
CHAPTER ONE

INTRODUCTION

1.1 The Purpose of this Thesis

This thesis is a comparative study of affirmative action measures in South Africa (SA), the United States of America (USA) and The Republic of India (India). It will examine affirmative action and affirmative action measures as a whole. It looks at the reasons for affirmative action; the legal standing of affirmative action; the present day application of affirmative action and the future of affirmative action. The underlying purpose of this thesis is threefold. Firstly, it will provide a historical background to the need for affirmative action in the first place and thereby creates a powerful tool for understanding racism and the need for affirmative action measures. Secondly, it will present a detailed examination of affirmative action measures on a comparative level and the various provisions that regulates these measures. Finally, this thesis will examine and consider some important lessons that SA should bear in mind in its development of affirmative action jurisprudence and in the exercise of such programmes. It is hoped that this will provide a basis for the better management of affirmative action in SA.

1.2 Why a Comparative Analysis

A comparative analysis of the political legal and constitutional systems of other countries is very relevant. It helps to promote a better understanding of a countries own situation and assists in a proper evaluation of one's own institutions. It also assists in the interpretation of constitutions and help to enforce human rights.¹ Further, whenever there is a controversial topic like affirmative action which poses a great deal of difficulty, such a problem can be solved with the help of a comparative study.² This comparative study will also be useful in that the experiences in the USA and India may be helpful in informing SA of the future and long term consequences of affirmative action. Therefore it is proposed to make a

¹ This information originally appeared as an article in the Brookings Review (2000) Winter V(18) No.1, and is drawn from the Cardozo Lecture given by Justice Ginsburg at the Association of the Bar of the City of New York on February 11, 1999.

² Bhandari M K Basic Structure of the Indian Constitution — A critical reconsideration (1993) at 110.

comparative study of the relevant constitutional provisions relating to equal opportunity in these three countries.

1.3 The Chapters

Affirmative action³ is a complex and controversial issue. The term itself invokes, in people, emotions that range from fear and rage, to satisfaction.⁴ Affirmative action has encouraged the ongoing debate regarding the legal, moral and economic questions arising from preferential treatment of certain groups of people in society.⁵ Underlying this belief are various concerns about the notion of reverse discrimination or the unfair disadvantage to individuals who bear no responsibility for past or present discrimination practised by others.

The goal of affirmative action in SA is to speed up the creation of a representative and equitable workforce and to assist those who were historically disadvantaged by unfair discrimination to fulfil their maximum potential.⁶ Albie Sachs assessment that “one person’s dream of advancement is another persons nightmare”⁷ merely touches on the various responses to affirmative action measures. One way to shed some light on affirmative action is to look at how its history and the courts have interpreted it. Inequalities in the labour market and society as a whole must be well documented in order for one to be able to understand present day inequalities.

Therefore, before one can even begin to understand the reasons for affirmative action and employment equity measures, it would be imperative to understand why countries have

³ The term *affirmative action* has different meanings and definitions which flow, and are derived from an individual’s view of the legitimacy of the use of race-conscious or sex-conscious preferential remedies for unlawful discrimination. Alternative terminology used to define or describe affirmative action includes, but is not limited to “reverse discrimination”, “affirmative discrimination” or “quotas” as in the Indian context.

⁴ Turner R The Past and Future of Affirmative Action — A Guide and Analysis for Human Resource Professionals and Corporate Counsel (1990) at 1.

⁵ Hodges G (ed) We Want Jobs A History of Affirmative Action (1997).

⁶ White Paper Affirmative Action in the Public Service Department of Public Service and Administration (March 1998) 1998ed Government Gazette V(394) 23 No. 18800 General Notice 564 of 1998.

⁷ Sachs A Affirmative Action and Good Government (1992).

reached a point for the need for affirmative action in the first place. The best place to start for an understanding and accepting (possibly) affirmative action measures would be to start with a discussion on the history of affirmative action. Such a discussion will help the reader to understand how and why people were discriminated against in the past and how these discriminatory practices have led to them losing their opportunities to be equal in all spheres of their lives and why is it that affirmative action has become a necessary programme to redress the inequalities inherited from the past governments.

Part I of this thesis discusses the history of affirmative action in SA, the US and India. It also attempts to provide a definition of affirmative action and its many synonyms. It will look at legislation that condoned discrimination of persons in apartheid-South Africa. It will provide a background to the reasons for anti-discrimination legislation in SA, the US and India and why voluntary actions alone will not suffice to eliminate discrimination. That is, it becomes necessary to have a discussion on why the repeal of discriminatory laws, though necessary, is not sufficient to achieve employment equity in the labour market.

Affirmative action in the US is not a legal concept that can be easily articulated or explained by pointing to a single section of the US Code. It is a complicated mixture of case law, statutes and regulations and as such this thesis will examine the US's approach to the constitutionality of affirmative action. Therefore chapters presented include definitions and terms that provides an extensive legal foundation to explain the history and current law surrounding affirmative action.

The importance of providing a historical chapter on affirmative action relates to the fact that affirmative action, without any historical context, may seem to be a policy that is forcing an employer or even an academic institution or any employment environment to admit under-qualified and undeserving persons from the population solely for the purpose of achieving diversity. Without this historical background it would be very difficult for one to get an understanding of the need for affirmative action measures. Therefore, Part I of this thesis sets the basis for affirmative action in SA, the USA and India.

Euphemisms, whether good or bad, have become central in the controversies surrounding affirmative action. To some people, affirmative action means achieving substantive equality,

while to others it means reverse discrimination. Further, whilst to some people, affirmative action is only a partial compensation for the legally mandated discriminatory practices of the past, others see it as a means of replacing competent whites with incompetent persons from the so-called designated groups. The reality of affirmative action is much more complex both in theory and in practice. To make this delicate and highly emotive issue more manageable, it becomes necessary to distinguish the basic concepts and legal rationale of affirmative action from the many specific laws, regulations, and practices that have developed under the affirmative action label. Part II of this thesis will look at some of these terms that have been used to describe affirmative action programmes or measures.

This part of the thesis is also important as this assists readers with an incomplete understanding of affirmative action to look at the real definitions of affirmative action and to understand various other aspects relating to affirmative action like who are the beneficiaries of affirmative action and who is a suitably qualified candidate for the purposes of an affirmative action appointment.

Part III of this thesis looks in great detail at the various provisions regulating affirmative action and discrimination in the different countries. The reason for this is twofold. Firstly, it will provide the reader with an understanding of the various provisions that regulate affirmative action and secondly, it will show that where countries have explicitly provided for affirmative action in their constitutions, the judiciary is more open to allowing such programmes as opposed to a constitution that does not have specific provisions for affirmative action measures.

Further, this thesis examines some of the problems relating to affirmative action policies that the various countries are attempting to resolve. Part IV of this thesis considers the actual results achieved and the general trends set in motion by these programmes and the effect that these programmes have had on the society that it targets. It examines the various court decisions regarding the constitutionality of affirmative action itself. It will discuss how the different courts in the different countries have interpreted affirmative action and the best route that SA should follow.

Finally, Part V of this thesis looks at some of the principles that SA should take into account for the proper management and implementation of such programmes. The purpose and goals of doing the thesis in this style is to provide useful guidelines and information to all persons involved in implementing affirmative action programmes.