ensure that the other performs their duties and obligations in the proper manner.⁷⁰⁸

The major problem with the *Harmse* judgment, it is submitted, is that it may give rise to a rush of litigation. Any unsuccessful applicant could approach the courts claiming that their ‘right to preferential treatment’ has been infringed. This will create a huge workload for the courts, slowing down the court process and causing major administrative and procedural problems. A second problem that is submitted is that the fear of litigation may force employers to appoint designated groups candidates for positions even though the applicants may not be suitably qualified. It is further submitted that this will have the

⁷⁰⁵ See Grogan *Workplace Law* at 295; Wilken ‘Affirmative Action Case Law Developments’; and Garbers (2004) 13 (7) *CLL* 61 at 65 for examples of criticising the *Harmse* judgment and promoting the *Dudley* judgment.

⁷⁰⁶ Garbers (2004) 13 (7) *CLL* 61 at 63.

⁷⁰⁷ The right to strike can be found in section 23 (2) (c) of the Constitution and section 64 of the Labour Relations Act 66 of 1995. The recourse to lock-out, however, can be found only in section 64 of the Labour Relations Act.

⁷⁰⁸ See Wallis *Labour and Employment Law* (1995) at para 47; and Brassy *Commentary on the Labour Relations Act* (1999) at chapter IV for a further discussion on strikes and lock-outs.

effect of reducing the quality of work produced by the employer as the new employee is not as efficient in the position as other applicants or employees.

A further problem relates to the concept of equality in the Constitution where it is stated that, “legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination *may* be taken.”⁷⁰⁹ As can be seen, legislative measures *may* be taken, not must. The fact that the section refers to ‘legislative and other measures’, highlights the fact that affirmative action is a means to an end.⁷¹⁰ Following this, one must “remain wary of simply equating a measure (such as affirmative action) with a value (such as equality). Measures, by definition, are pragmatic and temporary. Values, by definition and by way of contrast, are eternal.”⁷¹¹ Accordingly, by giving the right to affirmative action (which was intended to be a measure), one gives it a sense of permanency.⁷¹²

Moreover, the judgment arises around the fact that its main focus was based on an interpretation of the EEA that created, or discovered, a link between Chapters II and III of the EEA.⁷¹³ “The establishment of such a link is, of course, necessary if one wants to recognise a duty on *all* employers to implement affirmative action, and that all members of designated groups have a right to affirmative action and that the absence of affirmative action can constitute unfair discrimination (again, by all employers).”⁷¹⁴

The difficulty with this reasoning is that it goes too far. If one allows for a link to be made between Chapter II and III that creates the right to affirmative action under the guise of the protections against unfair discrimination contained in Chapter II of the EEA, one extends the duty to implement affirmative action to all employers. The EEA was not created to focus on all employers with regards to affirmative action. It was created to focus on designated employers and create obligations on set employers to implement

⁷⁰⁹ Section 9 (2) of the Constitution. Emphasis has been added on the word *may* by author.

⁷¹⁰ *George v Liberty Life Association of Africa Ltd* 999J – 1000G.

⁷¹¹ *Dupper Essential Employment* 282

⁷¹² The fact that affirmative action is only valid if it is of a temporary nature will be discussed in further detail under 5.5 of this work.

⁷¹³ *Dupper Essential Discrimination*.

⁷¹⁴ *Dupper Essential Discrimination* 283.

affirmative action. This is why the two chapters are divided and affirmative action measures are specifically focused on designated employers not all employers. Accordingly, it is submitted that the creation of this link makes the concept of a ‘designated employer’ a frivolous notion that lacks any real impact. This submission is based on the belief that the link causes the notion of designated employers to become obsolete as it causes the affirmative action obligations to fall on all employers.

The *Harmse* judgment has also been criticised in that it ignores the facts and, is “inconsistent with the fact that there are enforcement procedures in existence in the EEA and that this is not one of them.”⁷¹⁵ The issue of whether or not there was a cause of action arising out of not being preferentially treated could have arisen in the drafting of the EEA and been turned down. The EEA, instead, put power in its own hands and made itself a self-regulating Act, giving power to the Commission for Employment Equity, labour inspectors, State contracts and various other enforcement provisions to ensure its goals were achieved.

5.4.3 Dudley v City of Cape Town

(a) The Background

In this case, Dr Dudley – a black woman – unsuccessfully applied for a more senior position within the City of Cape Town. The position was given to the second respondent in the case, Dr Toms – a white male.⁷¹⁶ Dudley contended that the City of Cape Town had unfairly discriminated against her and reflected bias in favour of white persons or males over black persons and women. She further contended that the decision to appoint the second respondent, Toms, violated the obligation to implement affirmative action in terms of the EEA. She then contended that the City of Cape Town violated its constitutional obligation to implement “affirmative action measures as this infringed her

⁷¹⁵ Grogan *Workplace Law* 296.

⁷¹⁶ “After having referred the case to the Commission for Conciliation, Mediation & Arbitration, Dudley brought an application in the Labour Court seeking, *inter alia*, an order to set aside the appointment of the white male candidate and appointing her in that position.” See Motlali ‘Affirmative Action In South Africa: An Enforceable Right Or A Defence?’ at <http://law.sun.ac.za/equityexecsummary.pdf#search=%22Harmse%2BDudley%22> (accessed on 21 August 2006).

right to equality, its constitutional duty to implement fair labour practices and her right to dignity. Finally, Dudley contended that Toms' appointment amounted to unfair labour practice as it did not comply with the first respondent's affirmative action policy."⁷¹⁷

The City of Cape Town, on the other hand, contended that the Labour Court had no jurisdiction as Dudley should have exhausted the monitoring, enforcement and compliance procedures provided for in Chapter 5 of the EEA. The contention was that it was not the correct procedure to pursue unfair labour practice claims in the Labour Court, unless by agreement. The City of Cape Town contended further that appointing Toms over Dudley did not, in fact, amount to unfair discrimination.⁷¹⁸ Their third contention was that Dudley's claim that she was the better candidate, "alternatively ought to have been appointed on affirmative action grounds are mutually inconsistent or contradictory claims and are accordingly vague, embarrassing and bad in law."⁷¹⁹

(b) The Judgment

On an analysis of the submissions put forward, the main conclusion the Court had to come to was to comment on the 'sword and shield' precedent as set down by Waglay, J in the Harmse case. The essence of the judgment can be found in the words of Tip AJ when it was stated that:

"I regret that I am unable to follow this result. In my respectful view the learned Judge has not sufficiently maintained the distinction between Chapters 2 and 3 that the interpretation of the Act requires. In general, for the reasons set out in this judgment, if due affirmative action measures have not been applied by a designated employer that gives rise to an enforcement issue under Chapter III and not an unfair discrimination claim under Chapter II. In particular, there is with respect no sound basis upon which sections 20 (3) and (5) fall to be read together with provisions of Chapter II and, likewise, no basis upon which can produce a right to affirmative action."⁷²⁰

⁷¹⁷ Wilken 'Affirmative Action Case Law Developments' at <http://www.deneysreitz.co.za/news/news.asp?ThisCat=2&ThisItem=446> (accessed 30 May 2006).

⁷¹⁸ Wilken 'Affirmative Action'.

⁷¹⁹ Wilken 'Affirmative Action'.

⁷²⁰ *Dudley v City of Cape Town & Another* 438G-439A.

The court came to this conclusion on the basis that the general approach of the EEA to the concept of affirmative action is both systematic and collective.⁷²¹ It was also reasoned that the EEA sets out specific provisions highlighting the fact that affirmative action is to be enforced administratively.⁷²² A further reasoning of the court was that the EEA and Constitution both differentiate between affirmative action and unfair discrimination.⁷²³ The final reasoning of the court was that, despite that fact that there may be a plausible link between affirmative action and the prohibition of unfair discrimination, they are not the same.⁷²⁴ It was held “that logical requirement does not put in place a bridge between the provisions of Chapter II and Chapter III. Their purpose and operation remain distinct. In general, a failure to comply with the requirements of Chapter III will be a non-compliance issue and not one of unfair discrimination.”⁷²⁵

The Labour Court, therefore, went back on the decision of the *Harmse* case. This decision nullified the right to preferential treatment. Affirmative action will, from now on, merely function as a shield to employers who have actions arising against them due to preferential treatment. Affirmative action is no longer a sword; it is no longer a cause of action for aggrieved unsuccessful candidates.

(c) Commentary on the Dudley Judgment

The main strength of the *Dudley* judgment, it is submitted, is the severing of the link between Chapter II and Chapter III of the EEA that was created by the *Harmse* judgment. By separating these two Chapters of the EEA, “should an applicant be suitably qualified and not be successful in being appointed for a particular post, the matter must be dealt with administratively as set out in the EEA.”⁷²⁶

⁷²¹ Garbers (2004) 13 (7) *CLL* 61.

⁷²² Garbers (2004) 13 (7) *CLL* 61.

⁷²³ Garbers (2004) 13 (7) *CLL* 61.

⁷²⁴ Garbers (2004) 13 (7) *CLL* 61.

⁷²⁵ *Dudley v City of Cape Town & Another* 438A.

⁷²⁶ Wilken ‘Affirmative Action’.

By separating these two chapters, it is submitted that the obligation to implement affirmative action measures now only falls on designated employers and not all employers. The removal of the right to preferential treatment through the claim that one has been unfairly discriminated against also prevents an influx of fastidious and frivolous litigation.⁷²⁷ As stated above, every unsuccessful applicant who feels aggrieved would be able to approach the court under the *Harmse* judgment and, therefore, would cause an inundation of the courts by affirmative action and the infringement of the right thereof claims. If an employee has been unfairly discriminated against, however, they are still able to bring claims to the court under Chapter II of the EEA, as per the provisions of the EEA. A further reason that these Chapters must be separated is that under “Chapter II [of the EEA], the presence of unfair discrimination is a matter to be determined by the application of law. By contrast, Chapter III [of the EEA] is aimed at promoting affirmative action through consultation. Employers must consult employees on the content of the equity plan, as well as on its implementation.”⁷²⁸

The separation also brings a return to the self-regulation of the EEA. Chapter II is intended to be regulated by adjudication of disputes regarding unfair discrimination, whereas the “Enforcement of employers’ affirmative action obligations are dealt with in Chapter V. That procedure begins with a complaint to a labour inspector, who must establish whether the employer has failed to comply with any of its obligations under the Act ... if the employer refuses to give such an undertaking or fails to comply with an undertaking, the labour inspector must issue a compliance order.”⁷²⁹ By doing so, the EEA is now regulated as it was intended to be by the legislature.⁷³⁰ If the drafters intended affirmative action claims to be adjudicated in court, one can only assume that they would have included such a provision in the EEA.

⁷²⁷ This was discussed in the commentary on the *Harmse* judgment earlier in this chapter where it was submitted that: ‘*The major problem with the Harmse judgment, it is submitted, is that it may give rise to a rush of litigation. Any unsuccessful applicant could approach the courts claiming that their ‘right to preferential treatment’ has been infringed. This will create a huge workload for the courts, slowing down the court process and causing major administrative and procedural problems.*’ See 5.3.2 (c) of this work.

⁷²⁸ Grogan *Workplace Law* 297.

⁷²⁹ Grogan *Workplace Law* 297.

⁷³⁰ See Motlali ‘Enforceable Right’, where the judgment is summarised as follows: “Consequently, the Court established that the applicant did not have the *locus standi* to approach the Labour Court directly for an order that the City develop and implement an employment equity plan.”

Despite the fact that the *Dudley* judgment brings about a return to following the provisions of the EEA by separating the chapters, it does have some weaknesses. One of the major weaknesses of the *Dudley* judgment, it is submitted, is that by accepting the City of Cape Town's contention that the Labour Court had no jurisdiction as *Dudley* should have exhausted the monitoring, enforcement and compliance procedures provided for in Chapter 5 of the EEA, one limits the right of access to court. The right of access to Court is a fundamental right in the Constitution. Under the right of access to court, "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."⁷³¹

If an applicant feels that they have not been given preferential treatment; or if the employer has not fulfilled his/her obligation to preferentially treat candidates from designated groups, the aggrieved applicant must go through a long arduous process before the matter can be heard before the courts. In terms of the ruling of the *Dudley* case, the applicant is under a duty to exhaust all enforcement procedures as provided for in the EEA to ensure implementation of affirmative action by designated employers. This creates an arduous and tedious process for the employee as opposed to merely taking the matter to court to be resolved.

Although not a direct weakness of the *Dudley* case, the case of *FAGWUSA & another v Hibiscus Coast Municipality & Others*⁷³² followed the *Dudley* case. This case went on to hold that "designated employees are not entitled to appointment merely because they are designated. If the employer *bona fide* considers the qualifications, suitability and experience of the candidates, the appointment of a white male might not be unfair to a black candidate merely because the successful candidate was a white male."⁷³³ This judgment, it is submitted goes one step further than the *Dudley* case. By allowing for the appointment of the candidate from a non-designated group over an equally qualified

⁷³¹ Section 34 of the Constitution.

⁷³² (2004) 24 *ILJ* 1976 (LC).

⁷³³ Grogan *Workplace Law* 298.

candidate from a designated group, it is submitted that one ends up rendering the preferential treatment in the EEA impotent by bestowing a voluntary status on affirmative action rather than the mandatory status it enjoys now.⁷³⁴

The major problem with the *Dudley* judgment, it is submitted, is that it creates a barrier to the enforcement of affirmative action. Although the *Harmse* case was criticised above for creating a ‘fear in employers’, this fear may actually have a salutary effect. It could ensure that employers are proactive about implementing affirmative action as they are obliged to be under the EEA. A further criticism of the *Dudley* case is that, a “country like South Africa, with its gaping racial differentials in income and access to opportunities, cannot afford to have a statute that makes the redressing of these imbalances a mere defence in the hands of employers in the unlikely event that they get challenged about the implementation of their policies.”⁷³⁵ The members of the designated groups as created by the EEA need a sword.⁷³⁶ They need something to fight for their substantive equality rather than relying on a static piece of legislation in the EEA to ensure that they are given the things promised to them by the EEA.

5.4.4 Affirmative Action: A Shield or Sword?

Both cases accept the fact that affirmative action functions as a shield (defence) for employers. This shield can be used when it is claimed by an unsuccessful applicant that he or she has been unfairly discriminated against due to preferential treatment of an applicant from a designated group. The conflict arises as to whether or not affirmative action can also function as a sword (action) for an unsuccessful applicant from a

⁷³⁴ It is submitted that if this judgment were to be set down as precedent for future cases, a situation is created whereby a white male is able to be given a position over an applicant from a designated group even if they were similarly qualified and were both suitably qualified for the job. This is regardless of the affirmative action measures in the EEA. In essence, the EEA measures and even the enforcement measures of the EEA will be rendered futile if this judgment were to be followed literally.

⁷³⁵ Mbabane ‘Black Economic Empowerment’.

⁷³⁶ Although it has been argued previously in this chapter that affirmative action should be focused on groups rather than individuals, this does not mean that the individuals within the group are ignored in their personal capacity. Any individual within any group is entitled to defend their rights as bestowed upon them due to being a member of a certain group or class. In essence, an individual obtains the right to affirmative action by being a member of a group.

designated group. In other words, can the unsuccessful applicant take action against an employer for not applying affirmative action measures and giving that unsuccessful applicant from a designated group preferential treatment?

It would seem that the Courts have now chosen their stance in this debate. In the subsequent judgments of *Public Servants Association (PSA) obo I Karriem v South African Police Services (SAPS)*⁷³⁷ and *Bernadette Kotze* as well as *Josephine Thekiso v IBM South Africa (Pty) Ltd*⁷³⁸, held in the Cape Town and Johannesburg Labour Courts respectively, the Courts have sided with the *Dudley* judgment of Tipp AJ.

In the *Karriem* case, Nel AJ considered both the *Harmse* and *Dudley* judgments and concluded as follows:

“I have considered the reasoning of Tipp AJ in *Dudley* ... as well as that of Wagley J in *Harmse* ... and, respectfully, find myself in agreement with the reasoning of Tipp AJ.

I further find myself in agreement with Tipp AJ that any issue arising in respect of Chapter III of the EEA falls within the framework of Chapter V of the EEA and that Section 36 of the EEA sets out the initial enforcement step.

I associate myself fully with the reasoned manner in which Tipp AJ arrived at [his] conclusion.”

In support of the judgment passed down by Nel AJ in the *Karriem* case, Freund AJ in the *Thekiso* held as follows:

“I do not accept that there is any basis on which I could conclude that the decision in *Dudley* was clearly erroneous and I therefore regard myself as bound by it. I note in this regard that *Dudley* was recently followed by this court in *Public Servants Association, on behalf of I Karriem v SA Police Services & Another* (unreported Case No C435/04).”

737

738

In coming to a conclusion from the argument above, it is submitted that neither case is, in fact, entirely correct or incorrect. Although subsequent judgments have endorsed the *Dudley* judgment, it is the writer's belief that neither case satisfactorily gives a good judgment as to whether, and why, the law should merely give a shield or should give a sword *and* a shield. "The difference between *Harmse* and *Dudley* is not merely an issue of statutory interpretation. It highlights a policy choice."⁷³⁹ The *Harmse* decision was a complete promotion of substantive equality in that it stated that if two similarly qualified applicants apply for the same position, the applicant who is in a designated group must be appointed to that post and, if they are not appointed, that person has the right to take action against the employer. The *Dudley* decision promotes formal equality. It shows that although there should be a preferential treatment of people from designated groups, it is up to legislation (the EEA) to ensure that no barriers are put in the way of this preferential treatment.

The submission put forward is, therefore, to find a compromise between the two judgments. Although the EEA does not create a sword for designated groups and the precedents as set down by *Dudley*, *Karriem* and *Thekiso* specifically deny the use of a sword in affirmative action, it is submitted that the EEA should be amended in order to truly promote substantive equality. This would bring the EEA completely in line with the Constitutional aims. The purpose of affirmative action in South Africa is to ensure employment equity and substantive equality. The EEA is a legislative measure which enforces the right to substantive equality. By merely offering a shield to employees, one takes away much of the power of people in the designated groups to ensure that the measures of affirmative action created in the benefit are implemented.

It is submitted that an applicant should be capable of bringing forward an action if they feel they should have been given preferential treatment – that there is a legitimate right to

⁷³⁹ Grogan 'Conflict over Equity' (2004) April *Employment Law Journal* 17 at 17.

affirmative action.⁷⁴⁰ However, this action may not be brought before the courts if the applicant does not have similar qualifications as the other applicants. This must take into account all the factors listed in the EEA regarding ‘suitably qualified’. This does not mean that the applicant must only be suitably qualified or capable of performing the job in order to have the right to preferential treatment, but should be suitably qualified as well as having similar qualifications to the other applicants. If the candidate from a designated group is similarly qualified to a candidate from a non-designated group and suitably qualified, they should have the right to be chosen over that person. By creating this requirement to obtain the right to preferential treatment, one would prevent frivolous and trivial litigation. By giving the right to do this, it gives affirmative action more power and makes its enforcement more possible. By ensuring all possible avenues of enforcement are being used, one can bring about employment equity far more speedily than without its enforcement.

This submission is, admittedly, a highly idealistic one. However, it is further submitted that employment equity is based on the creation of substantive equality, an idealistic and morally based goal. In order to achieve such an idealistic goal, one needs to allow for strong steps to be taken to promote and endorse these goals. The final submission, therefore, is that affirmative action in South Africa should function as both a shield and sword, though the applicant must first be a ‘master of the blade’ to wield that sword.

5.5 The Continued Existence of the Employment Equity Act

“It is unfortunate that a ‘sunset clause’ was not included in the Act. Even a date in the distant future, say twenty one years from the dawning of the new era in South Africa, would have been a strong affirmation of the belief that the democratic child must ultimately progress beyond puberty to adulthood.”

– G Barker⁷⁴¹

⁷⁴⁰ If a claim is brought against the employer by an unsuccessful applicant, the successful applicant should be joined in the proceedings as they have the right to protect their reputation. See Grogan *Workplace Law* at 298 for a discussion in this regard; and *PSA v Department of Justice & Others* (2004) 25 ILJ 692 (LAC) for a case law example of this.

⁷⁴¹ ‘An Act of Equity’ (2001) *In Camera*, Rhodes University Law Students’ Journal 12 at 12.

5.5.1 Introduction

Affirmative action, according to both the UN Economic and Social Council and the International Labour Organisation is only a temporary measure for correcting the status of a designated group.⁷⁴² For this reason, affirmative action measures should also include some indication as to their temporary nature and to remove any perception that affirmative action measures are, or need to be, permanent.

It is submitted that one of the major flaws of the Employment Equity Act, is that the Act does not foresee its own end. The Act does not have any provisions regarding its removal or even its continued operation in the future. The reason that this is a major flaw is that society does not stand still and, therefore, cannot be governed by legislation as significant as the EEA for an unspecified and lengthy period. The purpose of the EEA is to achieve employment equity and, therefore, it serves a limited function and so, by its very nature, must have some provision for its closure or termination. By having no provisions for its removal, the EEA seems to be an Act that cannot be removed without further legislation brought forward in government by concerned parties.

A comment by Membathisi Mdladlana at a meeting of the Black Management Forum was that “nine years is not a long time. Those who are asking for a sunset clause apparently do not understand this, but racism is ingrained in our society. I was not invited to the

⁷⁴² Buys ‘Why Should Affirmative Action have a Sunset Clause?’ at <http://www.solidaritysa.co.za/Home/wmview.php?ArtID=164> (accessed on 15 May 2006). It was stated by Bossuyt at the United Nations Sub-Commission on the Promotion and Protection of Human Rights that affirmative action was a temporary measure. He said that “Affirmative action is a coherent packet of measures, of a *temporary character* ... Special attention has to be paid to the temporary nature of the measure taken. The simple fact that a category of the population has suffered from disadvantageous economic or social conditions does not mean that, in order to upgrade its material position, any distinction based on the characteristic defining the group should be considered legitimate, even if this ground is irrelevant as a basis of distinction with regard to a particular right.” See <http://www.imadr.org/geneva/2002/SCHR54.Week2.doc> full the full text of Bossuyt’s speech. Emphasis on *temporary character* added by author. Marc Bossuyt is a professor at Antwerp University (Belgium) since 1977 and Chairman of the Sub-Commission on Human Rights. See [www.un.org/law/icc/elections/judges/bossuyt/nominationstatement\(e\).pdf](http://www.un.org/law/icc/elections/judges/bossuyt/nominationstatement(e).pdf) for Bossuyt’s curriculum vitae.

funeral (of racism).”⁷⁴³ The comment is correct in that nine years is not enough time to rectify the discrimination of the past. However, some structure needs to be implemented to deal with the situation in the future when a ‘long time’ has past, what that long time is, is another question.

Adding to the dark cloud hanging over the temporary nature of affirmative action was the rather nebulous response of President Mbeki when being asked about the end of affirmative action. “How long it will be necessary to continue with the affirmative action programmes will depend on how fast we succeed in eliminating this inequality,”⁷⁴⁴ said Mbeki. Although it reiterates the fact that employment equity measures must be of a temporary nature, it still leaves this important question unanswered.

Although one may argue that at a future date, the repeal of the EEA may be discussed, it is submitted that to bring up the topic of a repeal of the EEA would be an arduous task. The proposition would have to be brought up in an extremely tentative manner due to the sensitive nature of the subject. Accordingly, the topic could be ignored for a lengthy period due to its sensitive nature. If this situation were to arise, the EEA would continue when it was unnecessary to do so and, therefore, would lack validity. It would then fall to the courts to determine whether or not the EEA should continue if an action arose regarding the validity of the EEA. It is, therefore, submitted, that the best method of removing the EEA is to include an end clause in the Act itself and, therefore, the sensitive topic regarding its repeal is self-regulated.

There are two possible techniques for the removal of affirmative action that will be put forward in this work. The first alternative is the introduction of a ‘sunset clause’ into the EEA. The second alternative is the introduction of a ‘timetable’ into the Act.

⁷⁴³ Le Roux ‘Affirmative Action To Stay’ at http://www.fin24.co.za/articles/default/display_article.asp?ArticleID=1518-1786_1744333 (accessed 15 May 2006).

⁷⁴⁴ Le Roux ‘Mbeki Rules out Equity Action Sunset Clause’ at <http://www.dispatch.co.za/2003/06/06/southafrica/embeki.html> (accessed on 15 May 2006).

5.5.2 Commission for Analysis of Workplace Representivity

Before the implementation of an end clause for affirmative action, an objective and representative body should be created. This body should be given the task governing the continued existence and eventual removal of affirmative action. The function of this body should be to oversee the process of implementation and the progress of the affirmative action measures and to make recommendations for both continual amendment of the EEA and a date for the repeal of the Act.

This commission should be made up of persons who are suitably qualified to determine whether or not society has reached a state of employment equity or substantive equality. It is submitted that the people best qualified to determine whether or not the correct provisions have prevailed is a body made up of sociologists, industrial relations experts and legal experts.⁷⁴⁵ This body must be required to analyse the current state of society at certain specified periods during the existence of the EEA and should make recommendations on the basis of their findings to the Minister to ensure that the EEA and its affirmative action are amended and / or end at the appropriate time.

The Commission is titled the Commission for Analysis of Workplace Representivity⁷⁴⁶ in this work for ease of identifying the Commission being discussed. This body will be created by the inclusion of a seventh chapter in the EEA. This seventh chapter of the EEA should deal with all the provisions related to the CAWR's role in the continued existence and / or removal of affirmative action in the future. The only changes between the suggested provisions with regard to the two different systems that will be discussed (the sunset clause and timetable) are section 68 and 71. The following is recommended as the seventh chapter to the EEA:

⁷⁴⁵ The qualifications of the individuals from each field that is listed will be discussed in the proposed legislation put forward in this section of the work.

⁷⁴⁶ Hereinafter referred to as CAWR.

CHAPTER VII
THE CONTINUED EXISTENCE OF AFFIRMATIVE ACTION

66. **Establishment of Commission for Analysis of Workplace Representivity.** –
The Commission for Analysis of Workplace Representivity is hereby established.

(Date of Commencement ____)

67. **Composition of Commission for Analysis of Workplace Representivity**

- (1) The Commission consists of a chairperson, who must be a sociologist, and six other persons appointed by the Minister to hold office on a part-time basis
- (2) The members of the Commission must include –
 - (a) Two sociologists⁷⁴⁷;
 - (b) Two industrial relations experts⁷⁴⁸; and
 - (c) Two legal experts⁷⁴⁹.
- (3) The Minister must appoint a member of the Commission to act as chairperson whenever the office of chairperson is vacant.
- (4) The members of the Commission must choose from among themselves a person to act in the capacity of chairperson during the temporary absence of the chairperson.
- (5) The Minister may determine--
 - (a) The term of office for the chairperson and for each member of the Commission, but no member's term of office may exceed five years;
 - (b) The remuneration and allowances to be paid to members of the

⁷⁴⁷ 'Sociologist' should be included as a definition referring to a person with a Doctorate in Sociology.

⁷⁴⁸ 'Industrial Relations Expert' should be included as a definition referring to a person with a Doctorate in Industrial Relations.

⁷⁴⁹ 'Legal Expert' should be included as a definition referring to a person who has worked in the labour law field for over ten years.

Commission with the concurrence of the Minister of Finance; and

(c) Any other conditions of appointment not provided for in this section.

(6) The chairperson and members of the Commission may resign by giving at least one month's written notice to the Minister.

(7) The Minister may remove the chairperson or a member of the Commission from office for--

(a) Serious misconduct;

(b) Permanent incapacity;

(c) That person's absence from three consecutive meetings of the Commission without the prior permission of the chairperson, except on good cause shown; or

(d) Engaging in any activity that may undermine the integrity of the Commission.

(Date of commencement of s. 67: _____)

68. **Functions of for Commission for Analysis of Workplace Representivity—**

(1) The functions of the Commission will vary depending on the system used.

(2) The Minister is required to act in a reasonable manner on the findings and recommendations of the Commission.

(Date of commencement of s. 68: _____)

69. **Staff and expenses --** Subject to the laws governing the public service, the Minister must provide the Commission with the staff necessary for the performance of its functions.

(Date of commencement of section 69: _____)

70. **Public hearings.--**In performing its functions, the Commission may--

- (a) Call for written representations from members of the public; and
- (b) Hold public hearings at which it may permit members of the public to make oral representations.

(Date of commencement of s. 70: 14 May, 1999)

71. Report by Commission for Analysis of Workplace Representativeness.--

The report date will vary depending on the system used.

(Date of commencement s. 71 _____)

The inclusion of section 68 (2) – The Minister is required to act in a reasonable manner on the findings and recommendations of the CAWR – ensures that the findings of the CAWR are taken with the utmost seriousness. This ensures that the Minister cannot ignore their findings, therefore rendering them impotent. If the Minister were able to merely hear their finding and recommendations but was not required to take heed of them, the politics of the day could determine the continued existence of the EEA. By making sure that the CAWR has such powers, the necessary changes to ensure an effective EEA can be made or a situation whereby the EEA becomes unnecessary but continues to exist cannot occur.

5.5.3 A Sunset Clause

One way of limiting the lifespan of the EEA would have been to include a sunset clause. This suggestion is not original to this thesis. “Solidarity recently [in 2004] put forward suggestions about introducing a so-called ‘sunset clause’ to affirmative action, arguing that a foreseeable end to the process should be envisioned.”⁷⁵⁰ However, the plea for the inclusion of a sunset clause in the EEA has so far fallen upon deaf ears. President Mbeki has dismissed the possibility of including a sunset clause in the EEA and believes the Act

⁷⁵⁰ Visser ‘Coming to Terms with the Past and the Present: Afrikaner Experience of and Reaction to the ‘New’ South Africa’ at http://academic.sun.ac.za/history/dokumente/coming_to_terms.pdf (accessed 16 May 2006).

should stay as it is.⁷⁵¹ This dismissal is ill advised, however. The sunset clause is a very necessary provision to include in any Act that should be of a temporary nature.

(a) Definition

A sunset clause is a “provision, inserted in a set of regulations, for the expiry of specified arrangements should certain conditions prevail.”⁷⁵² In other words, if at some point in the future if South Africa reaches a point whereby employment equity and substantive equality can be said to have been reached, affirmative action measures would be required to end.

(b) Should Certain Conditions Prevail

As has been stated in the previous chapters, affirmative action in South Africa is focused on groups and not individuals. Thus ‘the conditions that prevail’ would be that black people, women and people with disabilities as a group achieve a substantive equality to white males as a group. This would have to be decided by an impartial body. Therefore, CAWR needs to look at the position of white males in South Africa as compared to the designated groups with regard to proportions and then determine whether or not the groups are proportionately equal.⁷⁵³

In the case of *United Steel Workers of America v Weber*⁷⁵⁴ the court came to the conclusion that the affirmative action plan under scrutiny did not pose a heavy burden as it “ends when the racial composition of [the employer’s] craft work force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to ‘maintain’ a previously achieved balance.”⁷⁵⁵ This case serves as a good example for South Africa as it highlights: firstly,

⁷⁵¹ Le Roux ‘Mbeki Rules out Equity Action Sunset Clause’.

⁷⁵² Carew ‘The Language of Money’ at http://www.anz.com/edna/dictionary.asp?action=content&content=sunset_clause (accessed on 15 May 2006).

⁷⁵³ Although this description of the ‘certain conditions that should prevail’ may be a simplistic one, it is purposefully done as such. The ‘conditions that should prevail’ is a concept that is extremely difficult to define or ascertain and, for this reason, the qualifications of the members of the CAWR has been set at an extremely high standard across the three fields of expertise.

⁷⁵⁴ 443 US 193 (1979).

⁷⁵⁵ Pretorius *Employment Equity Law* 9-35.

that affirmative action measures are only valid if they are temporary; and, secondly, possible conditions that must prevail for the end of affirmative action programmes.

(c) Continual Amendment

The sunset clause is a good system as it ensures the EEA will come to an end at the appropriate time. However, the sunset clause system cannot work on its own. It is submitted, however, that there will also need to be continual amendment clause. This would allow for the EEA to be constantly amended in order to ensure that it is working as efficiently as possible at all times during its existence. The purpose of continual amendment is to ensure the EEA is not static and that societal development does not overtake the EEA and cause the EEA to be an archaic piece of legislation that does not correctly reflect the problems of society.

As shown by the Malaysian example, flexibility and continual amendment of affirmative action measures is vital to the effectiveness of affirmative action.⁷⁵⁶ Although the NEP implemented stringent affirmative action measures, the government was flexible in the enforcement of these measures when it saw that they were not working.⁷⁵⁷ A good example of this is the ‘growth pause’ suffered by the Malaysian economy in the early 1980s.⁷⁵⁸ “The government confronted this situation realistically, and modified Malay preference policies in such a way as to emphasise the overall priority of promoting economic growth.”⁷⁵⁹ By doing so, the government put the economy, which is important for all people, ahead of helping out one group to the detriment of other groups.

(d) Section 68 and 71

As noted in the proposed legislation above, section 68 and 71 of the EEA would read as follows:

⁷⁵⁶ Refer to Chapter IV of this work for a further discussion on affirmative action in Malaysia.

⁷⁵⁷ Esman ‘Contrary Consequences of ‘Affirmative Action’ In Malaysia in Conflict: Policy Interactions in the Pacific Basin CSIA Discussion Paper, Harvard’ (1991) at http://bcsia.ksg.harvard.edu/BCSIA_content/documents/disc_paper_91_08.pdf (accessed on 21 March 2006).

⁷⁵⁸ Emsley *The Malaysian Experience of Affirmative Action: Lessons for South Africa* (1997).

⁷⁵⁹ Esman ‘Contrary Consequences’ 29.

68. **Functions of the Commission for Analysis of Workplace Representivity—**

- (1) The Commission advises the Minister on—
 - (a) The proportionate representativeness of the workplace;
 - (b) Policy and any other matter concerning the amendment of this Act with regard to its effectiveness to correctly reflect the current requirements and needs of society; and
 - (c) Whether or not conditions have prevailed that require the end of employment equity measures and the Employment Equity Act.
- (2) The Minister is required to act in a reasonable manner on the findings and recommendations of the Commission.

71. **Report by Commission for Analysis of Workplace Representivity.**--The Commission must submit report to the Minister regarding their findings every five years from the commencement of section 71.

As noted, the Commission would not amend the EEA or repeal the EEA itself but would merely propose amendments or the repeal of the EEA to the Minister. This would still have the effect of leaving the power in the hands of the Minister as the Commission merely recommends that the Employment Equity Act be amended or repealed at the sunset clause date. This would leave the power with the legislature and would, therefore, give validity to the process. Although the Commission would only be advisory, the Minister should be required to take serious heed of the Commission's findings. Any action by the Minister to the contrary could bring about an infringement on all peoples right to just administrative action.⁷⁶⁰

5.5.4 A Timetable

(a) Purpose of a Timetable

The purpose of a timetable in an Act is to set a date for its monitoring, amendment and

⁷⁶⁰ Section 33 of the Constitution.

repeal. This means that the Act has certain goals and a time limit in which to achieve these goals. On reaching that time limit set out in the Act, the Act is repealed whether or not these goals have been achieved. Although the Act is repealed, neither the Act nor its goals are forgotten. At the date of repeal, a new Act must be put in place to ensure the goals of the previous Act that have not been achieved, are given some importance and are attempted to be achieved.

(b) The Malaysian Example of Timetables

The Malaysian experience of affirmative action saw the New Economic Policy⁷⁶¹ being established in 1970, with the inclusion of a repeal date set twenty years later in 1990. The NEP had two major goals. The first was to eradicate poverty and the second was to bring about substantive equality for the Bumiputera people. The NEP was only successful in its second goal and poverty was still rife in Malaysia in 1990.⁷⁶² Although one may say that this was a failure of the NEP, it is submitted that the NEP succeeded in that it brought about the more important goal of achieving substantive equality for its designated group – the Bumiputera people. The government can now take further action to bring about substantive equality for all people, regardless of race. The Malaysian government has now undertaken this task with a new policy, the National Development Policy replacing the NEP in 1991 which places “a larger focus on eradicating hardcore poverty, rather than on poverty between races, as undertaken by the NDP.”⁷⁶³

This sets a good example for South Africa. On the date of repeal of the EEA, the government should review the current situation in South Africa and assess the progress, or lack of progress, of less advantaged people. By looking at their situation, new legislation can be produced to achieve substantive equality for all people regardless of race. Although not all people are substantively equal in South Africa, affirmative action is aimed at groups and so if groups are substantively equal at the date of repeal, a new Act with new goals can be passed. However, if the EEA has been unsuccessful, it can be

⁷⁶¹ Hereinafter referred to as the NEP.

⁷⁶² Global Rights ‘Affirmative Action: A Global Perspective’ at www.globalrights.org/site/DocServer/Affirmative_Action_Global_Perspectives.pdf?docID=2623 (accessed on 22 March 2006).

⁷⁶³ De Klerk ‘Affirmative Action in Malaysia’ 4.

re-implemented or can be amended to such an extent that it focuses on all the areas it failed to achieve in its first term.

(c) The Repeal Date

If the EEA were to include a timetable setting out the duration of its existence, the date to be used would be a matter of much controversy. The date that is submitted in this work is twenty-three years into the future from the date of commencement of the EEA. This date is submitted as it allows an individual to attend primary and secondary school, complete an undergraduate degree and complete a one-year post-graduate degree. This means that, at the end of the twenty-three year period of the EEA's existence, all persons who were born on or after the date of commencement have, in theory, never experienced institutionalised discrimination and have experienced the benefits affirmative action. At that stage, the repeal date generation will all be on an equal footing.

The problem with this twenty-three year date is that there will still persons who did suffer discrimination in the past in the employment market. These people would, therefore, not be able to receive the benefit of employment equity when they may still be in need of the benefits of employment equity. This could then lead to a complicated system of people having to be a certain age in order to be eligible to benefit from employment equity measures. The legislature will need to assess all the surrounding factors regarding employment equity and society and establish a uniform date for the EEA to end.

A further problem revolves around the fact that all people are not substantively equal nor is their situation improving during the EEA. An example of this can be shown by the poor quality of many of the schools around the country that children have no option but to attend and, therefore, be caught in a perpetual cycle of substantive inequality.⁷⁶⁴

⁷⁶⁴ These children are still being given an inferior education and are not being given an equal opportunity to succeed. It cannot be said that substantive equality is in place in this situation. Furthermore, one cannot set a finite date as to when a state of substantive equality has been reached for such children. Therefore, these children are still living under a form of discrimination and are not receiving any of the benefits of the EEA and other such corrective legislation. "Conditions under which hundreds of thousands of rural children are expected to learn. Of course they don't expect these remote schools to be the same as those in the cities. But they do expect certain basic standards. Instead, they sometimes find run-down shanty buildings without roofs, sanitation or electricity. Desks, if they exist, are usually old and damaged. And where are the basic

Despite the possibility of such problems, if this system were to be used, the repeal date should be included in the title of the EEA and the title should accordingly read as follows:

EMPLOYMENT EQUITY ACT
NO. 55 OF 1998
[ASSENTED TO 12 OCTOBER, 1998]
[DATE OF COMMENCEMENT 9 AUGUST 1999]
[DATE OF REPEAL 9 AUGUST 2021 (23 years later)]

(d) Section 68 and 71

Although this approach is criticised as not being as effective as a sunset clause, it is still put forward with the necessary changes to the proposed chapter 7 of the EEA. As noted in the proposed legislation earlier in this section, section 68 and 71 of the EEA would read as follows:

68. Functions of for Commission for Analysis of Workplace Representivity—

(1) The Commission advises the Minister on—

- (a) Determine the proportionate representativeness of the workplace;
and
- (b) The current state of society and determine new measures focused on the current disproportionality in the representativeness of the workplace to be included in a follow up Act to this Act, if so required.

(2) The Minister is required to act in a reasonable manner on the findings and recommendations of the Commission.

71. Report by Commission for Analysis of Workplace Representativeness.--The Commission must submit report to the Minister regarding their findings two years prior to the repeal date of the Employment Equity Act.

necessities like books, pencils and paper? Like the children, teachers are frustrated and powerless ... These aren't informal schools we're talking about, but official state schools, supposedly funded by provincial education departments.” See Furlonger ‘Ignorance Is No Bliss For SA's 'Afterthought' Children’ at <http://free.financialmail.co.za/rallytoread/rally2006/mar06.htm> (accessed on 24 August 2006).

As can be seen, one of the functions of the Commission under the timetable system is to review societal changes before the completion and repeal of the EEA. A further function is to propose a new system that focuses on the areas and groups that still require development after the EEA has ended.

5.5.5 Conclusion

“It is clear that the UN and the ILO regard affirmative action as a temporary measure. Permanent discrimination against white males will turn them into second class citizens in their own country.”⁷⁶⁵ By having no end to affirmative action, the past will merely repeat itself and, eventually, it will be white males who will need to be given preferential treatment to allow them to be substantively equal to the rest of South Africa. For this reason, it is submitted that something has to be done to create a system for ending affirmative action. It may not be either of the two systems recommended in this work but it has to be something in order to validate affirmative action in South Africa.

Although continual amendment can be included in the timetable system, this system could cause affirmative action measures to become too rigid. It does not allow for the EEA to end when circumstances necessitate its end but requires it to end at a specific date. The problem with this is that at the end date, the Act may have been required to end sometime ago. The end date is also extremely problematic to determine, as argued in 5.5.4 (d).

Of the two systems put forward by this work, the final recommendation, therefore, is to include a sunset clause in the EEA. It is submitted that this system will be far more effective than it currently is and will bring about results more quickly and more effectively than the timetable system. The sunset clause system ensures that the Act continues – with amendments – till the correct time and not a specific date in the future. Accordingly, the EEA becomes a living Act that truly reflects the needs of society.

⁷⁶⁵ Buys ‘Why Should’.

5.6 Global Lessons for South Africa

Several lessons have been put forward in this work that South Africa has learned and needs to learn. The two countries that were examined were Brazil, Canada and Malaysia. However, affirmative action is a system used in many other countries and there are lessons to be learned from a variety of countries.

5.6.1 Brazil

The inconsistency of the implementation of affirmative action in Brazil is one of its two major downfalls. The Brazilian system's inconsistent approach and implementation can be highlighted best by examining the measures that have been introduced in the past six years, as discussed in chapter IV of this work.⁷⁶⁶

This essentially creates different systems around the country and, therefore, Brazil will never be able to achieve anything on a national scale, which is the goal of their affirmative action measures. The current system would function well as a follow up to an initial system. The initial system should be consistent and implemented at a macro-level which results in the entire country being governed by one set of laws. When this system comes to an end, the problem areas can then be found and affirmative action can be implemented at a micro-level.

The second major downfall is the problem of quotas. South African specifically excludes quotas and this is for good reason. A quota is not an active implementation of affirmative action. Quotas merely set up a required number and leave it at that. By implementing affirmative action in this manner, one does not achieve substantive equality of a high level that is efficient and effective. This system merely creates a cosmetic equality and will have a detrimental effect on the economy as the standard of performance will be low if people are merely given a benefit to make up numbers. It is, therefore, submitted that

⁷⁶⁶ Global Rights 'Global Perspective'.

the South African system of achieving substantive equality far outweighs the Brazilian system and the Brazilian system could learn a lot from South Africa.

5.6.2 Canada

The view put forward in this work regarding the lessons South Africa can learn from the Canadian affirmative action model is an optimistic one. The South African EEA is, essentially, a copy of the Canadian Employment Equity Act.⁷⁶⁷ However, it would seem that the South African Act saw the problems with the CEEA and amended those before introducing the South African EEA. There are, however, two provisions that South Africa did not include that it is proposed should be included. The first is the use of seniority rights as it gives a sense of validity in the minds of non-designated groups regarding the EEA.⁷⁶⁸ The second provision that should be included is the use of employment equity measures in the armed forces; however, this should be included only for the more senior levels of the armed forces of South Africa.

5.6.3 Malaysia

The two most important lessons Malaysia has to teach South Africa are flexibility and economic growth. Flexibility is essential as it ensures that affirmative action measures are not static and, therefore, ineffective when society changes or certain facets and circumstances of society change. Economic growth is even more important as affirmative action can only truly be successful if the economy also increases. Affirmative action, by its very nature, is only valid if it is not detrimental to those people who are not beneficiaries of affirmative action. Therefore, if affirmative action negatively affects the economy, it will be detrimental to the entire country, including the beneficiaries of affirmative action.

⁷⁶⁷ Act c44 of 1995.

⁷⁶⁸ To reiterate, this does not mean that people cannot be dismissed due to their senior status. It means that if a black, female or disabled candidate and white male candidate with ten-years of service in the company apply for the same job, for example, the white male should be preferred due to his senior status. Therefore, the EEA does not merely protect and promote designated groups but has the added protection of all types of people.

5.7 Conclusion: The Most Effective Employment Equity in South Africa

It is submitted that if the changes proposed in this work are implemented into the current Employment Equity Act as it stands today, affirmative action will be far more functional in South Africa. The submissions made also give the courts some definitive interpretations to the EEA that they have failed to make themselves and have left as unanswered questions. Although these submissions are made with humility, they propose some major changes to employment equity law in South Africa. Although the submissions put forward propose amendments of legislation; changes to judicial precedent; have the effect of rendering some judicial precedents null and void; and cause the EEA to have a new interpretation, it is submitted that these changes are necessary.

The proposals of this work are, therefore, put forward in an attempt to fill in the gaps of the current employment equity legislation. This is done in order to have the most effective employment equity measures possible in South Africa to ensure a quick and smooth transition to the substantively equal rainbow nation that was envisaged in 1994.

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Abbreviations of Journal Titles:

NYL School Intl & Comp. L

New Your School of International and Comparative Law

SALJ

South African Law Journal

ILJ

Industrial Law Journal

THRHR

Tydskrif vir Hededaagse Romeins-Hollandse Reg

SA Merc LJ

South African Mercantile Law Journal

CLL

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