

**AFFIRMATIVE ACTION, EQUALITY AND
SECTION 8 OF THE CONSTITUTION**

by

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DECLARATION

I declare that **Affirmative Action, Equality and Section 8 of the Constitution** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

ABSTRACT

The constitutionality of affirmative action in terms of section 8 of Act 200 of 1993 is investigated. The study contends that in constitutional interpretation it is permissible to have recourse to ethical precepts as long as these are anchored within the four corners of the Constitution. It is contended that the "equality clause" does not prescribe equality of outcome in favour of substantive equality of opportunity. It is asserted that group-based affirmative action may justifiably be attacked as being unconstitutional; either on the basis that it infringes the non-beneficiary's equality rights in terms of sections 8(1) and 8(2) or that it falls beyond the constitutional protection afforded to affirmative action in terms of section 8(3). Furthermore, group-based modalities of affirmative action may also not constitute a permissible limitation on the fundamental right to equality, if compared to an individual-based socio-economic affirmative action model.

Key words: Affirmative action, constitution, compensatory justice, discrimination, distributive justice, equality, freedom of choice, liberty, limitations clause, quotas, reverse discrimination, section 8, section 33.

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CHAPTER 1: INTRODUCTION

1.1. Affirmative action: The term affirmative action is used in many different guises and it is not readily apparent what a person means when employing the term. It may indeed be that the context in which and the words chosen to describe whatever the speaker may mean, tell us more about his bias than the actual meaning of the term.¹ In this study affirmative action is viewed as those pro-active and remedial measures designed to bridge the gap between formal equality of opportunity and substantive equality of opportunity. Viewed thus, affirmative action comes to the fore in a society in which the stage has been reached that the law does not discriminate, but societal discrimination and the present effects of past discrimination are still prevalent. The concepts "equality" and "affirmative action" are both susceptible to conflicting interpretations. In a sense the ambiguity that inheres in these concepts is doubly unfortunate, firstly, because of the conceptual confusion this leads to and, secondly, because of the importance attached to these concepts in the public debate (and the capacity to engender a sense of social injustice and to threaten social stability). At the root of the controversy and complexity of the concept affirmative action are differing notions of "equality". For some it may mean the ideal of an egalitarian society and for others a society characterised by the allocation of social goods according to just deserts. Whereas the debate around discrimination appeals to people's sense of justice in arguing for the extension of basic liberties, the denial of which offends against most civilized notions of morality, the affirmative action debate is much less clear cut and forces us to question our stance on some of the most basic questions about social justice and human rights. This may explain the apparent paradox that while people may be in full agreement with the morality of and necessity for affirmative action, they can hold negative opinions on any specific affirmative programme.²

1.2. The controversial nature of affirmative action: *"Affirmative action is a battleground for competing values, especially competing concepts of distributive justice."*³ Libertarianism's claim that merit should be the universal principle of distributive justice can be questioned. Firstly, there is the problem of defining merit⁴ and the influence of culture on the definer of merit which seems to make it a less than

¹For example, "protection against discrimination", "compensatory redress", "preferential treatment" or "reverse discrimination" are all indicative of a certain bias. Starks criticizes the terms "benign discrimination" and "reverse discrimination", "... as an inappropriate and misleading way to describe affirmative action. The goal is not to injure or insult white males or to place them in an inferior status in relation to minorities, but to aid minorities only to a limited degree and in limited circumstances for the purpose of furthering racial equality" [Starks S.L.: "Understanding Government affirmative action and Metro Broadcasting Inc. v FCC" in *Duke Law Journal* Vol. 41, 1992: pp 933-975: p 939].

²Taylor's empirical research shows this to be true for American white males (1991: p 133). Also see Brown D.R. & Gray G.R.: "Not Making EEO the Scapegoat" in *Supervisory Management* May 1990: pp 8-9: p 9: "Surveys show that virtually everyone supports EEO and endorses AA in the abstract. However, when you get down to concrete specifics, ..., that support crumbles."

³Taylor (1991): p xv.

⁴See, for instance, Dworkin's argument that the university's refusal to allow Bakke despite his having higher grades than some of the minority groups who were admitted to the medical school, can be justified on bases other than the traditional notion of merit, that is, the fact that a black could well turn out to be a better doctor in a black community than a white doctor, despite the fact that the latter has "greater merit" as understood by traditional admission policies [Dworkin R. (1978): *Taking Rights Seriously* Cambridge: Harvard University Press (5th Ed): p 230].

objective standard by which to allocate goods. Secondly, there is the inappropriateness of merit as a criterion of distribution in certain circumstances.⁵ Thirdly, the question should be asked whether merit is a socially desirable criterion since it may have undesirable societal consequences.⁶ Fourthly, a further source of controversy is the criteria for defining the distributive values used to guide the allocation of social goods and resources. For Williams, prevailing standards are nothing more than collective, subjective preferences⁷, and are, as such, suspect and open to the challenge that they are reflective of pervasive prejudice. Although there may be consensus about what value shall serve as basis of a distribution, there may be a considerable sense of injustice about the criteria that are used to define the value.⁸ Within a community, affirmative action may enjoy a generally high degree of acceptance, as a value in itself, on which to base job allocations, but there may exist an equally great resistance to the criteria used to identify the beneficiaries of affirmative action (for example group-based criteria versus actual victims of past discrimination).⁹

1.3. Ethical theories and constitutional interpretation: In this section it will be argued that in the context of a constitutional equality provision, ethical theories can play a very important role to inform the Courts. An equal protection clause in a Bill of Rights constitutionalizes the norm of equality, but how are the Courts to give effect to this norm and what is the role of philosophical interpretations of equality in this endeavour, if any? In order to answer this question one first needs to determine how the philosophical discourse on equality differs from that of the judge presiding on a constitutional matter. A proper ethical solution of a problem is not necessarily a permissible legal solution, since courts in arriving at a decision are largely guided by authoritative texts. This results in the constitutional judge being more constrained in his range of permissible options than the philosopher since ethical reasoning

⁵Deutsch M. (1985): *Distributive Justice: A Social-psychological Perspective* New Haven: Yale University Press: pp 29-30.

⁶... I believe we must begin to challenge the assumptions underlying the competitive, meritocratic ideology of our society. ... Finally, we must raise the central question: if the competitive grading system in our schools – a less corrupted version of a competitive merit system than the one that characterizes our larger society – does not foster a social environment that is conducive to social well-being and effective social control, why would one expect that such values would be fostered in a society that is dominated by a competitive, meritocratic ideology? If the competitive-hierarchical atmosphere is not good for our children, is it good for us? [Deutsch (1985): p 221].

⁷Standards are concrete monuments to socially accepted subjective preference" (Williams P.J.: *The Alchemy of Race and Rights* Cambridge: Harvard University Press, 1991: p 99). These sentiments are echoed by Asmal in a paper delivered at the 5th Annual Labour Law Conference held in Durban from 16 to 18 July 1992 (Asmal K.: "Affirmative Action or Not?" unpublished paper Durban 1992.)

⁸There are also different ways of evaluating equality in the same homogeneous space, using distinct methods of measuring inequality. Variations in inequality indicators in a given space (e.g. coefficient of variation, Gini coefficient, standard deviation of logarithms, measures of entropy) have been extensively discussed in the literature. The ideas underlying the discipline of measurement vary greatly among the different measures, and while many of these ideas have good reasons behind them, they often conflict with each other. Different features of basal equality can, therefore, suggest different rankings of particular situations" [Sen (1992): p 132].

⁹Interestingly, Taylor found in his research that whereas affirmative action as an abstract generalization enjoys high acceptance among white male Americans, there is considerable resistance to specific affirmative action programmes [Taylor (1991): p 133].

differs from legal reasoning in not starting with some authoritative text.¹⁰ This difference in ethical enquiry and legal reasoning leads one to the question of constitutional interpretation.¹¹ One of the interpretive methods¹² is "value arguments" that make claims about justice, morality and/or social policy. It has been claimed that value arguments have an accepted role in cases involving constitutional language, such as the equal protection clause, whose meaning is essentially contestable and has a valuative component.¹³ To the extent that value arguments are accepted as permissible, ethical arguments may play a significant role in constitutional interpretation. This may be especially apposite in cases where it is difficult to apply the other methods of constitutional interpretation, for instance, where the text is general and vague, the intent of the framers difficult to ascertain, constitutional theory indeterminate and no relevant precedents exist. According to Dworkin the equal protection clause of the Fourteenth Amendment constitutionalizes the concept of equality without offering any specific conception of it.¹⁴ Rosenfeld argues that likewise the other preconditions for permitting a valid recourse to value arguments are present (in the absence of a relevant precedent in a particular case, of course) in the equal protection provision.¹⁵ Furthermore, in the case of precedents he points out that the judge has three competing views¹⁶ of equality to choose from, thus once again, leaving ample latitude for ethical considerations to inform the judge's choice.

The conclusion then is that ethical arguments may legitimately be used in the interpretation of an equality provision in a Bill of Rights. This conclusion is unremarkable if one remembers that a constitution is a value laden document rather than a rule book and hence requires an interpretive approach vastly different from the positivistic or literal approach traditionally followed by our courts when interpreting ordinary legislation.

1.4. Individual-based socio-economic model: Throughout this paper reference is made to an "individual-based socio-economic" model of affirmative action, it being offered as a better alternative

¹⁰Rosenfeld M. (1991): *Affirmative Action And Justice: A Philosophical and Constitutional Inquiry* New Haven: Yale University Press: p 137.

¹¹Fallon [cited in Rosenfeld (1991): pp 138-139] identifies five constitutional interpretive methods: the text of the constitution; the intent of the framers; arguments of constitutional theory; judicial precedent; and value arguments.

¹²Op cit.

¹³Rosenfeld (1991): p 139.

¹⁴Cited in Rosenfeld (1991): p 141.

¹⁵Rosenfeld (1991): pp 141-143.

¹⁶Rosenfeld (1991): pp 141-144. These are: (i) that the Constitution requires colour-blindness; (ii) that race-conscious classifications are justified only when compelling government interests are at stake; and (iii) that there are no limitations against using racial preferences aimed at removing the present effects of past discrimination.

than group-based programmes. This model rejects group-based modalities of affirmative action and is based on the premise that affirmative action's objective is to assist individuals in their pursuit of their rational life plans (rather than to promote group interests, which are served indirectly by assisting individuals). Operationalization of the model would entail identifying indicia of socio-economic deprivation (of which race, gender, etc would be important components) and calculating a compound score for individuals. Employers and other dispensers of social goods would be allowed the freedom to promote the interests of whomever they prefer, but rewards will be attached to the promotion of the disadvantaged in direct proportion to the degree of socio-economic deprivation. This model is fundamentally egalitarian but preserves and promotes freedom of choice in the interest of effectiveness and productivity. It is further assumed that equality as a constitutional ideal does not find its moral base in notions of past discrimination or compensatory justice, nor does it need to be of temporary duration. Affirmative action is a distributive justice issue and is necessary simply because our Constitution directs us to strive to eradicate inequalities, whatever their causes; but this does not mean that the Constitution permits us to employ any means towards that end. It is admitted that the implementation of this model presents formidable practical challenges. These, however, can be met, and, if the proposed National Educational Framework is taken as a comparator, the individual-based socio-economic model is but an extension of the idea that people should have a right to development and that those who assist them in this should be awarded accordingly and appropriately.

I wish to end this introductory chapter with a general observation on the South African debate on affirmative action. It never ceases to amaze me that in the affirmative action debate, South Africans, in their search for an appropriate model for South Africa, persist in using the rather dismal history of affirmative action in the US as a referent, apparently failing to appreciate the vastly different political and demographic situations prevailing in the two countries. The fact that affirmative action is currently facing severe headwinds in the US body politic and from the American public in general, does not necessarily mean that the same will happen in South Africa. In the US it is the political powerful majority group who granted affirmative action benefits to the black minority, and who, by the same token, can take them away. In South Africa it is the black majority who can initiate affirmative action legislation in favour of their own group and who would, as a matter of practical politics, find it extremely difficult, if not impossible, once introduced, to withdraw these benefits. It is in such a situation where the drawing of the constitutional boundaries of affirmative action is of particular importance to restrain the politically powerful from following their natural inclinations to favour their constituency irrespective of the harm this may cause to the interests of minority groupings and society as a whole.

CHAPTER 2: THE CONCEPT "EQUALITY"

2.1. INTRODUCTION

The concept "equality" has since the earliest of times¹ been used in a variety of ways and normally in a context that implies that it is a fundamental element of justice. While justice has many manifestations, we are concerned with distributive justice² when analysing the equality provision of a constitution.³ However, there seems to be little agreement as to what is meant by the concepts of equality and justice.⁴ One of the earliest definitions of justice holds that to treat equals equally and unequals differently encapsulates the essence of justice.⁵ But this simply begs the question since one's system of classification of "equals" and "unequals" and the consequences of this classification will determine the fairness of the awards and punishment attached to these classifications. For instance, to classify people as "black" or "white" may not be intrinsically reprehensible, but to make the distribution of social goods and civil liberties contingent upon the classification may well be grossly unfair. Neither is the prior problem addressed by the Aristotelian equation, namely the problem of relevant classifications that is central to the philosophy of equality.

The incommensurability of the opposing sides in the affirmative action debate is based on fundamental disagreements about the meaning of such concepts as "equality" and "justice"; both sides proclaim their allegiance to the ideal of equality.⁶ This traditional liberal-libertarian-socialist debate has been criticized by, for instance, the relational feminist movement⁷ for remaining imbedded in (and thus limited to) a (white) male cultural paradigm. The atomistic view of persons as individuals in society can, to my mind, justly be attacked from a communitarian perspective as not necessarily the only or the best narrative

¹From the Stoic philosophers to the Hebraic and Christian idea of equality before God. See Russel B. (1979): *History of Western Philosophy* London: George Allen & Unwin for an excellent review of the different historical strands that constitute our philosophical tradition. Also Griffith W.B.: "Equality and Egalitarianism: Framing the Contemporary Debate" In *Canadian Journal of Law and Jurisprudence* Vol. VII, No. 1, January 1994: pp 5-26.

²For the purposes of this study "distributive justice" can be defined as those values, criteria and rules used in deciding the manner in which social goods should be allocated.

³Torke J.W.: "The Judicial Process in Equal Protection Cases" in *Hastings Constitutional Law Quarterly* Vol. 9, 1982: pp 279-349: p 333.

⁴"Equality is a popular but mysterious political ideal. People can become equal (or at least more equal) in one way with the consequence that they become unequal (or more unequal) in others. ... It does not follow ... that equality is worthless as an ideal. But it is necessary to state, more exactly than is commonly done, what form of equality is finally important" [Dworkin R.: "What is Equality? Part 1: Equality of Welfare" in *Philosophy and Public Affairs* Vol. 10, No. 3, 1981: pp 185-246: p 185].

⁵This led to the use of the "similarly situated" test in the US and Canada. See Albertyn C. & Kentridge J.: "Introducing the Right to Equality in the Interim Constitution" in *South African Journal on Human Rights* Vol. 10, Part 2, 1994: pp 149-178: p 153.

⁶Rosenfeld M. (1991): *Affirmative Action And Justice: A Philosophical and Constitutional Inquiry* New Haven: Yale University Press: pp 2-3.

⁷Koggel C.M.: "A Feminist View of Equality and Its Implications for Affirmative Action" in *Canadian Journal of Law and Jurisprudence* Vol. VII, No. 1, January 1994: pp 43-59.

of social man.⁸ Acceptance of competing views of the relationship between individuals and society⁹ can have profound implications for our view of such fundamental concepts as property rights,¹⁰ rights and duties and equality.¹¹ These topics are, however, so wide-ranging and, since they are not amenable to superficial treatment, I shall not attempt to deal with them here, save for giving one example. By way of contrast with the orthodox libertarian conception of property rights, the modern tendency is towards a restriction of property rights in what has been referred to as the "socialization of property".¹² Jordaan¹³ describes this process as follows: "Socialization' of law entails the adjustment of conflicting interests in society through the subordination of the individual's interests to those of society at large. In relation to property, it entails a shift away from an individualist 'and basically exploitive' perception of property rights towards the notion that property is a social responsibility. The underlying premise is that the institution of property is derived from and protected by society, i.e. it is a social institution and may be made to serve particular social objectives. This is accomplished through 'public law' regulation of the use and application of property resources. 'Absolute' rights are replaced by rights qualified to suit the needs of society best. ... Legal rules do not exist in a vacuum but are tied to the social system within which they operate." The preceding reasoning can validly be used to justify further intrusions into managerial prerogative, for instance, to achieve the goals of affirmative action and equality.

2.2. ANALYSING THE CONCEPT 'EQUALITY'

The bland assertion that "blacks or women should be treated equally" may be interpreted in a variety of ways, depending on what notion of equality the speaker has in mind. In the analysis such a statement

⁸Gochnauer M.: "Critical Notice: Myth, Misogyny and Male Neurosis" in Canadian Journal of Law and Jurisprudence Vol. VI, No. 1, January 1993: pp 153-167.

⁹See, for instance Andrews J.S.: "Liberal Equality and the Justification of Multicultural, Civic Education" in Canadian Journal of Law and Jurisprudence Vol. VII, No. 1, January 1994: pp 111-126.

¹⁰See for instance, MackInnon K.A.B.: "Giving It All Away? Thomas Reid's Retreat from a Natural Rights Justification of Private Property" in Canadian Journal of Law and Jurisprudence Vol. VI, No. 2, July 1993: pp 249-285; Waldron J.: "Property, Justification and Need" in Canadian Journal of Law and Jurisprudence Vol. VI, No. 2, July 1993: pp 185-215; Singer J.W. & Beerman J.M.: "The Social Origins of Property" in Canadian Journal of Law and Jurisprudence Vol. VI, No. 2, July 1993: pp 217-248.

¹¹See, for instance Koggel C.M.: "A Feminist View of Equality and Its Implications for Affirmative Action" in Canadian Journal of Law and Jurisprudence Vol. VII, No. 1, January 1994: pp 43-59; Jacobs L.A.: "Equal Opportunity and Gender Disadvantage" in Canadian Journal of Law and Jurisprudence Vol. VII, No. 1, January 1994: pp 61-71; Nzegwu N.: "Gender Equality In a Dual-Sex System: the Case of Onitsha" in Canadian Journal of Law and Jurisprudence Vol. VII, No. 1, January 1994: pp 73-95.

¹²Jordaan in Rycroft A. & Jordaan B. (1992): A Guide to South African Labour Law Kenwyn: Juta & Co. Ltd. (Second Edition): p 15.

¹³ibid: pp 16 - 17.

the following questions need clarification¹⁴:

- (i) For whom is the assertion of inequality/equality to hold (the "subject of equality")?
- (ii) With respect to what is equality being claimed (the "domain of equality")?
- (iii) Is an equal distribution of some social goods or an equal distribution of an opportunity to acquire those goods, being claimed ("equality of opportunity or means")?
- (iv) By what standards are the assertion of inequality/equality asserted (the "metric of equality"¹⁵)?

Returning to the statement "*blacks and women must be treated equally*", we can see, in the light of the above four questions, that it is such a vacuous statement that none of egalitarians, liberals, or libertarians¹⁶ will have a problem in endorsing it. The real focus of disagreement will be uncovered when liberals and libertarians are asked to reach agreement on each of the above questions.

2.2.1. The subject of equality: As I shall be returning to this question when discussing section 8 of the Constitution, I am not dealing with this question in any detail, save to say that the assumption that equality enhancing interventions should be founded upon a group-based notion of affirmative action is fallacious. It may well be argued that these notions of affirmative action are unconstitutional if compared to a more narrowly tailored means such as an individual-based socio-economic model of affirmative action.¹⁷

2.2.2. The object/domain of equality: In this section it will be argued that the proper question is not "why equality?" or "equality versus egalitarianism",¹⁸ but "equality of what?". All normative theories of the "just society" that have stood the test of time have one characteristic in common, namely that they

¹⁴These analytical questions have been formulated by, among others Griffith and Sen. The subsequent discussion in the text is heavily indebted to these two authors. [See Griffith W.B.: "Equality and Egalitarianism: Framing the Contemporary Debate" in *Canadian Journal of Law and Jurisprudence* Vol. VII, No. 1, January 1994: pp 5-26; and Sen A. (1992): *Inequality Reexamined* New York: Oxford University Press Inc: p ix.]

¹⁵This term is borrowed from Dworkin. See his series of articles on equality. [Dworkin R.: "What Is Equality? Part 1: Equality of Welfare" in *Philosophy and Public Affairs* Vol. 10, No. 3, 1981: pp 185-246; Dworkin R.: "What Is Equality? Part 2: Equality of Resources" in *Philosophy and Public Affairs* Vol. 10, No. 4, 1981: pp 283-345; Dworkin R.: "What Is Equality? Part 3: The Place of Liberty" in *Iowa Law Review* Vol. 73, 1987: pp 1-54.]

¹⁶I do not put forward definitions of these terms, but the following should give a sense of what I mean by them: an "egalitarian view" could be associated with some form of socialism which holds that equality in some material respect is desirable (e.g. welfare or income, hence "welfare egalitarians" and "income egalitarians"); a "libertarian view" would subscribe to the pre-eminence of the individual and the inviolability of individual rights and the minimal state (Nozick is the obvious example); a "liberal view" could be associated with "social market" economies and legal philosophers such as Rawls (it is roughly the view that individual and communitarian considerations should both be considered).

¹⁷See Chapter 1.

¹⁸Since all enduring theories of social justice are "egalitarian", as explained in the text *infra*.

demand equality of "something",¹⁹ that something being central to a particular theory.²⁰ Utilitarians demand equal weights on the utilities of all, libertarians insist on equal enjoyment of civil rights and liberties for all, income and welfare egalitarians regard equal incomes and equal welfare levels, respectively, as indispensable for the just society. Therefore, to characterise the controversy over equality as one involving those who are against equality versus those who are for equality is "... to miss something central to the subject."²¹ For instance, a libertarian would have no objection in principle to equal incomes given a certain set of prevailing circumstances and provided that equal enjoyment of individual rights and liberties is not compromised. Insisting on equality in respect of a particular variable that is central to a given theory of social justice of necessity entails tolerating inequalities in competing variables. For instance, a libertarian cannot demand equal enjoyment of rights and liberties and insist on the pre-eminence of the merit principle and at the same time insist on equality of income levels. The dispute between egalitarians and libertarians in truth therefore resides not in the concept of equality but in identifying the central social variable that should be given priority over competing socially desirable arrangements. Human diversity will inevitably cause that equality in one respect will give rise to inequality in another.²² Ethical theories typically try to justify inequalities in the peripheral variables by pointing to equality in the focal variable which it is proposed is the most important equality in terms of a particular ethical theory.²³ The question is therefore: what focal variable is central to section 8 of our Constitution?

2.2.3. Equality of opportunity or equality of means: In this section two broad issues are addressed, namely, the meaning of the much used phrase "equality of opportunity" and human diversity in capacity to achieve versus equality in freedom to achieve. Before turning to the main topics of this section some brief comments on the relationship between equality and freedom are apposite.

¹⁹John Rawls ("equal liberty" and equality in the distribution of "primary goods"); Ronald Dworkin ("treatment as equals" and "equality of resources"); Thomas Nagel ("economic equality"); Robert Nozick (*extensive liberties "equality guaranteed to each"*).

²⁰The ubiquity of "egalitarianism" in all social theories can be explained by the fact that a theory, in order to endure, must possess some ethical plausibility. This is difficult to obtain unless everyone is given equal consideration in respect of something.

²¹Sen A. (1992): *Inequality Reexamined* New York: Oxford University Press Inc: p lx.

²²The differences in focus are particularly important because of extensive human diversity. Had all people been exactly similar, equality in one space (e.g. incomes) would tend to be congruent with equalities in others (e.g. health, well-being, happiness). One of the consequences of 'human diversity' is that equality in one space tends to go, in fact, with inequality in another" (*Ibid*: p 20).

²³Indeed, it is equality in that more important space that may then be seen as contributing to the contingent demands for inequality in the other spaces. The justification of inequality in some features is made to rest on the equality of some other feature, taken to be more basic in that ethical system. Equality in what is seen as the 'base' is invoked for a reasoned defence of the resulting inequalities in the far-flung 'peripheries' [Sen (1992): p 19]. And "(t)he answer we give to 'equality of what?' will not only endorse equality in that chosen space (the focal variable being related to the demands of basal equality), but will have far-reaching consequences on the distributional patterns (including necessary inequalities) in the other spaces. 'Equality of what?' is indeed a momentous – and central question" [Sen (1992): p 21].

Equality versus liberty: Equality and liberty are often presented as mutually exclusive ends, or at least as sharing an inverse relationship. Libertarians such as Nozick are seen as anti-egalitarian primarily because of the priority they attach to liberty. This way of viewing the relationship between liberty and equality is erroneous since it is based on a category mistake since "(l)iberty is among the possible fields of application of equality, and equality is among the possible patterns of distribution of liberty. ... the need to face explicitly the choice of space is an inescapable part of the specification and reasoned evaluation of the demands of equality. There are, at one end, demands of equal libertarian rights only, and at the other end, various exacting demands of equality regarding an extensive list of achievements and also a corresponding list of freedoms to achieve."²⁴ Equality and liberty need not be mutually exclusive, although there will frequently be a tension between them, depending on the means employed to promote these two values.

"Equality of opportunities": Equality of opportunity is one of the touchstones of distributive justice (and hence the need for anti-discrimination laws to restore this state of equal opportunities, as a first step towards equality). Since opponents of affirmative action enlist the equal opportunity principle to support their opposition²⁵ as well as proponents to bolster their arguments²⁶, it is necessary to analyse this concept in greater detail.²⁷ The concept of "opportunity" implies a freedom to do or participate in something; freedom in turn implies the absence of obstacles or restrictions. In order to distinguish between freedom and opportunity, something more than the absence of obstacles or restrictions is necessary, otherwise "opportunity" and "freedom" would be synonymous. The additional element that distinguishes "opportunity" from "freedom" is the fact that the person presented with an opportunity must exert a choice as well as invest some effort in order to make use of the opportunity.²⁸ These active elements of the concept of "opportunity" also distinguish it from "chance" in that the latter implies that there is a certain probability of the person obtaining some reward or not, irrespective of his own exertions. The concept of equal opportunity can now be defined as follows:²⁹ *The opportunities of persons X and Y are equal in respect of some goal, A, if they face the same obstacles in attaining A.* From this definition it is clear that two things need to be equalized, that is "opportunities" and "obstacles". Supposing that we place a duty on society to provide equality of opportunity, the following

²⁴*ibid*: pp 22-23.

²⁵Affirmative action amounts to favouritism, reverse discrimination, and as such is subversive of the equal opportunity principle.

²⁶Preferential measures are necessary to achieve true equality of opportunity.

²⁷This analysis is based on Fullinwider [Fullinwider R.K. (1980): *The Reverse Discrimination Controversy: A Moral And Legal Analysis* Totowa, New Jersey: Rowman And Littlefield: pp 97-109].

²⁸Although opportunity arises when some obstacles to achievement are removed, other obstacles, needing effort to overcome them, will still remain. Opportunities can be grasped or let pass, seized or squandered. The agent must decide. It is an essential part of something's being called an opportunity that both an agent's choices and efforts are called for [Fullinwider (1980): p 97].

²⁹Fullinwider (1980): p 97.

questions arise: (i) equalize opportunities in respect of what goals?; and (ii) equalize in respect of what obstacles? It is clear that it would be unattainable and unreasonable to expect society to equalize all goals for every individual, given the unique and different attributes of people. Similar problems present themselves when we turn to the equalization of obstacles: not all obstacles can be equalized, nor can a duty be placed on the community to equalize.³⁰ A further problem with the equalization of obstacles is how to determine when an obstacle can be regarded as equal. Does it mean that the task (that is, the obstacle to be overcome) should be the same or that a similar amount of effort should be required from both individuals?³¹ It seems as if the notion of equality of opportunity³² is too open to conflicting interpretations to serve without more ado as a basis for distributive justice.³³

Human diversity in capacity to achieve versus equality in freedom to achieve: The equality debate can be analysed in terms of two types of diversities: (i) the innate diversity of human beings;³⁴ and (ii) the multiplicity of variables in respect of which equality can be demanded. In the preceding discussion I reviewed some of the variables involved in the latter question. I now turn to human diversity. A person's position in society can be evaluated from two different perspectives, namely (i) his freedom to achieve, and (ii) his actual achievement. Likewise, inequality can be evaluated in terms of actual achievement or the real opportunity (freedom) to achieve. These two variables need not be congruent since people's ability to convert a freedom into actual achievement will vary depending on their innate abilities, dispositions, et cetera. In evaluating the social justice of a particular community it will therefore make a great difference whether we distinguish between achievement and freedom when applying the equality criterion. Some social theories, such as utilitarianism, focus exclusively on achievement while affording freedom only an instrumental value. The exclusive focus on achievement has recently been challenged by a shift of focus towards the means to achievement rather on achievement as such.³⁵ Since the degree of freedom a person enjoys is a function of the means at his disposal, the shift from evaluating

³⁰For example, a person brought up in a household in which achievement and qualifications are highly prized may have an advantage over someone brought up by parents who did not inculcate these norms. Can society be expected to provide a surrogate, for the parental support the former would receive from his family, for the latter person? It has been argued that Rawls's theory requires the abolition of the family as a social institution to attain greater equality of opportunity.

³¹The latter interpretation may, for instance, entail that society must provide a disabled person with the means to compete with an able-bodied person without the former having to exert any more effort than the latter.

³²Fullinwider (1980: pp 101-109) discusses two forms of equality of opportunity, which he calls "formal equality of opportunity" (FEO) and "liberal equality of opportunity" (LEO). He defines FEO as: "X and Y have equal opportunity in regard to jobs so long as neither faces a legal or quasi-legal barrier to employment the other does not face." (*ibid*: p 101) And LEO as: "X and Y have equal employment opportunities when neither faces a total package of educational, legal, and market barriers which is distinctly greater than the package faced by the other" (*ibid*: p 108).

³³The principle can be interpreted to permit, forbid or require preferential hiring.

³⁴The importance that Sen (1992) places on the reality of human diversity is a recurring theme in his work.

³⁵Sen (1992): p 33. Examples are the Rawlsian concern with the distribution of "primary goods" and the Dworkinian focus on the distribution of "resources".

a person's social position in terms of actual achievement towards his command over resources, entails a shift from achievement to the means of freedom.³⁶ Freedom must therefore not be confused with the means to freedom since there exists great diversity in people's ability to convert primary goods or resources into achievements.³⁷ From this it follows that *"... comparisons of resources and primary goods cannot serve as the basis for comparing freedoms."*^{38,39}

2.2.4. The metric of equality: The measurement of equality must pose some of the most daunting tasks for anyone trying to formulate a coherent theory of affirmative action. The fact of vast inequalities in our society cannot be disputed, but how to quantify these disparities in a way consistent with theory is a difficult problem. On a practical level one could simply take figures from the government's Department of Central Statistical Services and the annual report of the Department of Labour and infer from these that there are inter-group differences based on gender or race. Apart from the problem that at present these sources of statistical information do not cover all the protected categories mentioned in section 8 of our Constitution⁴⁰, there is a much more serious objection to this approach. In general terms this objection relates to peoples' differential ability to convert freedoms and means into well-being as well as the influence of cultural differences on peoples' life choices (discussed in the previous section). From a theoretical viewpoint, the statistical approach will not reflect people's differential capacity to achieve and will thus not fit very well with a conception of equality based on equality of welfare.⁴¹

The importance of cultural diversity and its effects on life choices, such as the selection of a career, are sometimes scoffed at or downplayed by lawyers.⁴² Why this is so is not difficult to understand. Once one has constructed a neat theory in terms of which the differences between groups are explained by

³⁶*ibid*: pp 36-37.

³⁷*Equality of freedom to pursue our ends cannot be generated by equality in the distribution of primary goods. We have to examine interpersonal variations in the transformation of primary goods (and resources, more generally) into respective capabilities to pursue our ends and objectives. If our concern is with equality of freedom, it is no more adequate to ask for equality of its means than it is to seek equality of its results. Freedom relates to both, but does not coincide with either" (Sen (1992): p 87).*

³⁸*ibid*: p 38.

³⁹*Resources are important for freedom, and income is crucial for avoiding poverty. But if our concern is ultimately with freedom, we cannot – given human diversity – treat resources as the same thing as freedom. Similarly, if our concern is with the failure of certain minimal capabilities because of lack of economic means, we cannot identify poverty simply as low income, dissociated from the interpersonally variable connection between income and capability. It is in terms of capability that the adequacy of particular income levels has to be judged" (ibid: p 112).*

⁴⁰*The categories listed in s 8(2) are 'race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language'.*

⁴¹*Dworkin R.: "What is Equality? Part 1: Equality of Welfare" in Philosophy and Public Affairs Vol. 10, No. 3, 1981: pp 185-246.*

⁴²*See for instance Smith (1995).*

one variable only, namely unfair discrimination,⁴³ then it would not do to allow for a nuisance variable such as culture to confuse the measurement of equality/inequality. Ignorance of the profound and enduring effects that cultural variables have on people's ability to compete successfully for jobs and educational opportunities (or to downplay its importance by saying that culturally determined values are easily changed⁴⁴) do not, however, refute the empirical evidence in contradiction to this.⁴⁵ Just to name a few examples of instances where the facts confuse (and are therefore rejected by people such as Fiscus and Smith) the neat discrimination-as-only-explanatory-variable hypothesis: Afrikaners had, after eighty years of vigorous, government driven affirmative action not reached economic parity with English-speaking South Africans although they were a relatively small group who could suppress the blacks and exploit the country's resources and large industries.⁴⁶ Should one use Fiscus' theorem and compare the Afrikaner group with their English compatriots as a group, one would have to reach the conclusion that the Afrikaners were discriminated against over the past eighty years! In a study of the persistence of skill, educational and income differentials over generations of immigrants to the US the conclusion was reached that "... ethnicity matters, and it matters for a very long time."⁴⁷ A last example can be extracted from the phenomenon that Jews, irrespective of their country of residence, tend to overachieve relative to their proportion of the total population of their host country.⁴⁸ I am by no means trying to assert that socio-economic factors do not play a determinative role in achievement or to introduce a race superiority theory by the back door into the debate. As far as race as determinant of cognitive abilities is concerned, there is no scientific proof of this.⁴⁹ That a group's socio-economic status can and will influence scores on general intelligence tests are well documented. For instance, Afrikaner school children as a group used to score consistently and significantly lower on intelligence tests than their English counterparts. To infer an inherent inferiority from this would have been erroneous: this difference in scores has been obliterated by the Afrikaners' subsequent socio-economic

⁴³This is the central thesis of Fiscus [Fiscus R.J. (1992): The Constitutional Logic of Affirmative Action London: Duke University Press].

⁴⁴As Smith does [(1995): p 100].

⁴⁵The fact that lawyers are not trained in the scientific method common to the hard sciences is also a major contributing factor. A natural scientist will start from discreet observations from which he will deduce hypotheses to be subjected to empirical verification and application to new phenomenon (the so-called deductive-hypothetico-inductive method). To come to the truth through pure reason rather than by way of empirical observation would strike the natural scientist as strange indeed.

⁴⁶See Peron J. (1992): Affirmative Action, Apartheid and Capitalism, FMF Paper #9: Johannesburg.

⁴⁷Borjas G.J.: "Long-run Convergence of Ethnic Skill Differentials: The Children and Grandchildren of the Great Migration" in Industrial and Labor Relations Review Vol. 47, No. 4, July 1994: pp 553-573: p 572. Borjas concludes that it might take four generations, or roughly 100 years, for these differentials to disappear (*op cit*).

⁴⁸Williams points out that Jews, who only constitute 2 % of Americans, account for 25% of winners of Nobel prizes. Williams provides the following further examples: American blacks constitute 12% of the population, but represent 75% of professional basketball, 60% of professional football and 17% of professional baseball players [Williams W.E.: "False Civil Rights Vision and Contempt for Rule of Law" in The Georgetown Law Journal Vol. 79, 1991: pp 1777-1782: p 1778].

⁴⁹In general, see Block N. & Dworkin G. (Eds) (1977): The IQ Controversy London: Quartaed Books.

upliftment. The point is that ethnicity⁵⁰ is of significant practical importance when making inter-group comparisons. This is in addition to discrimination, and not in refutation of the discrimination hypothesis to account for inter-group differentials.

Returning to the question of achieving and measuring equality I wish to point to another reason why this is of more than practical importance, and indeed goes to the heart of the moral justification of affirmative action perceived as a remedial measure for past societal wrongs. It is of some importance that all South African writers⁵¹ feel compelled at some stage to mention that affirmative action is of a temporary nature only. The reason for this is straightforward: if one wishes to justify affirmative action as a means to rectify a wrong, the rationale for the preferential intervention should logically come to an end at some time in the future, even if it is 100 years hence.⁵² I do not see affirmative action as merely a temporary remedy. Properly viewed it should be seen as an ongoing corrective for society's tendency to discriminate against non-dominant groups.⁵³ Politicians also find it useful to sell affirmative action to the majority on the basis that it is a temporary remedial device for past injustices. But is this true or do such programmes have a natural tendency to become permanent?⁵⁴ Opponents of affirmative action cite India, Malaysia and Pakistan as instances where preferential programmes with legally mandated cut-off dates have continued far past those dates by subsequent extensions.⁵⁵ Even supporters of affirmative action concede that privileges once enjoyed are not easily removed, even in situations where the political majority has conferred these privileges and in theory can withdraw them: as is the case in America, political exigencies militate against this.⁵⁶ Also, because of the different ways in which inequality can be measured and the different types of equalities present in society it is doubtful whether the ideal state of equality will ever be achieved,⁵⁷ or, for that matter, will be recognized, if achieved

⁵⁰And the concomitant cultural values identified with a specific group.

⁵¹Or at least, I have not come across anyone questioning the temporary nature of affirmative action (I may be wrong in this).

⁵²Borjas [(1994): p 572]: concludes that it might take four generations, or roughly 100 years, for these differentials to disappear. I do not share this optimistic time schedule of the expiry date of affirmative action in South Africa.

⁵³See the discussion in the text. Also see the discussion of "atomized and generalized conceptions of discrimination" under Section 3.5.1. *infra*.

⁵⁴"Affirmative action policies often addressed the needs of the aspiring middle classes to the neglect of policies and programmes aimed at the needs of the lower social classes" [Weiner M.: "Affirmative Action: The International Experience" in Urban Foundation Publication: *Development and Democracy* 4 May 1993: pp 1-15: p 12].

⁵⁵Peron J. (1992): *Affirmative Action, Apartheid and Capitalism*, FMF Paper #9: Johannesburg: p 4.

⁵⁶Sloot (1986): pp 284-285; Fullinwider (1980): pp 248-249. Also see Thompson's discussion of affirmative action in Malaysia and India. [Thompson C.: "Legislating Affirmative Action: Employment Equity And Lessons From Developed And Developing Countries" in Adams C. (Ed) (1993): *Affirmative Action in a Democratic South Africa* Kenwyn: Juta & Co. Ltd.: pp 21-46].

⁵⁷"The need to admit incompleteness in inequality evaluation is inescapable, and there is much to be said for addressing that question explicitly rather than in grudgingly implicit ways ... Babbling is not, in general, superior to being silent on matters that are genuinely unclear or undecided ... Those who see equality as a clear, articulate, and decisive arbitrator of every social or political dispute would find this position particularly unattractive" [Sen (1992): p 134].

(thereby also pointing to the logic of admitting the permanency of affirmative action).

2.2.5. The limits of the pursuit of equality of outcome: The question may be asked whether it is true that, if it is axiomatic that in a straight conflict between freedom and equality, freedom must lose (as Dworkin asserts⁵⁸) and considering the overriding importance our Constitution confers on equality, that any means to equality will be constitutional? The answer to this question must be an emphatic "no". We may be able to ascertain the broad contours of the limits placed on the pursuit of equality by way of a few examples. It has been said that true equality will only be obtained if the social institution of the family were to be abolished.⁵⁹ Assuming a statute is adopted abolishing the institution of the family and mandating that all children must be raised by a government agency, in the name of equality, would such a statute pass constitutional review? It seems highly unlikely, given the importance placed on the family and the family group in our society, despite the statute's laudable aim and its presumed effectiveness in achieving its objective. Likewise a statute reserving more than a proportionate share of jobs for blacks or totally barring whites from partaking of certain social goods, even if only for a specified limited period, would not likely be regarded as constitutional, regardless of its effectiveness in achieving the objectives of a more egalitarian society.⁶⁰ To my mind the most satisfactory way of measuring inequality would be to move away from the group-based notion and rather to focus on individual socio-economic indicators of disadvantage (one or more of which will be race and gender, in recognition of the fact that there has been great discrimination against blacks and women – but not against all blacks and all women). This is of course not to say that a composite model of individual disadvantage will not have to face up to the same practical and theoretical problems encountered in the group-based approach to equality and affirmative action. But at least this individualized approach will bring us nearer to the measurement of those variables that are of importance in relation to the object of affirmative action: we do not want to uplift groups in the abstract, we want to come to the assistance of flesh and blood individuals who happen to be members of groups and as a consequence of the aggregate advancement of individuals of the group the group itself would as a whole be better off. But the latter consequence to the group is merely incidental to the real objective of affirmative action, that is the improvement of actual individuals' life circumstances and prospects.

⁵⁸See Dworkin R.: 'What is Equality? Part 3: The Place of Liberty' in *Iowa Law Review* Vol. 73, 1987: pp 1-54 ['Any genuine contest between liberty and equality is a contest liberty must lose' (p 7)]. Also Fakile Bam's contention that our present Constitution "... gives priority to equality over freedom" [Laurence P.: "Equality before freedom" in *The Star* 6 October 1994].

⁵⁹See, for instance, the references to Rawls' theory of justice in Duff D.G.: 'Taxing Inherited Wealth: A Philosophical Argument' in *Canadian Journal of Law and Jurisprudence* Vol. VI, No. 1, January 1993: pp 3-62.

⁶⁰Smith (1995) provides the example of a statute prohibiting universities from admitting whites for a period of fifteen years in order to address the imbalances in education and job opportunities currently prevailing between whites and blacks. Given the limited resources available for tertiary education and the inadvisability of appointing and promoting unqualified blacks, such a statute would make sense (from a purely effectiveness or instrumentality point of view), but it would, to my mind be unconstitutional because it would employ reverse discrimination in pursuit of a legitimate objective.

CHAPTER 3: CONSTITUTIONAL EQUALITY

3.1. INTRODUCTION

Most, if not all, constitutions seek to protect and promote equality and liberty as their guiding principles.¹ Numerous reasons can be offered for the pre-eminence of these values in constitutions, but in general one could say that the presence of liberty and equality in a society improves the ability of its members to pursue their diverse ends² or conceptions of the good.³ It has been claimed that the difference between a liberal democratic state and an illiberal state is that the latter prescribes a conception of the good whereas the former promotes none.⁴ Especially in a culturally diverse society like ours it is important that the government be not too closely associated with a particular conception of the good, since this will lead to the government being identified with a particular segment of society thereby alienating other segments that hold a different conception of the good. The danger of government partiality in this respect lies in the potential that it may progress into coercive measures⁵ to impose its values and ideals on others. This tendency to autocracy is premised on the assumption that, should the government not be neutral regarding the plurality of diverse values and the conceptions of the good prevalent in society, its bias could generate intolerance.⁶

Given the historical context⁷ in which our Constitution came into being, it is not surprising that our

¹Davis D.: "Equality and Equal Protection" in Van Wyk D., Dugard J., De Villiers B. & Davis D. (Eds) (1994): Rights and Constitutionalism: The New South African Legal Order Kenwyn: Juta & Co. Ltd.: pp 196-211: p 196.

²The freedom to choose one's ends and the means to achieve these do of course not imply that in a democracy based on freedom and equality the state is prohibited from placing reasonable limits on the individual's freedom of choice. In this regard see Cohen-Almagor R.: "Between Neutrality and Perfectionism" in Canadian Journal of Law and Jurisprudence Vol. VII, No. 2, July 1994: pp 217-236.

³Liberal philosophers view the aim of a just state as to further liberty and certain egalitarian values [John Rawls and Ronald Dworkin are two well-known examples].

⁴Cohen-Almagor R.: "Between Neutrality and Perfectionism" in Canadian Journal of Law and Jurisprudence Vol. VII, No. 2, July 1994: pp 217-236.

⁵The best-known prophet of the slide from welfare state intervention to totalitarianism is of course Hayek [see, Hayek F.A. (1960): The Constitution of Liberty London: Routledge & Kegan Paul Ltd.; Hayek F.A. (1982): Law, Legislation and Liberty: A new statement of the liberal principles of justice and political economy London: Routledge & Kegan Paul Ltd.: Volume 2: "The Mirage of Social Justice"; also his much celebrated book The Road to Serfdom published in 1945].

⁶The endemic nature of political intolerance in present day South Africa needs no substantiation (the interethnic violence in KwaZulu-Natal; the inability of traditionally white political parties to campaign in black townships, et cetera). John Rawls describes the problem faced by political liberalism thus: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable religious, philosophical, and moral doctrines?" [Rawls J. (1993): Political Liberalism New York: Columbia University Press: p xxv]. In Political Liberalism Rawls calls this a problem of "political justice" and offers a solution to this liberal conundrum.

⁷The equal treatment clause is of particular importance in South Africa where the previous constitutional system rested upon the foundation of discrimination based upon race. This racial discrimination permeated throughout society and was so thoroughly reprehensible that it to a certain extent masked other forms of discrimination (especially against women) which were also prevalent in society" [Basson D. (1994): South Africa's Interim Constitution Text and Notes Kenwyn: Juta & Co. Ltd.: p 22].

Constitution⁸ exhibits the same general trend in giving pride of place to equality. Not only does the first fundamental right enumerated in Chapter 3 of the Constitution deal with "equality",⁹ but also the first, second, third and fifth "Constitutional Principles" contain provisions relating to equality and freedom.¹⁰ However, "equality" is such an elusive concept that an excursion into the possible meanings of the term is necessary before proceeding with the interpretation of the equality provision in our Constitution.

Previously¹¹ it was concluded that under certain circumstances ethical and philosophical arguments may legitimately be employed in constitutional interpretation provided that the interpretive discourse can be placed within the parameters set by the Constitution. Since affirmative action deals with different precepts of equality, which in turn are based on some pre-legal intuition of fairness, the equality and affirmative action provisions of the Constitution seem to be pre-eminently suited for this sort of interpretive endeavour. This is even more so if the realities in other jurisdictions are taken into account where value judgements, although hidden by technical legal jargon, more often than not form the true foundation of constitutional interpretation.¹² This does not mean, however, that constitutional judges possess unbounded licence to interpret a constitution in whichever way their subjective value systems may lead them. If we subscribe to some theory of institutional limitation on the Constitutional Court, we must accept that properly conceived, the choice between theories of equality and justice is one that should be determined in the political sphere, whether legislative or constitutional. We indeed do not have a *"bevy of platonic guardians but judges over our Constitution (who) ... want restricted tasks."*¹³ With this caveat in mind, the approach adopted in the subsequent discussions can be described as a fusion of moral and jurisprudential reasoning.

⁸Constitution of the Republic of South Africa, Act 200 of 1993.

⁹Section 8 of Act 200 of 1993.

¹⁰Also see the preamble to the Constitution which reads in part as follows: *"WHEREAS there is a need to create a new order in which all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms". Also the "afteramble's" vision of a society built on "... a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex."* That the constitutional drafters were well aware of the fine balance that will have to be followed between transformation and social stability is clear from the afteramble: *"The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend the divisions and strife of the past, which generated gross violations of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for ubuntu but not for victimisation."* From this one may infer that transformational strategies such as affirmative action should not amount to vengeance, retaliation or victimisation.

¹¹See Chapter 1.

¹²On an observation regarding the US Supreme Court's decisions involving the Fourteenth Amendment and the role of value calls, see Torke J.W.: *"The Judicial Process in Equal Protection Cases"* in *Hastings Constitutional Law Quarterly* Vol. 9, 1982: pp 279-349.

¹³Torke J.W.: *"The Judicial Process in Equal Protection Cases"* in *Hastings Constitutional Law Quarterly* Vol. 9, 1982: pp 279-349: p 334.

This discussion of equality in our Constitution is limited to the equality provisions contained in section 8 of Act 200 of 1993. Section 8 reads as follows:

***8. Equality.--**

(1) Every person shall have the right to equality before the law and to equal protection of the law.

(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

(3)(a) This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

(b) Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.¹⁴

(4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.¹⁵

3.2. THE "EQUALITY CLAUSE" [S 8(1)]

The formulation of section 8(1) seems to be in line with the wording found in many constitutions¹⁵ in guaranteeing the right to equal protection of the law. This section can be regarded as the typical embodiment of equality as a fundamental value that must be upheld. Traditionally one could regard the object of section 8(1) as guaranteeing formal equality for all. Davis¹⁶, however, argues that section 8(1) can be broadly interpreted to include within its ambit not just formal equality but also substantive equality (i.e. as not only prohibiting discrimination but also allowing for affirmative action¹⁷). He bases his argument on section 232(4) read together with Constitutional Principle V¹⁸ of the Constitution. Section 232(4) provides that *"(i)n interpreting this Constitution a provision in any Schedule, including the provision under the heading "National Unity and Reconciliation", to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution."* Constitutional Principle V enjoins the legal system to *"... ensure the equality of all before the law and an equitable legal process. Equality before the law includes laws, programmes or activities that have as their object the amelioration of the*

¹⁴Section 8(3)(b) is not discussed.

¹⁵Most notably the Fourteenth Amendment of the US Constitution.

¹⁶Davis (1994): pp 207-208.

¹⁷I am not here dealing with s 8(3) which explicitly authorises affirmative action and does not appear to regard it as a deviation from equality.

¹⁸Contained in Schedule 4 to the Constitution.

conditions of the disadvantaged, including those disadvantaged on the grounds of race, colour or gender.¹⁹ This broad interpretation of section 8(1) would render section 8(3) superfluous and thus in conflict with the well-known canon of interpretation that every provision in a statute must be given meaning. Davis overcomes this objection by proposing that the phrase "disadvantaged by unfair discrimination" in section 8(3) indicates a function for section 8(3) which is distinct from the objective served by section 8(1). In short, Davis seems to say that whereas section 8(1) can be used to justify affirmative action to promote substantive equality without a showing of prior discrimination, the ill which section 8(3) seeks to remedy is the harm suffered by persons or groups who were the victims of unfair discrimination, which remedies are, according to him "... placed beyond constitutional scrutiny."²⁰ This latter assertion cannot be correct. Surely Davis cannot contend that once a person or a group has shown that it was the victim of unfair discrimination any measure to remedy this injustice must pass constitutional muster irrespective of its effects on others? A literal interpretation of Davis's words must lead to this conclusion because he also argues that the ambit and operation of section 8(3) should only be limited by interpreting what constitutes "unfair discrimination" without recourse to the general limitation clause, contained in section 33(1).²¹

If this understanding of Davis' argument is correct, he asserts that the combined effect of sections 8(1) and 8(3) would be that: (i) the legislature must endeavour to promote formal as well as substantive equality irrespective of the causes thereof²² (leaving aside for the moment the problems attached to the meaning of "equality"²³); (ii) if it can be shown that "persons or groups or categories of persons were disadvantaged by unfair discrimination", affirmative action measures may be implemented in order to "enable their full and equal enjoyment of all rights and freedoms", which measures will be immune

¹⁹Also see Constitutional Principle I ("The Constitution of South Africa shall provide for the establishment of one sovereign state, a common South African citizenship and a democratic system of government committed to achieving equality between men and women and people of all races"); Constitutional Principle II ("Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution"); and Constitutional Principle III ("The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity").

²⁰Davis (1994): p 208.

²¹Davis (1994): pp 208-209.

²²This result is obtained by an expansive interpretation of the meaning of the word "equality" in s 8(1) based on s 232(4) and Constitutional Principle V of Schedule 4 to the Constitution. ["Section 232(4) of the Constitution of the Republic of South Africa provides that in the interpretation of the provisions of the Constitution the provisions of the schedules to the Constitution and the 'afteramble' are to be regarded as of similar weight to the substantive provisions. It is thus open for a South African court to treat these parts of the Constitution in the same way as the Indian court has used the Directive Principles ..." and "... the Indian Supreme Court has exhibited a commitment to an egalitarian society and has sought authority for this approach in the Directives Principles of State Policy ... 'equality must not remain a mere idle incantation but must become a living reality for the large masses of people' (Davis (1994): p 204).]

²³See Chapter 2 *supra*.

from constitutional scrutiny²⁴; and (iii) presumably, legislative interventions to promote the egalitarian ideal in terms of section 8(1) will be subject to the general limitation clause,²⁵ whereas affirmative action measures in terms of section 8(3) will only be limited by the qualifications implicit in the words "designed to achieve" and "unfair discrimination" contained in section 8(3). Both these latter phrases warrant further scrutiny.

3.3. THE "ANTI-DISCRIMINATION CLAUSE" [S 8(2)]

The word "unfair" is used to qualify the word "discrimination" to distinguish between the pejorative and the benign meanings of the word.²⁶ Therefore the qualification makes it clear that it is not differentiation as such that is prohibited but invidious differentiation.²⁷ Secondly, section 8(2) provides for direct as well as indirect measures of discrimination to be proscribed. Thirdly, the phrase "without derogating from the generality of this provision" ensures that the list in section 8(2) remains open within certain limits.²⁸ Fourthly, it is submitted that, irrespective of the uncertainty whether the Constitution has only vertical, or vertical as well as horizontal, application²⁹, the question whether discrimination between private individuals will be permissible is of little practical importance³⁰ since ordinary legislation³¹ will guard against privatising apartheid and such legislation will be protected against a Constitutional attack by

²⁴Davis (1994): pp 207 and 209.

²⁵Section 33 of Act 200 of 1993.

²⁶Also see Section 3.4.2. *infra*.

²⁷Cheadle (1994): p 103.

²⁸Cheadle (1994): "This does not, however, amount to an invitation to admit any ground or classification. ... the list of grounds reveals a distinct strand. They are all human traits. They are all either immutable characteristics or inherent features of the human personality. The unstated classifications contemplated by the clause ought to be limited to analogous classifications. They are all classifications that have been used to make invidious distinctions between human beings for the benefit of one group at the expense of another" (at pp 104-105). Also see Cachalia et al (1994): pp 24-32. But for a contrary view, see Albertyn & Kentridge (1994): pp 149-178.

²⁹A discussion of this issue falls beyond the scope of this research. I may note that I am of the opinion that *Drittwirkung* will enable Chapter 3 to have a profound effect on the way our courts will interpret open-ended requirements such as "boni mores" in the law of contract and "unfair labour practice" in labour law. Many authors have already commented on the ambiguity of the Constitution in this respect; for example, see Dion Basson's book in this regard (I am in broad agreement with the author except that he does not seem to appreciate the difference between the direct horizontal operation and the indirect horizontal operation - *Drittwirkung* - of a Constitution) (Basson D. (1994): South Africa's Interim Constitution Text and Notes Kenwyn: Juta & Co. Ltd.: pp 15-16).

³⁰I am assuming that we shall see a comprehensive legislative programme in the near future and I am also side-stepping those cases that will inevitably fall outside the statutory web.

³¹That this is already happening is clear from recent legislation such as the Independent Broadcasting Authority Act, Act 153 of 1993 and the Labour Relations Act of 1995. Likewise in the US, Title VII of the Civil Rights Act of 1964 is the private sphere equivalent of the Fourteenth Amendment to the US Constitution. It is of course true that there is not perfect equivalence, but the issue of *Drittwirkung* falls beyond the purview of this research and will not be pursued any further.

virtue of section 33(4).³² Furthermore, should the question of private discrimination come before the courts, it may well be that, for example, when interpreting a contract which discriminates unfairly, the courts will interpret³³ the boni mores requirement for the validity of a contract in such a way that a contract that in its operation flagrantly disregards the values espoused in Chapter 3 of the Constitution, will be declared invalid for this reason.³⁴

In the context of affirmative action litigation, section 8(2) suffers from two deficiencies also present in the Fourteenth Amendment to the US Constitution and Title VII of the Civil Rights Act of 1994, namely, it is silent on the issue of a suitable comparator (for the purposes of determining indirect discrimination) and on the problem presented by the frequently overlooked phenomenon of compound discrimination. These two problems will be examined with reference to the US experience. The fact that I have designated these as deficiencies of section 8(2) does not mean that I think that these concerns should be catered for in the Constitution. They could more appropriately be catered for in ordinary legislation. However, these technical issues should be clarified if we do not wish to run the risk of leaving it up to the Courts to muddle through.

3.3.1. The comparator for indirect discrimination: In the context of allegations of indirect discrimination during the selection process of people, for whatever reason, a glaring lacuna in the American legal system exists, in that none of the Civil Rights Act of 1964, the Courts³⁵, or the Uniform Guidelines³⁶ drawn up by the various enforcement agencies, have bothered to define what is meant by *'disparate impact'*.³⁷ The question therefore still remains what group must be used as comparator to establish disparate impact/indirect discrimination. This lacuna has led to inconsistent applications of the disparate impact theory by the US Supreme Court.

³²(4) *This Chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of section 7 (1).*"

³³*In terms of s 35(3) of the Constitution the courts are instructed to interpret any law (including the common law and customary law) in the "spirit, purport and objects" of Chapter 3. Furthermore, it is significant that s 35(3) explicitly includes the development of customary law and the common law by the courts in terms of the guidance provided by Chapter 3. [(3) In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter.]*

³⁴*This is an example of Drittwirkung. See Van Aswegen A.: "The Implications of a Bill of Rights for the Law of Contract and Delict" in South African Journal of Human Rights 1995: pp 50-69.*

³⁵*The locus classicus on disparate impact theory, Griggs v Duke Power 401 U.S. 424 (1971), introduced the concept but did not adequately define disparate impact.*

³⁶*According to these Guidelines, validation is only and always required when adverse impact exists. Adverse impact is defined as a "substantially different rate of selection in hiring, promotion, or other employment decision." But substantially different from what? See Lerner B.: "Employment Discrimination: Adverse Impact, Validity, and Equality" in Supreme Court Review 1979: pp 17-49.*

³⁷*"Disparate impact discrimination" is the term used in the US for what we refer to as "indirect discrimination".*

Three comparators or standards are possible: (i) pool-of-applicants³⁸; (ii) general population figures³⁹; or (iii) data on the **qualified labour force** in the area of recruitment⁴⁰. Lerner⁴¹ suggests that the following guidelines should be followed: (i) General population figures are never an appropriate basis of comparison in disparate impact cases. (ii) The pool-of-applicants is an acceptable basis for a prima facie case of disparate impact only in cases involving **incumbent employees** all of whom met the same initial hiring standards and are successfully performing related jobs. (iii) In cases involving **external applicants**, the appropriate standard for a prima facie case of disparate impact is a comparison between an employer's workforce and the **qualified labour force** of the area of recruitment. (iv) In the latter case, pool-of-applicants data may be relevant in **rebuttal**, because willingness to take a job is a necessary, albeit not a sufficient, condition for hiring. In evaluating such data, the Court should take pains not to penalize defendants/employers for the consequences of affirmative action programmes, their own or those of others in their area of recruitment. (v) Plaintiffs should be given an opportunity to counter such rebuttal evidence by showing that defendant's action distorted the data by convincing qualified applicants that it would be futile to apply (for example, advertising bias). (vi) Face validity, otherwise known as reasonableness, should suffice to show that the selection device (test or non-test) is job related. (vii) If the defendant's selection practices have an adverse impact and they are not justified by face validity, then they should be held unlawful unless the defendant has formal validity data strong enough to prove that in this case, common sense is wrong (that is, that although the device has no face validity, it is still valid).

The arguments in favour of the above guidelines are compelling⁴² and it is suggested that when South Africa formulates similar legislation or enforcement agency guidelines, explicit provision should be made in these for standards of comparison to establish disparate impact in accordance with the proposals put forward by Lerner.

3.3.2. Compound Discrimination⁴³: The last topic to be covered in this section deals with the problem

³⁸Griggs v Duke Power 401 U.S. 424 (1971).

³⁹Dothard v Rawlinson 433 U.S. 229 (1976).

⁴⁰Fumco Constr. Corp. v Waters 438 U.S. 567, 17 FEP 1062 (1978).

⁴¹Lerner (1979): pp 38-39.

⁴²Lerner [(1979): pp 25-35].

⁴³Shoben E.W.: "Compound Discrimination: The Interaction of race and Sex in Employment Discrimination", in New York University Law Review Vol. 55, November 1980: pp 783-836.

of "compound discrimination".⁴⁴ This type of discrimination is a prime example of the disparity between legal and societal classifications of discrimination. It is not clear whether section 8(2) protects an individual against compound discrimination. For example, if the employer uses a selection process in which applicants must pass a written test and a height requirement, the test may discriminate against blacks and the height requirement against females, so that a black woman is doubly disadvantaged. The question is whether in such a case the individual must prove the grounds for discrimination separately (that is, that she is being discriminated against not because she is a black woman but because of her blackness and her gender, separately).⁴⁵ It is, of course, possible that it is the interaction effect itself that is the source of the discrimination (race times gender) rather than the cumulative main effects of race and gender. The former is compound discrimination and should not be confused with double discrimination. Double discrimination may be described as the discrimination that someone suffers because he belongs to two different groups, both of which are adversely affected by an employer's practices, whereas compound discrimination results specifically from the fact that the person belongs to both groups.⁴⁶ Although black females are not *eo nomine* a protected class under section 8(2), it can be argued that section 8(2) does protect compound groups, since the courts would entertain reverse discrimination claims by white males, who themselves are a compound group.⁴⁷ Nor is compound discrimination the same as "sex-plus" discrimination. Sex-plus discrimination occurs when a hiring practice, while not explicitly directed at a particular sex, operates to exclude one sex.⁴⁸ In this situation the enquiry is whether the employer has created a category that unlawfully operates against a protected group. In the case of black women, the question is whether section 8(2) protects black women as a category and not whether a rule against blackness, which is applied only to women,

⁴⁴I consider this topic worthy of inclusion for several reasons: Firstly, it is not readily recognized that compound groups, such as black females, might suffer a different kind of discrimination, distinct from that of either of the "main protected groups", namely blacks or females. Secondly, that this type of discrimination is conceptually distinct from double discrimination (the victim is discriminated against by virtue of being both black and female). And thirdly, that even civil rights groups do not seem to recognize this (for example, feminists treat lesbians as part of their group, and homosexuals likewise treat them as part of their group) without recognizing the possibility that they might be a distinct compound sub-group – this leads to the conundrum: are lesbians the female wing of the homosexual group or the lesbian wing of the feminist group? The answer, in terms of compound discrimination analysis, is neither: they form a distinct group of their own. The danger of not recognizing these "hidden" groups is that their interests are neglected in pursuit of the main protected groups' interests. I suspect that something analogous is happening in South Africa as regards gender issues championed by civil rights groups that are addressing race issues (with the obligatory nod towards gender issues).

⁴⁵See Du Plessis L. and Corder H. (1994): *Understanding South Africa's Transitional Bill of Rights* Kenwyn: Juta & Co. Ltd.: p 143. The authors assume without further ado that s 8 covers compound groups. It is also not clear whether Du Plessis and Corder appreciate the difference between "double discrimination" and "compound discrimination".

⁴⁶For example, a woman who returns to the economically active labour market after having reared her children may be discriminated against for being female, by some employers, but also for being over forty years of age, by other employers (double discrimination: sex and age). On the other hand, an employer may have nothing against employing white women or black males, but may discriminate against black females (this will be an instance of compound discrimination: race times sex).

⁴⁷Shoben (1980): pp 797 - 798.

⁴⁸For example, in *Phillips v Martin Marietta Corp.*, 400 U.S. 542 (1971), the US Supreme Court held that a rule against hiring female applicants with pre-school children, although men with pre-school children were hired, violates Title VII. The rule applied only to a subset of persons with pre-school children, and that subset was composed entirely of women.

amounts to discrimination against women.

The logic of allowing protection against compound discrimination, should it occur, is unassailable: the problem arises in its application. For instance, to use the protected classes listed in section 8(2) as an example to construct an extreme case, how would one deal with a plaintiff who is an over-forty Zulu lesbian atheist, with limited education and who is blind and can only speak Zulu?⁴⁹ In direct discrimination cases this should not be a problem in that intent and not the statistical effects of the alleged discriminatory employer is at issue, but in a case based on indirect discrimination the sample (used as comparator) would in all likelihood be too small to make reliable inferences from statistical data. Based on the protected categories listed in section 8(2), one could contrive the following extreme example to illustrate the theoretical problem: In section 8(2) there are arguably fourteen separate protected categories (let us call these the "main protected groups") listed. These fourteen groups may, for the purposes of compound discrimination, be combined into a total of sixteen thousand three hundred and sixty nine compound groups. Together with the "main protected groups" this comes to a total of sixteen thousand three hundred and eighty three groups potentially to be protected under section 8(2)!⁵⁰

3.3.3. The groups protected by s 8(2): The effect of the phrase *"... without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language"* is what concerns us here. Despite the extensiveness of this list it is clear from the words *"... without derogating from the generality of this provision ..."* that the listed categories do not constitute a numerus clausus. The question is whether the protected categories can be extended without limitation or whether the recognition of additional (unlisted) categories should be limited to grounds analogous to the listed classes. Some authors are of the opinion that since the grounds listed all involve personal characteristics that are immutable *"... at least in the sense that they cannot be changed by the choice of the individual"*⁵¹, the extension of protected categories must be limited to similarly immutable grounds. Since assumptions relating to genetics and the philosophical issue of individual choice versus predetermination are all relevant to this presumptive principle for limiting the extension of the protected

⁴⁹Example adapted from Shoben (1980): p 796.

⁵⁰The mind boggles if one were to entertain the possibility of bringing ethnicity and language into the equation, not as one variable each, but broken down into the diversity found in South Africa (e.g. fourteen languages). A troubling aspect of group-based affirmative action programmes based on race (rather than ethnicity) is the possibility that one black ethnic group may be allowed to discriminate against another black ethnic group with impunity (e.g. against a Zulu by a Xhosa company).

⁵¹Cachalia et al (1994), quoted in Albertyn & Kentridge [(1994): p 168].

categories, I do not find this line of reasoning persuasive.⁵² Albertyn and Kentridge rejects the "*listed and analogous grounds*" approach as being a "... too narrow reading of the named grounds".⁵³ The authors propose that a better view would be that the listed grounds all reflect "*elements which are constitutive of human identity*"⁵⁴ and that therefore "... any additional ground need not necessarily be an immutable personal characteristic, but must be a valuable aspect of human identity."⁵⁵ They conclude that the principle that should guide the extension of the protected classes should be the "*principle of anti-subordination*".⁵⁶ Thus, "... it is necessary to show [for an unlisted group seeking the protection of section 8(2)] that the discrimination in question is unfair in that it creates or reinforces the subordination of a vulnerable group or class of persons."⁵⁷ According to Albertyn and Kentridge, the application would be successful only "... if striking down that discrimination will either counter pervasive disadvantage or strike down an exercise of arbitrary and irrational power."⁵⁸ This seems like circular reasoning to me. Firstly, it is difficult to conceive of "*pervasive disadvantage*" that will not overlap with one or more of the listed categories. Secondly, the "... exercise of arbitrary and irrational power" (presumably directed at a definable group) is per definition discrimination. This amounts to saying that any group can claim protection under section 8(2) provided it can show intentional (or direct) discrimination or if the group is, as a group, in a disadvantaged position (presumably this refers to indirect discrimination). The latter is too wide (in that it brings purely socio-economic disadvantage) under the ambit of section 8(2). It should be noted that whereas I have pointed out earlier that the so-called individual-based socio-economic model of affirmative action would address socio-economic

⁵²For instance, may it be said that a person's religion, culture or language is a matter of choice or are these immutable? A freedom of opportunity analysis would yield the conclusion that the person born in the "wrong" culture (and who therefore has to switch cultures) is faced by an appreciably more difficult hurdle than the person born in the "right" culture. See "equality of opportunities" in Chapter 2 *supra*.

⁵³Albertyn & Kentridge (1994): p 168.

⁵⁴Albertyn & Kentridge (1994): p 169. The "human identity" approach does not entail the assumption of immutability (as does the "listed and analogous grounds" approach). It is of course not clear what constitutes the "human identity": The "nature-nurture" controversy in psychology has been raging for most of this century with as yet no clear winner. Maybe the outcome of the "Human Genome Project" will tip the balance in favour of nature – but what if a person may then be offered the choice of pharmaceutical interventions to change the personality effects of his genetic make-up? "Prozac" is just such a psychotropic drug. If I can choose to change my human identity then it may be (if not now, then in the future) that the very "elements of human identity" may become a matter of choice. It will be much better to work with the "principle of anti-subordination" as a moral imperative without trying to derive it from little understood psychological constructs.

⁵⁵Albertyn & Kentridge (1994): pp 168-169.

⁵⁶Albertyn & Kentridge (1994): p 170.

⁵⁷Albertyn & Kentridge (1994): p 170. Discrimination as a social phenomenon seems partly reflective of but also partly the result of vulnerability (i.e. society tends to discriminate against vulnerable groups, thereby increasing their vulnerability). If this is correct it poses a proportionality problem: how to ascribe the discriminated-against person's social status to discrimination by partialling out the effects of other causes of vulnerability? Rawls (1971) provides a common sense answer, namely, do not even try to do this, rather operate by the maxim that initial disadvantage (such as accident of birth and the "natural lottery") should not be perpetuated by society.

⁵⁸Albertyn & Kentridge (1994): p 170.

disparities irrespective of its causes,⁵⁹ it does not follow that these same disparities can automatically be labelled as "discriminatory".

3.4. THE 'AFFIRMATIVE ACTION' CLAUSE [S 8(3)]

3.4.1. The meaning of "designed to achieve" [s 8(3)(a)]: The adoption of the words "*designed to achieve*" in section 8(3) by the writers of our Constitution has an interesting history. According to Mureinik⁶⁰, an earlier draft contained the words "*aimed at*" which gave rise to some controversy during the Kempton Park negotiations. The controversy surrounding the words "*aimed at*" (used in an earlier draft) revolved around the concern that this formulation would have authorized a court to enquire whether a measure was aimed at undoing disadvantage, but not whether it was likely to succeed.⁶¹ It was to meet this concern that the words "*aimed at*" were replaced with the words "*designed to achieve*", which change Mureinik argues should guide a court when interpreting the wording "*designed to achieve*" to conclude that the intention was to include both the means and the ends sought by the measure since this is the more justifiable interpretation.⁶² Thus, whereas "*aimed at*" refers to intention more explicitly, "*designed to achieve*" may signify either intention or competence/ability to achieve the end product. However, given the history attached to this phrase, it can be inferred that the intention of the drafters was to exclude the first possible meaning of the words "*designed to achieve*".

3.4.2. The meaning of "unfair discrimination" [ss 8(2) and 8(3)]: It should be noted that the original meaning of the word "discrimination" was simply the ability to distinguish between classes or groups without the pejorative connotation commonly assigned to the word in present usage.⁶³ The word "discrimination" in modern usage refers to the practice of selecting between people or groups on the basis of inappropriate criteria or arbitrarily. Implicit in this usage of the word is the pejorative quality of "unfairness". This interpretation would render the qualification "unfair" used in sections 8(2) and 8(3) superfluous, hence the conclusion that the drafters intended the word "discrimination" to carry its original non-pejorative meaning. It is therefore not "discrimination" per se that should be eradicated but "unfair

⁵⁹See Chapter 1.

⁶⁰Mureinik E. (1994): "A Bridge to Where? Introducing the Interim Bill of Rights" in *South African Journal on Human Rights Centre for Applied Legal Studies, University of the Witwatersrand, Kenwyn: Juta & Co. Ltd.:* pp 31-48.

⁶¹*i.e. the court may review "the intentions of the authors of the measure, but not its effects [Mureinik (1994): p 47]. "The anxiety was that the courts would have been confined to scrutinizing the ends sought by the measure, and precluded from scrutinizing the means chosen to realize those ends" (op cit).*

⁶²Mureinik [(1994): p 48]; Davis [(1994): p 210].

⁶³As in the phrase "he has discriminating taste".

discrimination". Benign forms of discrimination, such as affirmative action, are therefore permissible.⁶⁴ Albertyn and Kentridge come very close to denying that discrimination against privileged (read white) South Africans can ever amount to unfair discrimination provided that it is as the result of a rational means of achieving the objective of full equality by promoting the interests of persons who have been disadvantaged by unfair discrimination (this, despite a disclaimer to the contrary).⁶⁵

3.4.3. Does s 8(3) deviate from or supplement s 8(1)? Equality is a core value permeating our Constitution.⁶⁶ This being the case, the question may be asked whether section 8(3) deviates from or supplements the principle of equality as embodied in section 8(1) and protected in section 8(2). If affirmative action is viewed as supplementing the equality clause in that it promotes substantive equality, section 8(3) should be afforded a generous and liberal interpretation in line with the principle that provisions conferring rights should be given an expansive interpretation and in favour of those rights.⁶⁷ On the other hand, if the affirmative action clause is seen as an exception to the fundamental value of equality, unfortunately necessitated by our past history of societal and statutory discrimination, a more restrictive interpretation of section 8(3) limiting the scope for a wide range of affirmative action interventions would be more appropriate. Although the words "*shall not preclude*" used in section 8(3)(a) do appear to express an exception, the words "*in order to enable their full and equal enjoyment of all rights and freedoms*" indicate a contrary intention. One could also argue that section 8(3)(a) limits section 8(2).⁶⁸ The effect of such a construction will be that it is implicitly recognised that affirmative action amounts to unfair discrimination.⁶⁹ This construction, combined with the mistaken idea⁷⁰ that section 8(3)(a) is not subject to s 33 scrutiny,⁷¹ is dangerous because it places no limitation on the harm that may be done to non-beneficiaries of affirmative action as long as the programme satisfies the

⁶⁴Generally, see Cheadle H.: 'Impact of the Constitution on Labour Law' in Cheadle et al (1994): pp 94-112. From the 'victim's' perspective affirmative action will not be "benign" but it may nevertheless be lawful – see "unfairness and reasonableness" under Section 4.11.2.

⁶⁵Albertyn & Kentridge (1994): p 162.

⁶⁶See Du Plessis and Corder (1994).

⁶⁷Smith (1995): p 88.

⁶⁸As do Du Plessis and Corder (1994): pp 129-130.

⁶⁹Because the adjective "unfair" in s 8(2) already allows for fair discrimination. If s 8(3)(a) limits the prohibition of "unfair discrimination" it can only mean that affirmative action that is unfair but satisfies the provisions of s 8(3)(a), will be constitutional despite its unfairness [i.e. regardless of s 8(2)].

⁷⁰See Section 3.2.

⁷¹See Davis (1994); and Du Plessis and Corder (1994): p 130. The latter authors argue that s 8(3)(a) does not confer a right (because, so the argument goes, it merely allows for the possible future introduction of affirmative action programmes rather than creating a right to affirmative action). Thus, since the limitation clause provides for the limitation of rights (rather than possible "entitlements"), s 33 is not applicable to s 8(3)(a).

requirements set by section 8(3)(a)⁷² and because it conflates the ideas of "fairness" and "reasonableness".⁷³

Previously, it was stressed that one should not conflate the aspirational aspect of the Constitution with the constitutionality of the means to pursue the constitutional ideal. In discussing the relationship between section 8(3) and sections 8(1) and 8(2), Albertyn and Kentridge do just that.⁷⁴ They propose that section 8(3) was included *ex abundante cautela* (since sections 8(1) and 8(2) already commit us to substantive equality) and "... *simply makes explicit the fact that substantive equality permits treatment which is differentiated according to the needs of the recipient.*" This reading of section 8(3) is defective for several reasons. Firstly, the authors isolate "needs" as the only value underlying distributive justice. This may be appropriate in certain cases (e.g. feeding schemes or free hospital care for the indigent), but certainly not for all cases. In the employment context a needs-based notion of affirmative action would totally disregard efficiency considerations. For instance, a welfarist or needs-based approach would justify demands for full employment and minimum wages legislation. As regards only the latter, one could also attack this equality-as-welfare-approach⁷⁵ as immoral and internally inconsistent in situations where the government cannot guarantee the payment of unemployment insurance, at least at the level of the minimum wage.⁷⁶ This attack is premised on the economic fact that minimum wages bar some people from the employment market, thereby making them pay for the minimum wage of the lucky few who are employed. It is internally inconsistent in that the needs-based notion of distributive justice would require that those in greatest need should proportionally be the greatest beneficiaries of social goods, but under a minimum wage regime the unemployed victims of the minimum incomes policy will be subsidising the less unfortunate (i.e. the lowly paid but employed beneficiaries of the scheme). Secondly, the authors do not distinguish between different modalities of affirmative action, and simply assume that all types of intervention that are aimed at greater substantive equality and are reasonably capable of achieving this, would be constitutional.

Both Davis⁷⁷ and Albertyn and Kentridge⁷⁸ base their arguments for the supplementary role of section

⁷²Which amounts to an 'effectiveness test' and that it must be for the benefit of people previously disadvantaged by unfair discrimination.

⁷³See the discussion under "unfairness and reasonableness" in Section 4.6. *infra*.

⁷⁴Albertyn & Kentridge (1994): pp 172-174.

⁷⁵See Dworkin R.: "What is Equality? Part 1: Equality of Welfare" in *Philosophy and Public Affairs* Vol. 10, No. 3, 1981: pp 185-246.

⁷⁶See Hayek F.A. (1960): *The Constitution of Liberty* London: Routledge & Kegan Paul Ltd.

⁷⁷Davis (1994): pp 196-211.

⁷⁸Albertyn & Kentridge (1994): pp 149-178.

8(3) on American and Canadian case law without fully appreciating the differences between our Constitution and these foreign comparators. Limiting myself to the US situation, it should be self-evident that the US Supreme Court had to employ an extensive reading of "equality", given the bare bones of the phrase "equal protection of the laws" contained in the Fourteenth Amendment, simply because society's evolving understanding of fairness and equality demanded it, and there were no other constitutional provisions to rely upon. Not so the situation in South Africa; our constitutional fathers tried to "codify" the lessons from abroad and explicitly included an affirmative action provision. Although our constitutional writers had the benefit of learning from the experience of other jurisdictions, this may well prove to be a two-edged sword in that the process of codification inevitably entails the use of different words and structures, which may have the unintended effect of giving a different texture and meaning to the provisions (although the intention was simply to express and encapsulate in words the jurisprudence developed by the Courts). Thus, for South African commentators to base their arguments for reading affirmative action into the equality provision as formulated section 8(1), on US case-law, is dubious, precisely because we have a section 8(3), whereas the US Courts had to evolve the meaning of their equality clause without the benefit of such an affirmative action clause.⁷⁹ The US Courts were forced by necessity to take recourse to an expansive reading of the equality clause, rendering it into something approximating a procrustean bed. Our Courts need not do this, simply because we have recourse to section 8(3).

I would have had no quarrel with an extensive interpretation of the equality clause contained in section 8(1) of our Constitution to include the aspirational ideal of substantive equality, but the problem arises when such an aspirational interpretation is used to render section 8(2) and section 8(3) superfluous, with the barely hidden intention to advance an equality-as-welfare agenda. Lest I be accused of reading too much into the expansive approach to the equality provision, I offer the following example of the boundless scope some proponents wish to establish for government intervention, based on a detextualized interpretation of section 8(1) [in the sense of ignoring the fact that our Constitution does happen to have a section 8(2) and a section 8(3)]. According to Albertyn and Kentridge⁸⁰ a proper reading of section 8(1) entails the following: it includes the substance and content of the law; it covers laws which afford benefits as well as laws which prohibit or regulate; it also opposes subordination and disadvantage in and through the law; it entails a commitment to making reparation and restitution; and it negates the distinction between public and private as "incoherent". According to this "expansive reading" of section 8(1), lawmakers and judges would have untrammelled authority to advance a welfarist vision of society, in the pursuit of which common law rights and duties as between private actors could

⁷⁹That the authors of *Cachalia et al* recognize this is clear from the following: "The effect of having one limitation clause is that much of the US jurisprudence concerning the different standards of review that the US Supreme Court has developed in respect of each of its guaranteed rights is just not applicable" [Cachalia A., Cheadle H., Davis D., Haysom N., Maduna P. and Marcus G. (1994): *Fundamental Rights in the New Constitution* Kenwyn: Juta & Co. Ltd.: pp 109-110].

⁸⁰Albertyn and Kentridge (1994): p 160.

be interfered with at will.

3.4.4. The meaning of the phrase "full and equal enjoyment" [s 8(3)(a)]: "True" or "substantive equality of opportunity" is seen as the goal of affirmative action and a recognition of the fact that, given past societal discriminatory practices, the imposition of antidiscriminatory measures will not, by itself, realize the goal of giving every member of society an equal chance of fulfilling his potential and life goals. Formal equality⁸¹, by itself, will not result in actual equality of access to those social goods⁸² necessary for obtaining equal opportunities. It is therefore necessary to take positive steps to achieve these objectives. Equality is an issue in the real world because scarce resources are unequally distributed in accordance with criteria and institutionalized processes and norms that are allegedly suspect. Consequently those who are at the bottom end of the allocative continuum are restricted in the exercise of their rights (although these rights may nominally be equally allocated regardless of group membership), thereby preventing them from enjoying or effectively striving towards the good life. Rights can be exercised effectively in pursuit of the good life only if the bearer of those rights possesses the necessary economic means; likewise, freedom of choice⁸³ is but an empty letter if the choice is between starvation and acceptance of a degrading job paying below the breadline (thereby ensuring that the incumbent's range of "choices" will remain static). Although all members of society may have equal political, legal, civil and other "basic rights", it is evident that the effectiveness of one's rights is dependent on one's economic position⁸⁴, and one's capacity to transform these into actual achievements.⁸⁵ Indeed, the power of words of choice and contract to conceal coercion, should not be denied. The rhetoric of choice is frequently invoked to protect vested interests against those who have been disadvantaged in the past.⁸⁶ It follows that I am of the opinion that section 8(3) embodies the ideal of real or substantive equality rather than mere formal equality as provided for in anti-discriminatory measures. Three cautionary notes need to be sounded to qualify the preceding statement: (i) it still leaves open the question of "equality of what?"; (ii) the scope of the "rights and freedoms"

⁸¹As provided for by anti-discrimination rules.

⁸²Including but not restricted to access to education, health care and jobs.

⁸³For poverty and the lack of satisfaction of basic needs which poverty entails constitute an impediment to freedom as well, to the basic freedom to formulate and pursue a meaningful life plan and control one's life as one desires" [Goldman A.H.: "Justice and Hiring by Competence" in *American Philosophical Quarterly* Vol. 14 No. 1 January 1977: pp 17-28 on p 21].

⁸⁴"Even though money generally cannot buy extra helpings of rights directly, it can buy services that, in effect, produce more or better rights Money buys legal services that can obtain preferred treatment before the law; it buys platforms that give extra weight to the owner's freedom of speech; it buys influence with elected officials and thus compromises the principle of one person, one vote" [Okun A.M. (1975): *Equality and efficiency: The big tradeoff* Washington, D.C.: Brookings Institution: p 22]. Regarding the attenuating effect on democracy by the concentration of wealth in the hands of some individuals, see also Rawls J. (1971): *A Theory of Justice*, Oxford: Oxford University Press.

⁸⁵See the discussion on "Human diversity in capacity to achieve versus equality in freedom to achieve" in Section 2.2.3. *supra*.

⁸⁶"The effects of legal doctrine in obscuring the law's role in subordination – through claims of neutrality and meritocracy ..." [Greene L.S.: "Breaking Form" in *Stanford Law Review* Vol. 44, 1992: pp 909 - 925: p 922].

referred to in section 8(3)(a) has likewise not yet been addressed; and, (iii) most important of all, one should **not confuse** the recognition of the **aspirational dimensions** of the Constitution with the claim that the ideals espoused by the Constitution may be pursued by **whatever means** possible. Our Constitution may express the ideal of an egalitarian society with parity of material resources for all members of our society, but one cannot infer without further ado from this constitutional aspiration that the Constitution does not place any limits on the means to achieving that end.

3.4.5. The meaning of "all rights and freedoms": I do not propose to discuss and analyse this phrase in any detail. At a minimum people should enjoy equality of opportunity in respect of at least the rights enumerated in Chapter 3 of the Constitution as well as other rights (such as common law rights) not in conflict with the listed constitutional rights and subject to the limitations clause (section 33). Since I have concluded that it is equality of opportunity and not equality of outcome that is protected by the Constitution it follows that one cannot derive substantive claims from most of the rights guaranteed in Chapter 3.⁸⁷ For instance, the right to acquire and hold rights in property section(s) 28) or the right freely to engage in economic activity (section 26) cannot be used as a base for claiming the right to have property equally distributed or to employment respectively (even though this end result may well be an aspirational value of our Constitution). I turn next to the meaning of the word "freedom".

A more difficult question than the one concerning "rights" is whether the term "freedom"⁸⁸ was included in section 8(3)(a) simply to distinguish substantive rights from "negative rights" (i.e. the individual's right to be protected from unwarranted state interference) or whether "freedom" can be seen as a substantive right per se. The latter interpretation will recognize that freedom of choice may be of more than just instrumental value in that the range of choices available to an individual may be determinative of his quality of life independent from the choices he in fact makes. For example, fasting is not just starving: it is choosing to starve when one does have other options. In examining a starving person's achieved well-being, it is of direct interest to know whether he is fasting or simply does not have the means to get enough food. Similarly, choosing a life-style is not exactly the same as having that life-style no matter how chosen, and one's well-being does depend on how that life-style happened to emerge.⁸⁹ One could therefore conclude that the *"full and equal enjoyment of all ... freedoms"* should be read as an instruction to treat the range of freedoms as an autonomous enjoyment of a substantive right, distinct from the mere instrumentality view of freedom.

⁸⁷This is of course not to deny that many of the rights inevitably have a substantive component, e.g. the rights of children and a clean environment will, if given effect to, place substantive duties on the state.

⁸⁸Interestingly, the Namibian Constitution distinguishes between "rights" and "freedoms".

⁸⁹Sen A. (1992): *Inequality Reexamined* New York: Oxford University Press Inc: pp 117-118.

3.5. PROOF OF DISCRIMINATION [S 8(4)]

Section 8(4) creates a rebuttable presumption that discrimination on any of the grounds listed in section 8(2) constitutes unfair discrimination. On a prima facie showing by an applicant of discrimination on any of the grounds listed in section 8(2), the onus will shift to the respondent to justify the discrimination (e.g. as being a "business necessity" or a "bona fide occupational qualification"⁸⁰). The words "... as contemplated in that subsection ..." indicate that this presumption would operate only in cases based on the grounds specified in section 8(2); applicants relying on an unlisted ground cannot invoke section 8(4) and thus will have to show both that discrimination occurred and that such discrimination was unjustified.⁸¹

I now turn to the question whether the conception of discrimination viewed from the perspective of the victim, is the only or the best way to approach this phenomenon, especially as it relates to matters of proof. To put it another way, could an applicant rely on proof of discrimination on the part of the discriminator on a ground other than the ground allegedly applicable in his case, in order to satisfy the requirements of sections 8(2) and 8(4) and to cause the onus to shift to the respondent, as explained in the previous paragraph?

3.5.1. Atomized and Generalized Conceptions of Discrimination: The most common way of proscribing discriminatory treatment is by reference to certain classes of potential victims and to outlaw discrimination against these protected groups.⁸² This approach to discrimination presupposes that people discriminate against those with a particular set of attributes associated with some identifiable, discrete group. A further supposition is that people generally discriminate on a differential basis, depending on the group in question. The result of such an "atomized"⁸³ approach to discrimination is that evidence of discrimination against a group other than the plaintiff's should generally not be admissible to prove discrimination in the case under consideration. Furthermore, a group not recognized by the law as a protected group would not have the option of convincing a court to extend legal protection to their group by showing discrimination against another (already protected) group.

There is, however, another way of looking at discrimination, namely from the point of view of the perpetrator. Whereas the atomized approach begins by identifying the kind of discrimination with the way in which victims might describe themselves, the generalized approach uses as its starting point the way

⁸⁰This terminology is borrowed from the US jurisprudence and Title VII of the Civil Rights Act of 1964.

⁸¹Albertyn & Kentridge (1994): pp 174-175.

⁸²See the listed protected groups in s 8(2) of Act 200 of 1993.

⁸³This term is borrowed from Freshman [Freshman (1990): pp 241-273].

in which the perpetrator views people who do not belong to the group that he favours or prefers. This generalized view of discrimination is based on the premise, for which there exists a considerable body of evidence,⁹⁴ that people who are prejudiced against one group are generally prejudiced against out-groups. The generalized view of discrimination does not assert that the atomized view of group specific and differential discrimination is invalid but simply that it is too restricted a view of the way in which people who tend to discriminate, generally do discriminate. Generalized discrimination may take many forms, for instance viewing attributes that would be regarded as commendable in a member of the in-group, as a negative feature if exhibited by a member of an out-group.⁹⁵ Where the perpetrator favours members of a preferred group, he will tend to attach attributes to an individual by virtue of that person's group membership rather than giving proper consideration to the individual's actual attributes.⁹⁶

If recognition is to be given to the very real phenomenon of generalized discrimination, this will make it possible for people of one group to use evidence of discrimination against another group in support of a claim of discrimination against their group.⁹⁷ It will also enable a previously unprotected group to assert a claim for protection and to bolster their allegation of discrimination against their group by proving discrimination against another (protected) group.⁹⁸ The reason why this extension of protection is more likely under the generalized view of discrimination is that under this doctrine discriminatory motive is rebuttably presumed to be present against all out-groups once discrimination is proved in respect of any one group. Whether the norms of society will regard a particular out-group worthy of protection is, of course, a different matter. But at least, if recognition is given to the fact of discrimination against that group, the question of the value of protecting it is brought to the fore.⁹⁹

⁹⁴See for instance Allport G.W. (1954). Also the following two quotes from Freshman (Freshman (1990): p 249): "If there's one thing that represents a lawlike statement in social psychology, it's that a person who's prejudiced toward one group is prejudiced toward others." And "(n)ot surprisingly, negative attitudes toward lesbian and gay people correlate strongly with traditional, sexist concepts about the appropriate role of men and women."

⁹⁵A good example of this occurred in *Price Waterhouse v Hopkins*, 109 S.C. 1775 (1989): A female employee was not made a partner because she was too assertive and not feminine enough. Assertiveness in a white male is a valued attribute, in a female or black it may become a negative quality, as in "bitchiness", "butchness" or "pushiness".

⁹⁶As happens in stereotyping. An example of this is refusing to consider a woman for a job that is regarded as the preserve of males, irrespective of the fact that the woman applicant in question may possess the attributes required for the job. An example of this occurred in *Ntsangani v Golden Lay Farms* (1992) 13 *ILJ* 1199 (IC): The employer accepted, without testing the assumption, that women do not possess the physical strength to do a certain kind of work.

⁹⁷Freshman: "But limiting evidence only to the atomized group of women makes no sense if an employer is motivated by a preference for a group, such as white Protestant males, that excludes not just women, but members of other atomized groups as well" [Freshman (1990): p 255].

⁹⁸For instance, HIV/AIDS sufferers, who at present do not enjoy specific protection against discrimination under s 8(2). It should be noted that in the context of the example given in the text, HIV/AIDS sufferers are not regarded here as a group being discriminated against because of a 'disability' (which is an explicitly listed group under s 8(2)). Whether HIV/AIDS or TB or STD's (or whatever disease carrying a social stigma) can be regarded as a 'disability' in terms of s 8(2) is not discussed (although I think it should).

⁹⁹Furthermore, this could also provide a solution to the problem of alleging and proving compound and double discrimination, neither of which is currently explicitly covered under s 8(2).

CHAPTER 4: AFFIRMATIVE ACTION AND S 8 OF THE CONSTITUTION

4.1. INTRODUCTION

In this chapter affirmative action is subjected to constitutional scrutiny in terms of section 8 of Act 200 of 1993. A comprehensive enquiry into affirmative action should comprise at least the following topics: the operational and moral bases of affirmative action; the balance between affirmative action and freedom; the balance between affirmative action and efficiency considerations; and the aspirational and permissible objectives of the Constitution as it relates to equality and liberty. Some, if not all, of these concerns will be addressed in this chapter.

4.2. MODALITIES OF AFFIRMATIVE ACTION

According to a taxonomy proposed by Sloot three modalities or forms of affirmative action can be distinguished: a **strong**, an **intermediate** and a **weak** form.¹ In the **strong variant** a person qualifies for preferential treatment solely on the grounds that he/she possesses an immutable characteristic (e.g. an employee is promoted because she is a female, without satisfying any of the job specifications). In the **intermediate/moderate variant** of affirmative action the person meets the minimum standards/qualification for the job and is given preference over another candidate who is better qualified, because of some immutable characteristic which he/she possesses but the better qualified person does not (e.g. the job specifies matric as a minimum qualification but preferably a bachelors degree, and a black matriculant is promoted rather than the white male graduate candidate). In the **weak variant** of affirmative action a black/female/handicapped/etc employee is promoted in preference to an able bodied white male only if both candidates are equally qualified for the job.

4.2.1. Strong variant of affirmative action: To this classification one could add another variant, namely a system whereby one group is excluded from jobs/promotions based on an immutable characteristic (as happened with job reservation in terms of s 77 of Act 28 of 1956, repealed in the 1970s). Now it would be evident that this variant is what is commonly referred to as "*apartheid employment policies*" and that it amounts to a restatement of Sloot's strong variant of affirmative action. The former is formulated in terms of the groups excluded whereas the latter is formulated in terms of the groups included, but both have the effect of absolutely excluding certain groups. The question may be asked whether, if it is correct that the strong variant is simply a restatement and application of apartheid, it is of constitutional significance which group is included/excluded. That is, could the strong variant of affirmative action, if applied to include blacks (and exclude whites) be constitutional? The answer to this question should be no. Even though such a policy would indubitably be very effective in promoting

¹Sloot (1986): p 217.

greater substantive equality between groups, it would be exclusionary and denigrating in its operation and would be counter to the constitutional principle of reconciliation contained in the "afteramble" to our Constitution. Furthermore, since this may well entail the appointment of totally incompetent people, this may lead to inefficiencies and a shrinkage of the economic pie, thereby working to the detriment of all the people, including those whom the system is supposed to help. From this Smith concludes that such a system would not be constitutional.²

4.2.2. Weak variant of affirmative action: What about Sliot's "weak variant" of affirmative action? This variant amounts to a slight deviation from what could be called the "colour-blind" or libertarian model of affirmative action. Basic to the colour-blind vision of affirmative action are the values associated with conservative libertarianism. This entails the supremacy of individual³ rights and the merit principle together with minimal state intervention. According to this view discrimination is an abomination and should be outlawed. But so should affirmative action as this amounts to no more than reverse discrimination.⁴ Adherents to this model deny that the application of their policy will ultimately deliver only formal equality. Their vision holds that so-called "*protected groups*" or "*minorities*" will over time reach parity with the dominant group through their own exertions and innate abilities. Klug criticizes the colour-blind model for being too narrow a base from which to address past injustices; he asserts that to limit affirmative action to compensation for past victims, is to seek "*to preserve the structural integrity of the prevailing system of production and distribution by merely shuffling some individuals as compensation for a history of systematic deprivation of a whole sector of society.*"⁵ Now, while one could argue that the libertarian model would be appropriate in a society characterized by true equality and without a history of systematic discrimination, it seems clear that in a society such as ours, a deviation from the norm of equality of treatment would be justified precisely by our history referred to in section 8(3) of our Constitution. This weak deviation from the principle of equality of opportunity could also be justified on the basis that, in a situation of parity of individual merit, the importance of the constitutional objective of promoting the ideal of societal equality should prevail. Furthermore, if both individuals possess the same merit, there is no countervailing principle whereby the person from the advantaged group should be given the job rather than the person from the disadvantaged group. The

²Smith (1995).

³The ethical analysis thus far finds that the greater the emphasis on the individual who already has access and choice, the more likely the opposition to affirmative action" [Taylor (1991): p 59].

⁴See Belz (1991), Peron (1992), Glazer (1991) and Abram (1991). [Glazer N.: "Racial Quotas" in Nieli R. (Ed) (1991): *Racial Preference And Racial Justice: The New Affirmative Action Controversy* Washington: Ethics and Public Policy Centre: pp 3-27; Abram M.B.: "Fair Shakers and Social Engineers" in Nieli R. (Ed) (1991): *Racial Preference And Racial Justice: The New Affirmative Action Controversy* Washington: Ethics and Public Policy Centre: pp 29-44].

⁵Klug (1992): pp 139-140. Interestingly, Klug is aware of the possibility of a "political process theory" challenge to group-based affirmative action in a South Africa governed by blacks, as he specifically excludes "the group's present political status" as a consideration for determining a group's entitlement to preferential treatment (*ibid*: p 141).

only question remaining is whether in such a situation a pure chance allocation would not be required by our Constitution. Following Rawls⁶ it is submitted that a lottery is neither just nor unjust and therefore the outcome of a lottery would likewise not be just or unjust, it is simply a fact of life. Given this, it could well be that, if there is no other consideration or principle to take into account, that an ethically neutral method of allocation is the most appropriate. This however, is not the case, given our Constitution's commitment to the ideal of equality and its commitment to the promotion of equality⁷, there is a strong constitutional imperative to award social goods to the disadvantaged person in situations of parity of merit.

4.2.3. Moderate variant of affirmative action: This leaves us with the moderate variant of affirmative action. The three variants of affirmative action can be viewed from different perspectives, namely, from the perspective of equality, from the perspective of efficiency and from the perspective of liberty. On the dimension of efficiency, it is clear that the strong variant will least serve the interests of efficiency whereas the weak variant will serve it better, although not as well as the libertarian version which holds that the best person for the job must always be selected. On the other hand, neither the libertarian nor the weak variant of affirmative action would significantly promote a move towards greater equality that our Constitution directs us to aspire to. For this reason these two options are rejected. From the liberty perspective, it is evident that the strong variant is most intrusive on the employer's freedom to choose whom to select whereas the weak variant is the least so. Accepting Dworkin's contention that liberty should yield to equality, there are strong indications that equality considerations will trump liberty and consequently would rule out the weak variant of affirmative action. However, if employers' property rights and their freedom to choose are taken into account (together with the efficiency considerations mentioned earlier), one could argue that the strong variant of affirmative action is too great a negation of the value of liberty (which next to equality is pre-eminent in our Constitution), to pass constitutional scrutiny. The conclusion at this stage is therefore that the moderate variant of affirmative action seems to strike a balance between the demands of efficiency, equality and liberty. But this still leaves the question unanswered whether our Constitution would permit the selection on the basis of group membership only or whether there may be a different operational basis that will better fit our constitutional regime. I shall return to this question later.

4.3. MEANS AND ENDS OF AFFIRMATIVE ACTION

It is of determinative importance for the constitutional evaluation of affirmative action to have clarity on the purpose that one wishes to achieve by means of an affirmative action programme. Is the objective

⁶Rawls J. (1971).

⁷See Chapter 3 *supra*.

of a retributive or compensatory nature or is it a means to achieve greater substantive equality⁸ or promoting substantive equality of opportunity? Apart from other considerations, clarity on the objective to be promoted by an affirmative action intervention is essential for evaluating the constitutionality of these programmes. Reference to two examples from foreign jurisdictions will illustrate this point. In the US a three-tier approach to constitutional review of statutory classification of groups of people was adopted. Statutes that classify people on the basis of race ^{are} automatically suspect and subjected to "strict scrutiny" review in terms of which a classification must be strictly relevant to the purpose of the legislation, that it is the least intrusive alternative available for promoting the legislature's objective and that this objective which serves as the basis for the justification of the classification be "compelling" and not merely amount to a legitimate state purpose. A less demanding test, that of "intermediate level of review" is applied in the case of classifications which serve important government objectives such as affirmative action interventions.⁹ In low scrutiny cases (such as applied to legislation relating to classification in purely commercial matters) the rebuttable presumption is that the legislation is constitutional and the courts typically defer to the legislature's intent, requiring only a showing of rationality¹⁰ between the means and the end.¹¹ In practice the differentiation between strict, intermediate and low scrutiny has the effect that legislation that is designated as warranting strict scrutiny is more often than not found to be unconstitutional while state actions that attract the lower levels of scrutiny tend to pass constitutional muster.¹² The Indian Supreme Court has adopted a similar basis of review which entails that any classification must have a rational basis in relation to the object which the legislation seeks to achieve; a classification would be justified "... if it is not palpable discriminatory, (and) as long as it has a rational basis."¹³ From these examples, one could draw the almost trite conclusion that should an affirmative action intervention has as its objective explicit or implicit "reverse discrimination" based on a scheme of racial classification, it would attract strict scrutiny and in all likelihood should not pass the constitutional test. It is only if one denies the possibility that any modality of affirmative action can ever amount to reverse discrimination that an enquiry into the means of affirmative action becomes unnecessary.¹⁴ Although most South African writers¹⁵ agree that section

⁸Some writers assume that substantive or factual equality is the purpose of any affirmative action programme. See for instance Basson's comments on s 8(3)(a) of the Constitution [Basson (1994): pp 22-23].

⁹Davis (1994): p 203.

¹⁰(A) legislative classification may be upheld only if it bears a rational relationship to a legitimate state purpose". Therefore "(w)hen faced with a challenge to a legislative classification under the rational-basis test, the court should ask, first, what the purposes of the statute are, and, second, whether the classification is rationally related to achievement of those purposes" [Brennan J. in *United States R.R. Retirement Bd. v Fritz* 449 U.S. 166, 183 (1980)].

¹¹Torke (1982): pp 282-283.

¹²Hoffman (1990): pp 889-919.

¹³Davis (1994): p 203.

¹⁴As Albertyn & Kentridge [(1994): pp 149-178] seem to be doing.

8 allows constitutional scrutiny of the ends as well as the means of affirmative action programmes, they limit the means enquiry to an evaluation of the instrumentality of such programmes in achieving their purported ends. This is not sufficient, because limiting constitutional scrutiny to the efficiency of the means in attaining a laudable end, does not guard against the possibility of excessive encroachment of the rights or freedoms of non-beneficiaries of affirmative action by unconstitutional means.

To summarize, we can draw the following preliminary conclusions: (i) any affirmative action scheme based on a racial classification justified by an objective amounting to reverse discrimination could be challenged as being unconstitutional; (ii) if the objective of an affirmative action intervention is to compensate for past injustices and employs racial classification as a means to that end, it may well be vulnerable to the attack that it is not a rational basis in terms of the object which the legislation seeks to achieve (because the most discriminated against individuals are not the beneficiaries); (iii) if the object of affirmative action legislation is to promote greater equality in the substantive enjoyment of all fundamental rights and freedoms, it could also be argued that to use group-based racial classification is not rationally connected to the object of the legislation (for the same reason as in (ii)). These inferences will be discussed in greater detail in subsequent sections.

4.4. COMPENSATORY JUSTICE ARGUMENTS¹⁶

The wording in section 8(2) and section 8(3) is open to the interpretation that what animates these provisions is the desire for restitution and compensation. Although, given our history, this interpretation is almost the most natural, one nevertheless needs to investigate the adequacy of these rationales to base affirmative action on.

The compensatory justice argument is based on the moral and legal precept that a person who has been done a wrong in the past, has a claim for retribution against his wrongdoer. In this mould the argument for affirmative action is that blacks were harmed by discrimination by whites, by virtue of which they are now entitled to compensation. This argument is flawed in many respects. Firstly, it ignores the fact that, even if we accept that the victims of discrimination have redistributive rights, preferential hiring may violate the rights of some other persons. These conflicting rights, may for instance, be a basic right to equal treatment.¹⁷ One will therefore have to show that violation of these rights is justified, for instance, to use American terminology, by a "compelling government" interest and that affirmative action

¹⁵See, for instance, the writings of Davis and Mureinik on s 8 [Davis (1994): pp 196-211; and Mureinik (1994): pp 31-48].

¹⁶This discussion is broadly based on that of Fullinwider [Fullinwider (1990): pp 30-44].

¹⁷In the US, white males have successfully based their attacks on affirmative action programmes on the equal protection clause of the Fourteenth Amendment. See *City of Richmond v Croson Co*, 488 U.S. 469 (1989).

is a remedy "narrowly tailored" to achieve this objective.¹⁸ The evaluation of social policy as being just or unjust will therefore hinge on the following: (i) does one regard the victims' claims as legitimate; (ii) does one regard these claims of such importance that they may trump the claims to equal treatment of other people; and (iii) does one view the reparation as appropriate and just (that is, is affirmative action the best and just way to compensate victims of discrimination or should other forms of assistance be given)? A second objection to the compensatory justice argument is that morally it is wrong to penalize someone other than the wrongdoer and that in most instances the people who would be most adversely affected by affirmative action are young whites, who have the least blame for past discrimination. A third objection is that it is morally dubious to compensate someone other than the victim, and that as not all blacks were disadvantaged by discrimination, it would be wrong to compensate all blacks. A fourth objection is that of proportionality: affirmative action has the consequence of compensating the least injured while doing little or nothing for the most disadvantaged, in that no-one contends that jobs should be given to the totally unqualified. Thus the principle of proportionality is not only not applied, it is in fact inverted, to grant the least injured the most compensation and vice versa. The opponents of compensatory justice as a basis for affirmative action therefore contend that it would only be an acceptable argument if the actual victim and the actual perpetrator can be identified and if the compensation is appropriate, given the harm suffered (and this is of course in reality difficult, if not impossible, to do). Defenders of the compensatory justice concept can retort that it is not a specific individual that is to blame but society as a whole and therefore society should carry the burden of compensation. On the face of it this argument is acceptable given the institutionalized form apartheid took. The only problem is that this does not provide a rationale for violating a specific individual's right to equal treatment when applying for a job. It is one thing to say that society or the government owes a debt, it is quite another to say that all individuals within that society owe a debt, since the latter cannot be inferred from the former.¹⁹

Having established that compensatory justice arguments can be undermined by the difficulties relating to determination of the actual victim and perpetrator, individual desert, guilt and proportionality, in most cases, it can still be asserted that compensatory justice relates to groups and not to actual individuals. Fullinwider²⁰ convincingly argues that it does not make sense to talk of group rights in this context. He points out that to proceed from the premise that as discrimination was addressed against a class, to the conclusion that affirmative action can vindicate the group interests of the victims of discrimination, is to

¹⁸In *Fullilove v Klutznick*, 448 U.S. 448 (1980) and *Metro Broadcasting Inc. v Federal Communications Commission*, 110 S. Ct. 2997 (1990) the American Supreme Court accepted the compelling government interest argument to override the rights to equal treatment of the plaintiffs. In *Richmond v Croson*, 488 U.S. 469 (1989) the Court rejected the set-aside programme of the local authority, among others, because it was not narrowly tailored to achieve the "compelling interest".

¹⁹By way of analogy, South Africa, as an entity recognized by international law, may incur foreign debts, this does not mean that South Africans as citizens have incurred or are liable for those debts.

²⁰Fullinwider (1980): pp 58-61.

ignore two different senses in which the term "class" or "group" is used. In the first instance discrimination was directed against a class *"only in the trivial sense that discrimination against any individual is always based on some property or characteristic which the individual has in common with others."*²¹ The fact that I discriminate against one or more persons of that class does not mean that I have discriminated against all the members of that class. This then is the mistake, according to Fullinwider, that proponents of the group-based compensation theory make: their conclusion (that is, the remedy suggested for the discrimination) includes all members of the class whereas the discrimination affected only some members of the class.

4.5. FREEDOM AND EFFECTIVENESS

I regard choice in the matter of affirmative action of great practical importance for various reasons. It is highly unlikely that, by enforcing group-based quotas (as in racial quotas) without the option of opting out, the objective of eradicating racial prejudice or its effects would be achieved.²² Will the extreme racist/chauvinist employer not find informal ways of making life on the shop-floor extremely unpleasant for blacks/women without incurring legal sanctions? May it not be better, as suggested by Bell²³, that prospective employees should be warned that an employer is a racist, so that they know beforehand²⁴ the dangers attendant to obtaining a job with him? If the effectiveness of any affirmative action programme is ultimately dependent on the willing cooperation of the employer, may it not be better to provide for the option to buy an exemption licence for those extreme cases in which the employee is likely to be the victim of invidious covert discrimination?²⁵

The primary factor in the effectiveness equation of affirmative action seems to be the level of commitment of those who wield the power to implement and monitor affirmative action programmes, whether at the macro-level or the micro-level of the business enterprise.²⁶ Whereas it can safely be assumed that a new South African government will exhibit sufficient commitment, the effective

²¹*If I discriminate against a person because of his halitosis, it is possible to define a class of smelly people against whom I discriminate.*

²²*Indeed, many would argue that racial quotas will increase racial animus rather than decrease it.*

²³Bell D.: 'Foreword: The Final Civil Rights Act' in *California Law Review* Vol. 79, 1991: pp 597-611.

²⁴*Black people, moreover, will no longer have to divine whether an employer, realtor, or proprietor wants to exclude them. The license will give them – and the world – ample notice. Those who seek to discriminate without a license will place their businesses at risk of serious, even ruinous penalties' [Bell (1991): p 609].*

²⁵*This scheme will not remove all instances of covert discrimination since some employers (those that fall in the less extreme category) may find the fine/exemption licence fee too high yet still practise discrimination. The remedy for this is to make the costs associated with "unlicensed discrimination" prohibitively expensive. See Bell (1991).*

²⁶*See Asmal (1992); Hofmeyr (1993); Innes (1992).*

transmission of this commitment to the level of the undertaking can be realized only partly by an enforcement agency. A speedy and smooth implementation of affirmative action programmes over a wide spectrum will be possible only with the willing acceptance of such programmes by chief executive officers of private enterprise.²⁷ Commitment as the crucial ingredient in an affirmative action policy and programme is thus seen as a two-tiered issue. It is argued that the chances of winning this commitment at the micro-level will be greatly enhanced if CEO's are given some choice in the matter (if only to the extent that they wish to embark directly and commit their organizations to an affirmative action drive; not the freedom to decide to avoid liability for such programmes). It is also hypothesised that a national affirmative action policy that allows CEO's to translate affirmative action decisions into strategic business decisions will further facilitate the process of acceptance.²⁸

An individual-based socio-economic affirmative action model offers this form of bounded voluntarism,²⁹ the choice can easily be formulated in terms of break-even points and in the terminology of strategic and competitive advantage. Whereas a completely voluntarist approach to affirmative action has proved a chimera, there is proof that at the micro-level affirmative action programmes entered into voluntarily by companies were more successful than in instances where affirmative action was enforced.³⁰

4.6. GROUP-BASED QUOTA SYSTEMS

A group-based quota system can be defined as *any affirmative action programme in terms of which pressure is exerted on an employer to make decisions based solely on group membership and in terms of which compliance with the programme is similarly determined by sole reference to the composition of the employer's workforce in terms of proportional or other prescribed ratio representation of defined protected groups*. The traditional criticisms of affirmative action are directed against this class of programme.

4.6.1. Evaluation of group-based quota programmes: It is undeniably true that affirmative action

²⁷The CEO's need to be co-opted by the government as "enforcement agents", and it is submitted that this will only materialize if a less than high-handed approach is followed in which private industry can assimilate affirmative action as part of their business environment. In any event, should such an approach fail, less desirable options are still open to government, although at the cost of resentment and increased resistance.

²⁸That is, if affirmative action is packaged in such a manner that it is amenable to the way in which managers are accustomed to approach business challenges and decisions.

²⁹The sense in which I use the term "bounded voluntarism" can be compared with the situation of a US company which has to make the decision whether to tender for a federal contract or a contract that falls outside the ambit of Executive Order 11246. This is a business decision and no appeal to ethics is required. There is American research which indicates that the position of protected groups who are employed by federal government contractors improved relative to people not so employed.

³⁰Villere M. & Hartman S.: "What's Affirmative About Affirmative Action?" In *Business Horizons* September/October 1989: pp 22-26: p 27.

programmes based on a group notion are the most popular and prevalent. Several reasons can be advanced for this. Firstly, it has the advantage of relative simplicity. Most people are easily identified as either male or female or as black or white. This ties up with the origin of affirmative action. Society first became aware of discrimination and its injustice in the context of white-black relations. Affirmative action was a response to this realization. Thus it made sense originally to base affirmative action on this socially clear-cut black/white dichotomy. The addition of females as a protected group did not much complicate matters. It was also an easily monitored system in that all that the employer and enforcement agencies had to do was to do a black and white head count and compare this with statistics that in many cases were already available.³¹ This simplicity has, however, dissipated in recent years as more and more groups started to demand protected group status.³² A further complicating factor is the realization that apart from simple "main effects" discrimination, a person may also be the victim of double and/or compound discrimination and where there is discrimination against a group, the group should be entitled, on the logic of the group-based quota system, on designation as a protected group. This implies that it is no longer possible simply to do a head count, that is, to classify on the basis of easily identified external attributes, such as race or gender.³³ It is also difficult to imagine that a group-based quota system can cater for a protected group comprising compoundly discriminated against people; apart from the difficulty in identifying whether someone belongs to such a group, this could also have the effect of enlarging³⁴ the number of protected groups beyond manageable numbers.³⁵

4.6.2. Proportional quotas as an operationalisation of constitutional equality: According to one view, the organization has a duty to reflect in its workforce composition the demographics of the community in which it operates as it is dependent for its very existence on the community. Public institutions especially, have a duty to be staffed by the "politically appropriate" ratios, as they are the servants (and the creations) of the communities in which they are situated. These fair-share quotas may be based on racial population percentages or on other factors irrelevant to the predicted future performance of the applicants. The major problem with quotas is that the criterion performance of one group of appointees

³¹In order to determine "disparate impact" in discrimination cases or to determine "underutilization" in contract compliance enforcement under Executive Order 11246. But see Section 3.3.1. *supra* for the inappropriateness of using national racial/ethnic statistics in many situations.

³²See Peron (1992) and Glazer [(1991): p 22].

³³A male would normally have some difficulty qualifying himself for affirmative action entitlements by declaring that he belongs to the protected group of females. It would be much easier to declare himself a homosexual for the same purposes (this is not to say that his mere declaration of his sexual preferences would be unassailable, just that it will be more difficult for an employer to determine a person's sexual orientation than his/her physical gender).

³⁴Opponents of affirmative action already allege that it "has degenerated into a spoils system among competing racial and ethnic groups" [Abram M.B. (1991): p 38]. The implication is that more and more primary groups will seek designation as protected group.

³⁵If there are seven "main" protected groups (for example, gender, race, religion, age, disability, origin and sexual orientation), then the theoretical number of protected compound groups would be 119 (assuming "race" to consist of only the black group) for a total of 126 groups!

can be expected to be lower than that of another group. This may result in practice in a "revolving door" procurement policy, or an accumulation of employees from one group at the lowest ranks of the organization (because they fail to qualify for promotion). Worse, a company that deliberately reduces its admission standards to employ more blacks, may find itself in Court defending its promotion policies.

Smith proposes that the proportionality criterion may be used to determine the constitutional limits of affirmative action.³⁶ He suggests that any quota requirement exceeding the proportions of groups within the larger society may be unconstitutional because it is not designed to achieve equality. For instance, legislation requiring 95% blacks in the civil service would be unconstitutional because the prescribed proportion exceeds the proportion of blacks found in South Africa.³⁷ He tempers this headcounting endeavour somewhat by proposing that, should there not be sufficient numbers of blacks to fill the positions, the parity principle may be deviated from at the point where the appointment of unqualified blacks would be to the detriment of whites as well as blacks.³⁸ Smith concludes his article by stating that whites "... should only be allowed to challenge affirmative action programmes on the ground that their rights are being infringed when they are being denied access to social resources that they would have been entitled to in a truly colour-blind society."³⁹ This counter-factual situation must presumably be determined by reference to proportional demographics.

4.6.3. Conclusion: Without stating the arguments in any detail, the main teleological arguments against affirmative action are in reality directed mostly at group-based quota systems, some of which can be summarized as follows: It increases racial divisions, lowers productivity, subverts the primacy afforded individual rights by the libertarian ethos, it is as immoral as discrimination, it is unconstitutional in that it operates in breach of the equality provision contained in most if not all constitutions⁴⁰, it tends to be permanent, it stigmatizes its beneficiaries, it undermines democratic values and it is largely ineffective

³⁶Smith (1995): pp 91-101.

³⁷This means that whites can be unfairly burdened by affirmative action programmes – when they are left with less than what they would have under conditions of genuine equality" [Smith (1995): p 96].

³⁸Compare the insightful comments of Sen [(1992): p 137] in this regard: "Aggregative considerations can make us move in a different direction from equality in general. In concentrating on the programme of explaining the far-reaching role of basal equality ... we must not overlook the plurality of ethical concerns that take us beyond equality altogether. The distinction between aggregative and distributive considerations has often been discussed in the specific context of assessing results (e.g. the conflict between increasing total income and reducing distributional inequalities in incomes, or between raising aggregate utility and decreasing interpersonal utility differences). But similar contrasts hold in other spaces as well which may not involve any particular concentration on results as such. For example, there may be a conflict between promoting some rights in general (irrespective of distribution) and seeking a more equal distribution of those rights. Indeed, the aggregative-distributive dichotomy is one of the more pervasive issues in social evaluation. Equality – no matter how broadly defined can hardly be the only concern in any basal space, and aggregative considerations (including the demands of efficiency) tend to have an irreducible status."

³⁹Smith (1995): p 101.

⁴⁰Cox P.N.: 'The Question of 'Voluntary' Racial Employment Quotas and Some Thoughts on the Judicial Role' in Arizona Law Review Vol. 23, 1981: pp 87-178.

in improving the lot of protected groups. Even if it is effective, it helps mostly those members of the protected group who are least in need of assistance (*"it helps the wrong people"*). The most telling arguments in favour of group-based quotas are its presumed simplicity and ease of monitoring as well as its alleged inverse moral equivalence with discrimination⁴¹ (that is, that it is a group-based remedy for a group-based wrong).

4.7. AFFIRMATIVE ACTION AND REVERSE DISCRIMINATION

I wish to end this part of the chapter with some comments on the reluctance of (white) South African writers to address the issue of whether affirmative action can ever amount to reverse discrimination (beyond a flat denial that *"affirmative action is reverse discrimination"* -- a conclusion which, but for its vacuity, I could fully endorse). It may well be that there is a real fear that by admitting that not all forms of affirmative action can be benign discrimination, a commentator (especially if he is a supporter of affirmative action) may be tainted by this admission with being an opponent who professes support while in reality wishing to protect white privileges. Without pursuing this issue further, it is astounding how some of the most incisive legal minds in South Africa skirt this issue.

Affirmative action is **not** discrimination in reverse, nor is it appropriate to apply the same requirement of neutrality, applicable in the domain of anti-discrimination regulation to affirmative action. This is so for two reasons. Firstly, to equate affirmative action with discrimination is fallacious as the aim of discrimination is to **exclude**, whereas affirmative action's aim is to **include**. Secondly, affirmative action requires **positive** action to overcome systemic, institutionalized discrimination, whereas anti-discrimination laws are **passive** in the sense that they proscribe someone from indulging in certain types of behaviour (as opposed to mandating certain conduct, as is the case in affirmative action initiatives). Against a background of centuries of discrimination, anti-discrimination laws are perpetuating discrimination, rather than eliminating it⁴², and may indeed exacerbate inequality.⁴³

If the preceding evaluation of the conceptual distinction between affirmative action and reverse discrimination is valid, one could expect that, irrespective of the professed benign motive of any programme, in its operation it must be inclusive rather than exclusive, otherwise it may amount to reverse discrimination. The US Supreme Court's reasoning in Bakke v Regents of the University of

⁴¹Rosenfeld argues that whereas race and gender originally were morally neutral, it gained derivative moral significance by virtue of having been used as attributes whereby to identify targets for discrimination. Rosenfeld M. (1991): Affirmative Action And Justice: A Philosophical and Constitutional Inquiry New Haven: Yale University Press.

⁴²Fullinwider (1980): pp 171-172.

⁴³Albertyn C. & Kentridge J.: "Introducing the Right to Equality in the Interim Constitution" in South African Journal on Human Rights Vol. 10, Part 2, 1994: pp 149-178: p 152.

California 438 U.S. 265 (1978) is a good example of an instance where an affirmative action programme was regarded as unconstitutional because it operated to exclude a person absolutely. In the Bakke case the Court found the university's minority set-aside for admission to medical school to be an illegal quota because it operated to exclude absolutely applicants from the majority group. The Court endorsed the Harvard University admissions system whereby race is only one factor among many, that are taken into account, when evaluating applications for admission. In the Court's view the Harvard system would be constitutional as it did not operate to exclude majority member applicants absolutely. This approach supports the individual-based socio-economic model referred to earlier.⁴⁴ It is somewhat perturbing that some South African commentators seem to verge on the assertion that, in the South African context, discrimination against the privileged can never amount to reverse discrimination, provided that it is in consequence of pursuing "the end of full equality."⁴⁵ As a matter of law and morality, this cannot be correct.

4.8. EQUALITY OF WHAT?

Looking at the Constitution as a whole it seems clear that the Constitution does not prescribe measures to compel equality of outcome (as in a command economy) but allows for substantive equality of opportunity to promote the ideals of freedom and egalitarianism. Neither does the present government come out in favour of a commandist economy⁴⁶ while it strongly condemns prevailing inequalities and shows a commitment to ameliorating these. Indeed, if regard is had to the rights and freedoms enumerated in Chapter 3, it is clear that any legislation purporting to introduce equality of outcome on a macro-economic scale would be unconstitutional. Support for this is to be found in the provisions relating to privacy⁴⁷, economic activity⁴⁸ and property⁴⁹ indicating an endorsement for some form

⁴⁴See Chapter 1.

⁴⁵Albertyn & Kentridge (1994): p 162. The authors try to protect themselves by saying that "... we are not saying that the Constitution always permits discrimination against privileged groups" (*op cit*). But it is clear from the discussion that follows on this (disingenuous) disclaimer, that that is exactly what they are saying.

⁴⁶That is, a centrally planned economy, as opposed to a "free-market" economy.

⁴⁷Section 13. Section 13 protects the individual from searches of his or her person, home or property or the seizure of his or her private possessions. Is a right to privacy possible without a right to property?

⁴⁸Section 28. (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory. (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

⁴⁹Section 28. (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights. (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law. (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and

of freemarket economy (qualified in some respects by social justice considerations). Thus it can be stated that the Constitution promotes the (instrumental) value of equality of opportunity In pursuit of the (substantive) value of equality (the latter also being "instrumental" in the context of striving for the ideal of egalitarianism). In support of this conclusion I wish to advance the arguments of two writers (Mansfield and Hayek) why a government policy based on "equality of outcome" is undesirable, namely that it will undermine democracy and freedom.

According to Mansfield⁵⁰ a constitutional democracy is based on the principles of public debate, persuasion and the consent of the governed; the affirmative action policies of successive American administrations violated these basic democratic values since affirmative action *"never made its way through the legislative process with public notice and debate."*⁵¹ By focusing on equality of result, affirmative action encourages indifference to means as long as the desired end is achieved. Mansfield warns that violation of these procedural safeguards in a democracy in pursuit of the desired ends may lead to a norm that *"freedom is doing as one pleases, or doing what one thinks is required by justice."*⁵² Hayek argues in similar vein that the intrusion of the government into the private sphere to promote the ideal of equality of welfare, will inevitably lead to the loss of civil liberties and herald the coming of the totalitarian state.⁵³ One could add to this that our Courts, when adjudicating on issues which in reality amounts to social engineering, should not stray too far from what the community would tolerate. In this regard our Courts could take heed of the following remarks by Devlin⁵⁴: *"... the social service which the judge renders to the community is the removal of a sense of injustice."* Without the removal of this sense of injustice people may turn to terrorism, or, if enough people feel aggrieved to social unrest. That is why impartiality and the appearance of it are the supreme judicial virtues. *"In the course of their work judges quite often dissociate themselves from the law. They would like to decide*

equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

⁵⁰Mansfield H.C.: *"The Underhandedness of Affirmative Action"*, in Neill R. (Ed) (1991): *Racial Preference And Racial Justice: The New Affirmative Action Controversy* Washington: Ethics and Public Policy Centre: pp 127-140.

⁵¹Mansfield (1991): p 127.

⁵²Mansfield (1991): p 139.

⁵³*"The great problem is whether this new demand for equality does not conflict with the equality of the rules of conduct which government must enforce on all in a free society. There is, of course, a great difference between government treating all citizens according to the same rules in all the activities it undertakes for other purposes, and government doing what is required in order to place the different citizens in equal (or less unequal) material positions. Indeed, there may arise a sharp conflict between these two aims. Since people will differ in many attributes which government cannot alter, to secure for them the same material position would require that government treat them very differently. Indeed, to assure the same material position to people who differ greatly in strength, intelligence, skill, knowledge and perseverance as well as in their physical and social environment, government would clearly have to treat them very differently to compensate for those disadvantages and deficiencies it could not directly alter"* [Hayek F.A. (1982): *Law, Legislation and Liberty: A new statement of the liberal principles of justice and political economy* London: Routledge: Volume 2: *"The Mirage of Social Justice"*: p 82].

⁵⁴Devlin: *"Judges and Lawmakers"* in *Modern Law Review* Vol. 39, No. 1, January 1976: pp 1-16: p 3.

otherwise, they hint, but the law does not permit. They emphasise that it is as binding upon them as it is upon litigants. If a judge leaves the law and makes his own decisions, even if in substance they are just, he loses the protection of the law and sacrifices the appearance of impartiality which is given by adherence to the law. He expresses himself personally to the dissatisfied litigant and exposes himself to criticism. But if the stroke is inflicted by the law, it leaves no sense of individual injustice; the losing party is not a victim who has been singled out; it is the same for everybody, he says.^{55,56} This may be tricky in South Africa given our plurality of interests. Pluralism of competing values in our society necessitates the creation in the belief in the legal system and the legal process and this will demand a balancing act (between equity and equality notions of justice) from our judges when interpreting statutes and the Constitution and from the Judicial Services Commission when appointing judges. A rights culture will be established only if the majority of each constituency in South Africa endorses the direction taken by the Constitutional Court. It can validly be postulated that in South Africa the disadvantaged group (predominantly black) subscribes to an equality notion of justice and the hitherto advantaged group (predominantly white) to an equity notion of fairness. The ambivalence in society about "justice" involves the conflict between two core values: individualism and egalitarianism. These values, recast in distributive terminology, result in a perception of justice somewhere between equity/merit and equality as pole values. Although it is argued that justice cannot be attained by making an exclusionary choice between either of these pole values, it cannot be said that even if such a selection were predicated on considerations of justice, that this would lead to a clear uncontentious solution to the distributive problem since the criteria whereby equity or equality is to be identified would still leave ample room for dispute. By nature man is neither an equity nor an equality theorist: both must be seen in their particular social and historical contexts. Our Constitutional Court will have to walk this tightrope between equity and equality. Devlin ends his discussion with an apocalyptic view (where he warns against the danger of judges adjudicating according to their precepts of justice), expressed in the following eloquent passage (strongly reminiscent of that of Hayek, eluded to before): *"In every society there is a division between rulers and ruled. The first mark of a free and orderly society is that the boundaries between the two should be guarded and trespasses from one side or the other independently and impartially determined. The keepers of these boundaries cannot also be among the outriders. The judges are the keepers of the law and the qualities they need for that task are not those of the creative lawmaker. The*

⁵⁵*ibid*: p 4.

⁵⁶Basson & Viljoen [(1988): pp 6-10] make a similar point: "It is generally stated that legitimacy essentially implies acceptability. A system of (constitutional) law which is acceptable (to the subjects), is a legitimate constitutional law system and its legitimacy in turn ensures the permanency or stability of the constitutional dispensation." And "(l)egitimacy, consequently, is the acceptance of a specific constitutional dispensation by the community on the grounds of their 'sense of justice'. It is clear that this ethical modality, which determines the sense of justice of the community, implies those legal principles, according to which positive law is judged for its validity (in terms of Dooyeweerd's theory of law). These legal principles then, represent an external value system (which is based on the principle of justice in particular) and it is on the grounds of this normative system that Van der Vyver evaluates the legitimacy of a system: the constitutional dispensation is legitimate (acceptable) when it satisfies the sense of justice which ought to exist in the community" [Basson D.A. & Viljoen H.P. (1988): Suid-Afrikaanse Staatsreg Juta & Co. Ltd.: Cape Town].

creative lawmaker is the squire of the social reformer and the quality they both need is enthusiasm. But enthusiasm is rarely consistent with impartiality and never with the appearance of it. ... Progressives are of course in a hurry to get things done and judges with their plenitude of power could apparently get them done so quickly; there seems to be no limit to what they could do if only they would unshackle themselves from their precedents. It is a great temptation to cast the judiciary as an elite which will bypass the traffic-laden ways of the democratic process. But it would only apparently be a bypass. In truth it would be a road that would never rejoin the highway but would lead inevitably, however long and winding the path, to the totalitarian state.⁵⁷

The arguments by Mansfield and Hayek and the warnings of Devlin should indicate that, if freedom and democracy are, next to equality, core values of our Constitution (and given the historical context in which the Constitution came into being, there is a strong presumption in this direction), the unbridled quest for equality of outcome can only be pursued at the grave risk of negating the constitutional values of democracy and freedom.

4.9. AFFIRMATIVE ACTION FOR WHOM?

While agreeing with Smith's assertion that *"(m)asures which help the individual will help the group"*⁵⁸ one can take issue with the underlying assumption of his broader argument which is based on the unreflective premise that section 8(3) is founded on a group-based notion of affirmative action (as opposed to individually based programmes).⁵⁹

Firstly, although most writers on and participants in the affirmative action debate assume group-based notions of affirmative action, the Constitution by no means proscribes other forms of affirmative action. As far as the wording of section 8(3)(a) is concerned it should be noted that it refers to *"persons"* as well as *"groups"* or *"categories"*. The inclusion of these classes of people who may have been the victims of unfair discrimination permits the following interpretation as far as affirmative action is concerned: (i) affirmative action may be employed to assist individuals; (ii) affirmative action may be based on groups or categories; and (iii) the inclusion of the word *"categories"* (in addition to groups) opens the way for an interpretation which allows for affirmative action based on a classification going beyond that of the traditional group-based notions such as gender or ethnicity or race. In none of these is it a requirement that a specific group should be identified as being the perpetrators of the unfair discrimination or need a specific instance of discrimination be proven. Thus, generalised societal discrimination is sufficient to

⁵⁷Devlin (1976): p 16.

⁵⁸Smith (1995): p 90.

⁵⁹Smith (1995): pp 89-91.

entitle a person, group or category to affirmative remedial action.

Indeed, the phrase "*categories of persons*" used in section 8(3) highlights the fact that categorization is a matter of convention rather than a given and this in turn leads to the conclusion that the act of classification itself entails a selection of certain particular diversities rather than others. The undeniable fact that group-based analyses have been predominant does not preclude other typologies being developed to better suit the objectives of affirmative action. For instance, once it is admitted that race and gender, whatever their pragmatic and analytical virtues,⁶⁰ are but derivative indicators of victimhood and that the true object of affirmative action should be to promote the interest of disadvantaged individuals in pursuit of the ideal of social justice or societal equality,⁶¹ rather than the favouring of a specific race or gender group, then it follows that group-based notions of affirmative action are seriously flawed.⁶² The defect in group-based affirmative action is that it may not satisfy the proportionality requirement of the limitations clause and that there are less drastic measures to achieve the objects which will at the same time be more effective than the blunt instrument of group-based affirmative action.

Secondly, the bland assertion that measures "*which help the individual will help the group*", cannot be accepted without qualification. The fact is that group-based affirmative action programmes typically help the least disadvantaged members of a group without necessarily helping the group as a whole and I fail to see how this could be of any real help to the masses of uneducated indigenous black individuals who should be the real beneficiaries of affirmative action (and who are far more representative of the black group than the lucky few). The logic of this argument is that it is the wholly unqualified who are in real need of preferential treatment and not those at the top end of the social scale within the protected group.⁶³ Furthermore, it is open to question whether it is scientifically correct to ascribe all unexplained

⁶⁰In fact, general analyses of inequality must, in many cases, proceed in terms of groups – rather than specific individuals – and would tend to confine attention to intergroup variations. In doing group analysis, we have to pick and choose between different ways of classifying people, and the classifications themselves select particular types of diversities rather than others. ... The crucial relevance of such class-based classifications is altogether undeniable in the context of general political, social, and economic analysis" [Sen (1992): pp 117-118].

⁶¹"Inequalities in the distribution of income and ownership will typically be part of the story, but by no means the whole of it" [Sen (1992): pp 121-122].

⁶²"In analyzing the relation between economic opportunities and freedoms, the tradition of classification based on the so-called Marxian classes can be quite inadequate. There are many other diversities and an approach to equality related to the fulfilment of needs or to ensuring freedoms has to go beyond purely class-based analysis. For example, even if inequalities based on property ownership are eliminated altogether, there can be serious inequalities arising from diversities in productive abilities, needs, and other personal variations. The case for going beyond class analysis was, in fact, persuasively made by Marx (1875) himself ..." [Sen (1992): p 120].

⁶³This will be true in many other spheres (e.g. university set-asides and affirmative sub-contracting), but not in all. For instance, affirmative programmes in basic health care and education probably will help the least advantaged members of society. It is interesting that these two examples are both instances of basic need fulfilment that could be applied to all members of society without necessitating a recourse to group-based affirmative action.

differences between two groups to a factor "X" and then to label that unknown factor⁶⁴ "discrimination". Such a methodology aprioristically assumes that groups may not on average diverge on other legitimate life choices and cultural values that may influence each other⁶⁵. It seems somewhat denigrating of the group to deny its right to culturally distinct characteristics.

The conclusion is therefore that group-based affirmative action programmes do in fact favour the best qualified within the protected group, and if it is assumed that this is not the goal of affirmative action programmes, this is a valid criticism. However, this is not a criticism that can be validly raised against affirmative action generally, but only against certain forms of affirmative action programme. An individual-based socio-economic affirmative action model does not presuppose that it is completely clear-cut who should be responsible for the development of human resources. Rather, it recognizes that the upliftment of under- or undeveloped people will exact a tax from all sectors of society, but it leaves the decision of who will actually do the upliftment to the employer. Because of the inescapable flaws inherent in group-based notions of affirmative action, it is proposed that the proper "*subject of equality*"⁶⁶ in the context of affirmative action should be the individual and not the group (the latter being but a handy indicator of possible discrimination rather than a direct measure of actual discrimination).

4.10. SECTION 8 AND POSITIVE DISCRIMINATION

To discriminate "... is to fail to treat fellow human beings as individuals."⁶⁷ This being the case, we can conclude that it is beyond contention that affirmative action based on group membership as the only dimension of the personality (i.e. to the exclusion of the richness of each person's individuality and individual circumstances) will amount to discrimination. But, as we have seen, our Constitution does not proscribe discrimination, only unfair discrimination.⁶⁸ Furthermore, section 8(3) allows for positive discrimination. The question then becomes whether discrimination in favour of disadvantaged groups will always be fair, irrespective of the means chosen to advance this objective. This question raises a

⁶⁴See Finkelstein for a discussion of statistical techniques and the law and in particular the issue of the "tainted variable objection" levied at multiple regression [Finkelstein M.O.: "The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases" in *Columbia Law Review* Vol. 80, 1980: pp 737-754: p 739].

⁶⁵Peron questions the validity of the "assumption behind affirmative action ... that wealth disparities are simply the result of discrimination when there exists a great deal of evidence to show that other factors are far more important." (p 23). Examples of such factors discussed by Peron are differences in cultural values, in family lives, in occupational distribution, age distribution and whether a person lives in a rural or urban area [Peron (1992): pp 24-38]. Although some, if not all, of these factors will be affected by discrimination, it is not to be denied that they can have an independent main effect on wage differentials apart from their interactional effect.

⁶⁶See Section 2.2. *supra*.

⁶⁷Van Niekerk A.: "Equality Rights and the New Act" in Cheadle H., Le Roux P.A.K., Thompson C. & Van Niekerk A. (1995): *Current Labour Law 1995* Kenwyn: Juta & Co. Ltd.: pp 76-94: p 77.

⁶⁸See the discussion in Sections 3.2. and 3.3. *supra*.

host of subsidiary and fundamental questions, only some of which can be attended to in this discussion.

It has been argued earlier that the benchmark established by our Constitution is substantive equality of opportunity rather than substantive equality of outcome.⁶⁹ As regards the latter it was said, however, that an egalitarian society can be seen as a constitutional aspiration or ideal. Substantive equality of opportunity being our starting point, we need to determine when a deviation from this principle will be allowed. Section 8(3) provides the answer, namely, a deviation from equality is permissible if it is designed to advance persons or groups disadvantaged by unfair discrimination. To say that a group has been disadvantaged can only have meaning in the most trivial sense, namely that everyone necessarily is a member of some group or other.⁷⁰ Turning to individuals, it is equally obvious that not all South Africans were unfairly discriminated against, even if the majority of the members of particular groups were unfairly treated. In this regard one can think of the children of expatriate freedom fighters or non-South African blacks who are now reaping the benefits of affirmative action.⁷¹ It follows that individuals who have not been "*disadvantaged by unfair discrimination*" are not covered by section 8(3) and therefore that affirmative action programmes that confer advantage on such individuals will amount to an unconstitutional deviation from the equality principle.

Based on the often drawn distinction between affirmative action and reverse discrimination, that the former is inclusionary whereas the latter is exclusionary, as well as foreign case-law, one could also argue that affirmative action schemes which would have the effect of absolutely excluding non-beneficiaries from competing for social goods,⁷² would fall outside the intended scope of section 8(3). For this reason group-based quota models of affirmative action can be discarded as unconstitutional. It is interesting that, according to a news report, the European Court has recently ruled that "*... positive discrimination in favour of women by use of quotas is, in effect, sex-discrimination against men.*"⁷³

The conclusion to be drawn from the above is that, in terms of section 8(3), affirmative action models would be constitutional only if they were designed in such a way that they would come to the assistance of actual victims of past discrimination (seen in its broadest sense as including general societal discrimination and not requiring the identification of an actual perpetrator), since section 8(3) limits affirmative measures to that category of persons. The reference to "groups or categories" in section 8(3) can be interpreted as an indication that group or category membership may be taken into account when

⁶⁹Section 4.8. *supra*.

⁷⁰See the discussion in Section 4.4. *supra*.

⁷¹It would be interesting to know how many black academics at South African universities are South Africans.

⁷²See Section 4.7. *supra*.

⁷³"European Court 'no' to job quotas for women" in *The Star*, 18 October 1995.

Identifying those disadvantaged individuals. It must be remembered that race and/or gender are in themselves not badges of disadvantage (except for racists and male chauvinists), but are simply used as presumptive indicia of unfair discrimination for the purpose of easy identification. Viewed as such, race and gender can be seen in their proper perspective, namely, as being useful to identify victims of unfair discrimination, but not by themselves constituting conclusive proof of discrimination. What can then constitute such proof? For this we have to turn to the aspirational value our Constitution confers on substantive equality. It is submitted that indicators of socio-economic deprivation combined with the presence of indirect indicia of deprivation are sufficient to qualify a person as being entitled to the benefits of affirmative action. Therefore, an indigent black female would be an appropriate beneficiary of affirmative action, not because she is a black person or a woman, but because she is a black woman who is, in real terms in a disadvantaged position. Her race and gender will create a presumption of unfair discrimination but it is her actual material circumstances that will confirm this presumption and make her entitled to affirmative action assistance.⁷⁴ Conversely, an indigent white male may well qualify for a lesser form of affirmative action if he possesses certain indicia of socio-economic disadvantage, such as having grown up in a poor home or area.⁷⁵ The constitutional ideal of substantive equality compels us to ameliorate all forms of real disparities, not by presumption but by looking at the actual positions of individuals, irrespective of their group membership (although, as indicated earlier, group membership may assist us in identifying disadvantaged individuals and may be used to categorise individuals according to the quantity of affirmative action society may be prepared to expend on them).

4.11. SECTION 33(1) AND AFFIRMATIVE ACTION

Having concluded in the previous section that group-based and quota-based affirmative action models may be unfair and unconstitutional in terms of section 8, it still remains to be determined, in the event that I am wrong in this, whether these models of affirmative action may not fall foul of section 33.^{76,77}

⁷⁴Because of the problems of establishing a causative correlation between socio-economic status and discrimination on the individual level as an empirical fact, this inferential process is proposed. Of course, in cases of direct discrimination actual discrimination as causative factor will have to be established.

⁷⁵Because of the endemic (and in the case of blacks, structural) discrimination against women and blacks, it would be easier in their case to justify the causative inference than it would be for the example of the white male mentioned in the text.

⁷⁶It should be noted that this discussion of s 33 is very incomplete and selective. To do justice to the complexities presented by s 33 falls way beyond the scope of this research paper.

⁷⁷The relevant provision of the limitation clause reads as follows: "33. Limitation.—(1) The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation—

- (a) shall be permissible only to the extent that it is—
 - (i) reasonable; and
 - (ii) justifiable in an open and democratic society based on freedom and equality; and ...'

A Bill of Rights typically contains basic rights that may conflict with one another in their application. A Court will have to decide which protected right enjoys priority in such an instance. For example, the right to equal treatment (used in America by civil rights groups to demand school integration) may come into conflict with the right to associate (used by white parents to maintain segregated schools). In Brown v Board of Educators⁷⁸, the American Supreme Court gave priority to the right to equality. The limitation clause would be central to any dispute over the alleged infringement of a fundamental right because conflicting rights will almost always be at issue. It will only be when the defence is based on a denial that the fundamental right has been infringed that the issue will not turn on a balance of rights in terms of section 33.

4.11.1. Unfair yet reasonable limitation: In the ensuing discussion the process and application envisaged by section 33 is given in broad outline by using the example of a white male challenging a group-based affirmative action scheme on the basis of section 33. The process in applying section 33 can be divided into the following two phases: In the first phase the applicant bears the onus of showing that a fundamental right or freedom of his has been infringed. In determining the veracity of this allegation a court will first have to determine the scope of the right in question, and, secondly, determine if the right has been infringed.⁷⁹ Should the applicant succeed in this, the party invoking the limitations provision must then show that the restriction is consonant with the limitations clause.⁸⁰ Satisfying this burden requires two things⁸¹: firstly it must be shown that the interest underlying the limitation is of sufficient importance to outweigh the fundamental right, and, secondly, it must be shown that the means used to further this interest are in proportion to the object of the limitation. Moving to the proportionality requirement, and without surveying foreign jurisdictions, it can be stated that, for the purposes of this research and following the exposition provided in Cachalia et al.⁸² it is accepted that the test as pronounced in R v Oakes 26 DLR (4th) 200, will apply. The proportionality test as proposed in the Oakes case consists of three components: (i) the limitation must be rationally connected to its objective; (ii) the limitation must impair the right or freedom as little as possible; and (iii) there must be proportionality between the effects of the limitation and its objectives.⁸³ In the context of possible affirmative action legislation an application of the preceding will entail answering the following questions: Firstly, is the

⁷⁸347 U.S. 483 (1954).

⁷⁹See Cachalia et al. (1994): pp 106-109 and the Canadian case law cited by the authors. Also see Spitz D.: "Eschewing Silence Coerced by Law: The Political Core and Protected Periphery of Freedom of Expression" in South African Journal on Human Rights Vol. 10, Part 3, 1994: pp 301-335.

⁸⁰Cachalia et al. (1994): p 107 & pp 109-116.

⁸¹It is of course rather difficult to give content to the phrase "reasonable and justifiable in an open and democratic society based on freedom and equality", but luckily we can have recourse to foreign jurisdictions to enlighten us.

⁸²Cachalia et al. (1994): pp 105-116.

⁸³Cachalia et al. (1994): p 112.

government objective of sufficient importance? Secondly, are the means (the modality of affirmative action contained in the statute) rationally connected to the objective? Thirdly, are the rights and freedoms of non-beneficiaries of the affirmative action legislation infringed as little as possible? And lastly, are the costs to the non-beneficiaries outweighed by the benefits to the beneficiaries of the legislation?

Applying the preceding process to the example of the white male launching a constitutional attack on a group-based affirmative action scheme, the argument could be structured as follows (for the purposes of our example we are assuming that the applicant has succeeded in showing that his fundamental right to equality in terms of sections 8(1) and 8(2) has been infringed and that such infringement is not saved by section 8(3)⁸⁴ and that the sponsor of the affirmative action programme now relies on section 33 as a justifiable infringement of the applicant's equality rights)⁸⁵:

- (i) **Sufficiently important objective:** What would constitute a sufficiently important objective is somewhat uncertain, but given our history and the pervasive and gross disparities present in our society there can be little doubt that affirmative action with the objective of making our society more egalitarian and promoting reconciliation will satisfy this requirement. However, objectives such as compensatory justice arguments or objectives amounting to reverse discrimination, would be, for reasons previously expounded, be unconstitutional. Assuming that the sponsor of the affirmative action model under attack has satisfied this ends-test, the Court will then move to the means used.
- (ii) **The limitation must be rationally connected to its objective:** Our disgruntled white male will point out that group-based affirmative action programmes do not advance the egalitarian objective in that such programmes have proved elsewhere to in fact increase the disparities within groups. He would also point out that group-based programmes do nothing (or very little) for the most disadvantaged members of the disadvantaged group. For these arguments he could adduce an abundance of research and statistical evidence from the US.
- (iii) **The limitation must impair the right or freedom as little as possible:** Depending on the nature of the group-based affirmative action model, the applicant may argue, in the case of a quota-model, that there are other ways of achieving the objectives of affirmative action that will

⁸⁴The applicant could base his arguments on many of the bases discussed in preceding chapters: that the affirmative action scheme has the effect of promoting the interests of persons not unfairly discriminated against [i.e. that it does not fall under s 8(3)]; that it excludes white males absolutely [i.e. that it amounts to reverse discrimination and as such infringes his equality rights enshrined in s 8(1) and s 8(2)]. It should be noted that this line of attack does not imply that s 8(3) is a limitation of the equality clause (and therefore not a realisation of equality): it is based on the argument that s 8(3) provides for the pursuit of substantive equality subject to certain preconditions.

⁸⁵See "unfairness and reasonableness" in the text *infra* regarding the relationship between "unfair discrimination" in s 8 and "reasonableness" in s 33. Can a respondent contend that the affirmative action programme is unfair discrimination in terms of s 8 but is nevertheless "reasonable and justifiable in an open and democratic society based on freedom and equality" in terms of s 33(1)?

have less of an impact on his equality rights. He could also point out that an individual-based affirmative action model will be less destructive of his freedom of choice. In essence this leg of the argument will entail convincing the Court that there are less intrusive ways of achieving the objective. As has been argued throughout this paper, an individual-based affirmative action scheme should, if accepted as a workable option by the Constitutional Court, suffice to sink group-based models at this stage of the enquiry.

- (iv) **There must be proportionality between the effects of the limitation and its objectives:** The applicant could advance the argument that the gains the most disadvantaged members of the beneficiary group (i.e. those who are in reality the people who stand to gain the least or nothing from the affirmative action programme) stand to realise as a consequence of the affirmative action scheme, and the disadvantages he stands to suffer, the scheme is disproportionate. If a strong variant of affirmative action is at issue, the applicant may also argue that, even if the outcome of the cost-and-benefit analysis as between his losses and the gains of the least disadvantaged members of the beneficiary group is inconclusive, the efficiency costs to the economy as a whole, should swing the scale against the programme. In the case of a moderate variant of affirmative action, the applicant would, in all likelihood, not succeed in his attack at this stage of the enquiry. If this variant of affirmative action is at issue, he would have to base his attack on the group-based model by comparing it to the individual-based model during stages (ii) and (iii) of the enquiry.⁸⁶

4.11.2. Unfairness and reasonableness: The problem in applying section 33 in the context of affirmative action is that one first has to work through the internal structure of section 8 to ascertain whether a situation is possible where an affirmative action programme could be unfair discrimination in terms of section 8(2), even though it falls within the ambit of section 8(3). Davis,⁸⁷ as well as Albertyn and Kentridge⁸⁸ would say that any affirmative action programme that complies with section 8(3) will be fair automatically and will not be susceptible to section 33 scrutiny. As argued previously, this cannot be correct, since the means as well as the ends of a programme must be constitutional.⁸⁹ In order to be constitutional the means must satisfy the effectiveness requirement of section 8(3),⁹⁰ but also not infringe the right not to be discriminated against guaranteed by section 8(2). It has already been argued

⁸⁶In the case of an affirmative action programme that operates to exclude absolutely a privileged group (such as white males) one could also argue that it contravenes s 33(1) since it negates the essential content of certain rights, for example, the right to equality and the right to economic activity. Since the 'essential content' concept is a controversial one, this line of argument is not further developed in this discussion.

⁸⁷Davis (1994).

⁸⁸Albertyn and Kentridge (1994).

⁸⁹See Chapter 2.

⁹⁰See the discussion of the meaning of 'designed to achieve' in Section 3.4. *supra*.

that certain forms of affirmative action may be very effective but would nevertheless be unconstitutional because it would amount to unfair reverse discrimination.⁹¹ Du Plessis and Corder base the immunity of affirmative action against section 33 scrutiny on the argument that section 8(3) does not entrench a "right".⁹² This reasoning is flawed because it only looks at affirmative action from the beneficiary's perspective. This is nonsensical since it can only make sense to talk of affirmative action in the context of beneficiaries and non-beneficiaries. Conceptually affirmative action in a universum consisting of beneficiaries only is an impossibility, the action embarked upon must affirm the position/treatment of one group as against another group. Recognising that non-beneficiaries are inextricably part of the notion of affirmative action, leads to the conclusion that section 8(2) protects the rights of non-beneficiaries in the context of affirmative action. Thus, whereas section 8(3) may be immune from section 33 scrutiny, if viewed from the perspective of beneficiaries, section 8(2) still operates to protect the rights of non-beneficiaries (whose interests form an integral part of the notion of affirmative action). On this analysis, an affirmative action programme in compliance with section 8(3)(a) may nevertheless be found to be unfair discrimination in breach of section 8(2), yet be found to be reasonable and justifiable in terms of section 33(1).⁹³ "Unfairness" and "reasonableness" should not be confused⁹⁴, the former is an aspect of justice whereas the latter falls more properly within the domain of policy considerations and political morality.⁹⁵ Some actions may be unfair as a matter of "simple justice between man and man", but nevertheless reasonable as a matter of abstract political morality.⁹⁶

4.12. CONCLUSION

In this paper I have tried to show that although the most popular conception of affirmative action as a group-based remedy for a group-based wrong, has the benefit of simplicity, it is flawed from both an

⁹¹See the discussion in Section 3.4., Section 4.7. and Section 4.10. *supra*.

⁹²Du Plessis L. & Corder H. (1994): *Understanding South Africa's Transitional Bill of Rights* Kenwyn: Juta & Co. Ltd.: p 145. As was stated before (Chapter 3, footnote 71), these authors argue that s 8(3)(a) does not confer a right (because, so the argument goes, it merely allows for the possible future introduction of affirmative action programmes rather than creating a right to affirmative action). Thus, since the limitation clause provides for the limitation of "rights" (rather than possible "entitlements"), s 33 is not applicable to s 8(3)(a).

⁹³For example, affirmative action in favour of blacks may satisfy the requirements of s 8(3) but may operate to exclude women unfairly, yet may be reasonable and justifiable in terms of s 33 because of limited resources. To deny that affirmative action can ever be unfair is dishonest. Likewise, to deny that such unfairness may sometimes be justifiable given an imperfect world with limited resources, is unrealistic.

⁹⁴I do not use these words here in their traditional administrative law or labour law context.

⁹⁵The words "in an open and democratic society based on freedom and equality" anchor "reasonable" and "justifiable" in a certain conception of the just society; by contextualising it thus, it becomes a question of political morality rather than one of fairness in the abstract.

⁹⁶It is much easier to justify the "fairness" of affirmative action as an abstract ethical issue than to explain to a real person on an individual basis why he is mistaken in regarding the adverse effects of an affirmative action programme on his job security and prospects as being unfair to him, to one's own satisfaction.

ethical and a logical perspective and can be attacked on constitutional grounds. The fact that South African commentators have not addressed the issues raised against this popular (but not the only) version of affirmative action, may be ascribed to the (real) fear that this may make them vulnerable to the stigmata associated with libertarian and/or racist sentiments. That this inference is unwarranted in the case of opposition to group-based models of affirmative action is clear, if the objections are founded upon an alternative model of affirmative action that would advance the constitutional ideals of equality, freedom and reconciliation much more effectively. It was proposed that an individual-based socio-economic model of affirmative action is just such an alternative. It is in testing the group-based model against section 33 of our Constitution that this alternative vision of an appropriate model for South Africa could be most effectively used by opponents of group-based initiatives.

An important aspect of the argument advanced in this research has been the notion that when interpreting the Constitution, one must distinguish between the **aspirational values** imbued in the Constitution and the constitutional means allowed to further these ideals. The latter will entail finding means that infringe upon other constitutional rights as little as possible, while advancing the commonwealth (or at least impinging as little as possible on all persons' collective interest in their society not being subjected to measures which would, on a utility analysis, reduce the commonwealth in pursuit of the egalitarian aspirational value endorsed by the Constitution).

Thus far I have been attacking group-based modalities of affirmative action from the perspective of white males, but is it also possible that this form of affirmative action may indeed be bad for those groups whom this form of affirmative action is supposed to help? I would think yes, since it is my conviction that such a model will do nothing for the people most in need of assistance in our society. Suppose after a number of years of vigorous implementation of various forms of group-based affirmative action, our society obtains race and gender proportionality in the distribution of jobs (to take but one social good). Based on present demographics, roughly 86% of all jobs will then be held by blacks (defined as those who are not white) and approximately 52% by women. According to the dictates of the group-based model the need for affirmative action would at this stage fall away. Yet, based on current population figures and available jobs, it is evident that this will leave a large number of people who were unfairly discriminated against who would not have tasted any tangible benefits from section 8(3) of our Constitution. Unfortunately for them they would have missed their opportunity since affirmative action would terminate once proportional parity has been obtained.⁹⁷ Not so in the case of an individual-based socio-economic model, which seeks to address instances of actual individual deprivation by awarding employers for employing and developing persons finding themselves at the bottom of the society; which

⁹⁷Proportionality is, according to Smith, the acid test for the (un)constitutionality of affirmative action [Smith (1995)]. A more nuanced concept of proportionality (than straight head counting based on national population figures) could entail a redefining of the universums to be compared (e.g. the proportion of blacks in a particular recruitment area who have specific minimum qualifications).

recognizes that forms of societal discrimination may be so pervasive and subtle as to elude the constitutional categories listed in section 8(2); and which does not operate under a suspensive condition of proportionality (but sees affirmative action as a permanent corrective in a free market economy). One may well ask what good such a scheme will do, given the assumption of a fixed number of jobs? The answer to this is threefold: Firstly, if affirmative action is built upon the precept of proportionality of redress, it seems ethically more justifiable to focus on the people who have suffered the greatest unfair discrimination rather than implementing a scheme that would in effect realise an inverse relationship between conferment of benefits and the degree of unfairness suffered. Secondly, promoting the distribution of jobs to the least developed members of society may stimulate the development of the human potential of those individuals by their employers and would at the same time force those better equipped to fend for themselves to strike out on their own (i.e. better qualified people, irrespective of their group membership, have a better chance of successfully starting their own businesses), thereby increasing the total number of job opportunities available. Thirdly, given that group-based models have proved themselves to increase the within-group disparities in the beneficiary group, the individual model will promote the constitutional ideal of egalitarianism better.

Lastly, the values of liberty and efficiency,⁹⁸ although they may, constitutionally speaking, be of a lower order than that of equality, should not be totally negated in the name of the constitutional ideal of equality. The importance of freedom of choice, in particular as it relates to affirmative action in the field of employment, would be disregarded at our economic peril.⁹⁹ But the inequalities present in our society would seriously endanger socio-political stability in our country, if left unaddressed. Balancing equity and equality notions of distributive justice is the difficult task facing us if we wish to avoid the twin dangers of economic stagnation on the one hand and social instability on the other. Our Constitution provides us with the guidelines to succeed in this precarious balancing act by elevating neither equality nor liberty to a position of unassailable supremacy over the other.

⁹⁸Although "efficiency" is not to be found as a "fundamental right" in Chapter 3 of Act 200 of 1993, efficiency considerations cannot be ignored in the pursuit of equality [see in this regard Dworkin (1987); Sen (1992); Hayek (1982); and Smith (1995) – the latter arguing that an extreme form of affirmative action (i.e. a scheme whereby the wholly incompetent are to be hired) would not be to the advantage of the supposed beneficiaries of the affirmative action scheme, and would, on these grounds, be unconstitutional]. Also, many of the fundamental rights contain, for their effective enjoyment, a very substantial substantive component [e.g. rights relating to children, the environment, legal representation, etc], so that it could be argued that in a cost-and-benefit analysis in terms of s 33, any state-sponsored intervention that significantly harms the economy, harms the full and equal enjoyment of those rights which require substantive resources.

⁹⁹See Section 4.5. *supra*.