CHAPTER TWELVE
MANAGING AFFIRMATIVE ACTION BETTER

12.1 The Purpose of Looking to Other Jurisdictions

Looking at the discussion of affirmative action in the foregoing chapters, this finale chapter analysis's those problematic areas of affirmative action as experienced in the USA and India and how these countries responded to those issues. Such an analysis will provide the reader with ideas on how SA can best use this information to better understand, manage and implement its own affirmative action provisions and programmes with the resultant goal of achieving equality. Looking at the equality provisions of all countries, this chapter will also attempt to analyse and discuss the best route that SA should be looking at to have more effective and successful implementation of affirmative action programmes. It does this by looking at the experiences of both the Indian and American approaches to certain affirmative action programmes.

This comparative approach becomes useful in that experiences in one country will help enrich another country to learn from such practices. It is evident from Part III of this thesis that when India's SC has judged the constitutionality of affirmative action measures, for example, it has considered US precedents. The US SC has however been reluctant to look beyond its own legal system. This inflexible approach has stifled much of the affirmative action initiatives in the US. It is suggested that the South African courts have been and will be enriched if it does look beyond its own borders.

Even though looking at the experiences of other countries is important in this regard, SA must not adopt the approach of the Indian and American courts without due consideration of its own specific history and Constitution. So, even though the equality provision in the South African Constitution is similar to the equality provisions in other countries,[1] the CC the in *Brink v Kitshoff NO*[2] case, has pointed out that —

[1] Like Canada, India and in some respects to the US Constitution section 15(1) of the Canadian Charter of Rights and Freedoms provides that — Every individual is equal before and under the law and has the right to the equal

> "[T]he text protecting the right to equality is worded differently in the various national constitutions. These differences reflect the different historical backgrounds of the countries and their different jurisprudential and philosophical understanding of equality. Interpretations of the equality clause of the South African Constitution must therefore be based on the wording of the right within the constitutional context and cognisance must be taken of our history. This interpretation directive must be borne in mind prior to having recourse to the extensive foreign jurisprudence on equality."[3]

This cautions that when a country is looking at the experiences of other countries, the specific history of its own country must be born in mind together with the remedies and aims that its constitution wants to achieve. Therefore, even though SA will do well to look beyond its own borders when implementing affirmative action programmes it should do so with circumspection taking into account its own specific history.

South Africa's future as a democratic nation depends on whether or not it can break down the barriers that have been used to segregate its people and to unite them all under a banner of equality. A starting point is that there must be an acknowledgement of the history of discrimination and injustices in its country. Only once there is such an acknowledgement can one gain an understanding into the need for affirmative action in SA.

Without such an acknowledgement or an understanding of this history many of the debates and problems that have burdened other Constitutions will overshadow the real need for such measures and its intended aims. Instead of a country trying to remedy the effects of past discriminatory practices, SA will become a country that is entangled in continuous debates about whether or not affirmative action is legitimate or even constitutional. Much of the debate surrounding the constitutionality of

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protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

2 *Brink v Kitshoff NO* (1996) 4 SA 197 (CC).

3 *Ibid* at 216.

affirmative action measures in SA has been circumvented due to the country's constitutional commitment to affirmative action itself.

12.2 Does Affirmative Action Spell Equality or Justice?

Looking at the various controversies surrounding affirmative action in this and the previous chapters, at the heart of this debate seems to be the concern for social justice or equality.[4] The fundamental issue surrounding the concept of equality is whether or not the use of affirmative action programmes does in fact amount to justice or equality. Social justice has been argued as being one of the sub-divisions of the concepts of justice. It is "concerned with the distribution of benefits and burdens throughout a society as it results from the major social institutions, property systems, public organisations etc".[5]

It would seem as though justice itself is integrally related to equality. According to Aristotle, justice is a synonym for equality. In his Nicomchea book of Ethics he wrote that "justice is equality and to be just is to be equal and to be unjust is to be unequal".[6] He further talks of two kinds of justice, i.e., distributive and corrective justice. He argues that distributive justice is manifested in the distribution of the honour, money, and other things which fall to be divided amongst those who have a share in them. He then identifies justice in this area as a form of equality amongst those who have to share the common grounds of honour. He argues that justice is an ethical standard of virtue in social and public relationships and consists of the observance in the rules of equality.[7] This implies the giving of favoured treatment to those who are governed by unfavourable circumstances and thus lacking in resources opportunities, incentives and the background needed to achieve success in terms of formal equality.

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4 Herbert T Affirmative Action in the South African Workplace (1994).

5 Miller David Social Justice (1989) at 19.
Brian Barry distinguished between aggregative and distributive principles. An aggregative principle is one which refers only to the total amount of good enjoyed by a particular group, whereas a distributive principle refers to the share of that good which different members of the group have for themselves.

6 Sir David Ross Ethica Nicomchea Book V Chapter VI in The Works of Aristotle (1996) 1996ed V(XII) (Ross).

7 Singh Amarpal Affirmative Action Programme — A Comparative Study of India and the US (2002-2003) (Singh).

According to Aristotle equality means that things that are alike should be treated alike and things that are unalike should be treated unalike. Injustice arises when equals are treated unequally and also when unequals are treated equally.[8] As has been shown in Part I above, not everybody is equal by nature or circumstances. The varying needs of different people coming from different classes or sections of population require differentiated and separate treatment. It has been shown that there is nothing as unequal as the equal treatment of unequals and therefore the state system has an obligation to take positive steps for the amelioration of the historically deprived and exploited sections of population. This philosophy is the central idea surrounding equality or justice and is the basic justification for affirmative action programmes.

The basic premise for social policies is that everyone should be treated similarly unless there is a morally relevant reason why they should be treated differently. However, this philosophy of treating like cases alike and different cases differently is incomplete as it lays down no standard for determining the likeness or differences. What the South African CC decisions on equality do, is to provide one with some guidelines in terms of which persons may be treated differently and under which circumstances this may be done, for example, where a differentiation impacts negatively on a persons dignity this will amount to an unfair discrimination.

In the case of affirmative action, it must be decided if there are ever circumstances that make it fair to favour one race over another when it comes to jobs or university admissions. One answer to that question might be found in the principle of compensatory justice, which states that people who have been treated unjustly in the past ought to be compensated for that inequality in treatment.[9]

Looking at the historical background to affirmative action in SA, the USA and India,[10] it is a justifiable argument that violations of basic human rights in these countries merit the use of affirmative action measures. This argument is valid bearing

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8 Ross *op cit* 6.

9 Schulman Miriam Affirmative Action or Negative Action — Is There a Different Way to Frame the Debate Over Race-Based Preference? in Issues in Ethics (Fall 1996) V (7) No. 3 20 (Schulman).

10 See Chapters Two, Three and Four to Part I of this thesis.

in mind what affirmative action means. The essence of equality and justice lies in some kind of a levelling process. This is what affirmative action aims to do, to level the playing fields so that all persons may be able to compete on an equal level.

According to Armpal Singh, this meaning of equality as an aspect of justice is capable of universal application irrespective of the fact whether the constitutional text of a society defines broader notions of equality as defined by the IC or it uses the language in the individualistic and universalistic terms as has been done in the constitution of the USA.[11] With this view in mind, when looking at the two largest democracies of the world, i.e., India and the USA, SA would benefit greatly from looking at how they implement affirmative action programmes in their specific ways. Such a reading will assist in a better understanding about how this programme can work or fail.

President Johnson had this justification for preferential treatment in mind when he signed the 1964 Voting Rights Act and said —

> "You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race, and then say, 'You are free to compete...' and still justly believe that you have been completely fair."[12]

This is the main reason for affirmative action measures. It is a means of assisting persons who were previously disadvantaged to obtain the skills that they would need to be able to compete on an equal footing. Affirmative action is seen as the means of correcting historical injustices and levelling the playing fields to enable all people to gain equal access to opportunities from which they were previously restricted.[13]

It has been argued that affirmative action may have been necessary thirty years ago, but the playing field is fairly level today.[14] According to Bowler, women continue to

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[11] Singh *op cit* 7.

[12] Schulman *op cit* 9 at 25.

[13] Thomas A Beyond Affirmative Action — Managing diversity for competitive advantage in South Africa (1996).

[14] Plous S Ten Myths about Affirmative Action in Understanding Prejudice and Discrimination (2003) at 206-212 (Plous).

earn seventy-six cents for every male dollar.[15] Black people continue to have twice the unemployment rate of white people, twice the rate of infant mortality, and just over half the proportion of people who attend four years or more of college.[16] In fact, without affirmative action the percentage of black students at many selective schools would drop to only two percent of the student body.[17] This would severely restrict progress toward racial equality and justice.[18]

Most people would agree that the history of apartheid in SA, slavery and Jim Crowism in the USA and caste based discrimination in India violates an understanding of what justice or equality means. The colour of someone's skin or the birth of someone into a lower caste is not and cannot be a morally justifiable reason for treating people differently. The argument then arises that if justice means treating all people equally in all circumstances then why is it acceptable to favour certain people because of their skin colour. Looking at the interpretations of equality by the South African and Indian courts the Courts have stated that —

> ".....if equality ..... is to have any meaning to all people, it was necessary for us to make provisions for those who were never equal to others and could not be equal to others unless special efforts were made to make them equal-to bring them at the level of others." [19]

In adopting this substantive approach to equality the South African CC has stated that sometimes it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.[20] A substantive interpretation of the right to equality recognises the inequalities of past

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15 Bowler M Women's earnings — An overview (1999) Fourth Quarter Monthly Labor Review at 13-21 (Bowler).

16 *Ibid* at 18.

17 Bowen W G and Bok D The shape of the river — Long-term consequences of considering race in college and university admissions (1998) (Bowen and Bok).

18 Plous *op cit* 14 at 209.

19 Diwan P & Diwan P Outlines of the Constitution of India (1991) at 302.

20 *R v Big Drug Mart Ltd* (1985) ISCR 295.

discrimination and therefore makes allowances for positive discrimination so as to achieve equality.[21]

It is because of this commitment to substantive or real equality that the drafters of the South African Constitution intended that affirmative action programmes be seen as essential and integral to attaining equality and not to be viewed as a limitation or exception to the right to equality. As affirmative action is seen as part of the right to equality, it would appear that persons challenging such programmes bear the onus of proving the illegality of such programmes.[22] Affirmative action legislation is expressly sanctioned by the constitution, thus forestalling or avoiding any argument as to whether preferential treatment for disadvantaged persons is permitted or not.[23]

The experiences of the past in SA, the USA and India have shown that arbitrary differentiation has been made for characteristics which are immutable and are beyond the control of individuals and groups. People have been discriminated against on the basis of slavery, segregation and caste, and these discriminations have been justified on various grounds. Whether one talks about the segregation or the slavery of blacks in the USA, the apartheid system of SA, or the plight of low caste people of India, all have suffered the same fate, i.e., exploitation and deprivation for the reasons beyond their control. These experiences have further highlighted that these individuals and groups have been exploited for the purpose of ensuring the dominance of certain groups or class of individuals. Looking at the concepts of justice and equality "justice or equality" would require equitable and just distribution of social resources and benefits.

Affirmative action programmes are the tools to remove the present and continuing effects of past discrimination, to lift the limitations in access to equal opportunities which has been impeding the access of the classes of people to public offices and

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21 *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC).

22 See Sheppard C Litigating The Relationship between Equity and Equality (1993) at 19-20.

23 In re: *Certification of the Constitution of the Republic of South Africa* (1996) (10) BCLR 1253 (CC) at para 44.

administration. Such measures as affirmative action, protective discrimination or reservations are adopted to remedy the continuing ill effects of prior inequalities stemming from discriminatory practices against various classes of people which have resulted in their social, educational and economic backwardness.[24] It also addresses the infirmities caused due to purposeful societal discrimination and attacks the perpetuation of such injustices.[25] This is the axis on which affirmative action revolves. For equality to be achieved then affirmative action in required. However such affirmative action must be carried out in a constitutionally valid manner.

(12.2.1) Achieving Equality in a Constitutional Manner — What does this entail?

Looking at the CC's approach to equality in SA, the right to equality in section 9(1) of the Constitution it can be seen that the equality provision does not prevent a government from making classifications. In fact people are classified and treated differently for a variety of legitimate reasons.[26] Thus whilst the government may legitimately make classifications, it can only classify people into different groups and afford different treatment to the different groups if the criteria upon which the classifications are based are permissible. Whether a classification is permissible, would depend on the purpose of the classification and whether there is a sufficient link between the criteria used to effect the classifications and the governmental objectives.[27] This approach was affirmed by the CC in the case of *Prinsloo v Van Der Linde and Another*.[28]

Further, according to the equality jurisprudence developed by the CC, unfair discrimination does not mean identical treatment in all circumstances. The Court will

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[24] Justice P B Sawant *in Indra Sawhney v Union of India* (1993) AIR 477 (SC) at para 23.

[25] Singh *op cit* 7.

[26] For a general discussion see Hogg Constitutional Law of Canada (2003) 3ed at 52.6.

[27] Seervai, after analysing the Indian cases restates the proposition thus —
"Permissible classification must satisfy two conditions, namely, (i) it must be founded on an intelligible differentia which distinguishes persons and things that are grouped together from others left out of the group, and (ii) the differentia must have a rational relation to the object sought to be achieved by the statute in question."
See Seervai Constitutional Law of India (1993) 4ed at 454.

[28] *Prinsloo v Van Der Linde and Others* (1997) 6 BCLR 759 (CC).

closely examine the impact of the discriminatory provision on the complainant in order to ascertain whether it is in fact unfair. Of particular importance is the extent to which a measure entrenches or deepens patterns of disadvantage experienced by groups in our society.[29] The developing jurisprudence on equality also draws a distinction between differentiation based on grounds that affect a person's dignity and worth as a human being and those based on grounds which do not have this effect. Where the differentiation does not impact on dignity, then the applicant is restricted to arguing that there is a violation of section 9(1).[30]

With regard to equality, the Constitution applies both horizontally and vertically. According to section 9(4) of the South African Constitution it is clear that not only the State but also all other employers may not unfairly discriminate against their employees on the grounds mentioned in section 9(3) of the Constitution.

Section 9(2) of the Constitution of SA endorses the concept of affirmative action. It is clear from this section that the advancement or promotion of persons, or categories or persons, is in line with the underlying principles of the Constitution. However the requirement is that those persons or groups of persons to be advanced must have been disadvantaged by previous discrimination.[31] This might involve the plaintiff proving that he or she has been previously disadvantaged.

12.3 Proving Discrimination

The apartheid society in SA had a distinct hierarchy of races. In India, the Hindus, although they share a common religious tradition, are themselves socially segmented by thousands of castes and sub-castes, hierarchically ranked according to tradition and birth. People categorised in these different groups have experienced varied discrimination, and discrimination on different levels. In confronting this diversity,

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29 *Harksen v Lane NO and Others* (1997) 11 BCLR 1489 (CC) at para 50-1; Brink *v Kitshoff NO* (1996) 6 BCLR 752 (CC) at para 44.

30 *Prinsloo v Van Der Linde and Others* (1997) 6 BCLR 759 (CC).

31 Grogan J Affirmative Action Affirmed — *George v Liberty Life* (October 1996) Employment Law V(13) No.1 6-8.

the framers of India's Constitution guaranteed fundamental rights, in some cases, through specific provisions for the protection of minorities.

Persons falling into any of the thousands of castes and sub-castes have to first prove that they belong to such caste before they may benefit from compensatory discrimination programmes. The Indian experience has shown that because of past discriminatory practices it would be legitimate, if genuine equality is sought to be achieved, to apply the affirmative action programmes in proportion to the measure of disadvantage suffered under apartheid.

However, it has been argued that[32] if an affirmative action measure has the effect of disadvantaging a community that had suffered from previous discrimination then the courts should adopt a slightly higher degree of scrutiny than the one discussed in Part III of this thesis. It is submitted that this is a view that should be taken into account by the courts. This is because it is unfair that a person who has been treated unequally in the past should continue to be treated unequally in the future without there being a reasonable explanation for such differential treatment. Individual communities disadvantaged by past discrimination should not, in the absence of clear justification, disproportionately bare the burden of the past.[33]

In India one can see that within SC's, ST's and OBC's there is a hierarchy. Taking into account India's almost sixty years of experience regarding affirmative action this hierarchy within groups has not resolved problems relating to employment equity. If anything, it has exacerbated the problems. Within these groups there are only certain persons that will benefit from the programmes. To better understand the situation an example will follow. If three persons from these three different socially and educationally disadvantaged groups were applying for the same job, the court would want these individuals to prove that the one is more socially and educationally disadvantaged than the other. As can be seen from the discussions in the previous chapters allot of problems can arise where one has to prove that they belong to a

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[32] Prof K Govender Equality — The South African Perspective (1997) at http://law.wustl.edu/Conferences/Equality/Gov-art4 last visited 31/11/04 (Govender).

[33] *Motala and Another v University of Natal* (1995) 3 BCLR 374 (D).

designated group. Firstly, the onus is on the person to claim that he belongs to any one of the SC's, ST's or to the OBC's.

When looking at proving discrimination, the Indian and American system of laws has shown that employment discrimination has consistently failed to recognise the practical difficulties inherent in individualised proof of discrimination in the employment context. The American court emphasises that the institution practising affirmative action should prove that it had indulged in racial discrimination in the past. Societal discrimination as such is not enough. The programme should be narrowly tailored to meet the purpose of remedying past wrongs. It is submitted that to ask a plaintiff to prove his or her degree of discrimination shows that the government has not fully recognised the practical difficulties inherent in proving discrimination where the plaintiff is a member of a group that does not have access to the legal system, does not have access to legal knowledge and where the evidence is uniquely within the control of the defendant rather than the plaintiff.

Further, proof of discrimination raises another question. This relates to the cost implications involved as well as the implications this would have for effective affirmative action programmes. It can be a very costly affair to prove one's disadvantage. Taking into account who these remedial measures are supposed to benefit, the persons from the designated groups are often indigent persons. They simply will not have the resources to go to court to prove that they are disadvantaged. If proof of disadvantage is a requirement, then the persons who are the intended beneficiaries of affirmative action programmes will never get to benefit under such measures, as most South Africans live below the poverty line. This requirement will act as a barrier to the achievement of equality in the workforce.

In India, among the designated groups there are sometimes persons who are more advantaged than others. A situation will then arise where these persons, because they have the resources, will be the ones to benefit time and again under affirmative action programmes. The situation has arisen in India, whereby there are now elites among the designated castes and classes and these are the ones to always benefit from the affirmative action programmes.

In SA, as in other countries obtaining evidence of past discrimination can be costly and highly impractical. Proving discrimination in SA cannot be an ideal situation. Although, eventually, it is an individual that will benefit from the affirmative action programme, these programmes are intended to benefit groups as a whole. The problem that may also arise is that like the situation in India, there may now be a different court or procedure to decide on who is in fact more socially and educationally disadvantaged. Keeping in mind that the South African courts are currently stretched to its limits, the cost implications will also be enormous.

Not only have the cost implications for designated groups in India posed a problem but, proving their disadvantaged status in society has led to allot of animosity and further segregation amongst its people. So, it would seem that affirmative action in this and other forms, instead of bringing the nation together, is actually one of the causes of the exclusion of the untouchables in the Indian society. Looking at the aims of affirmative action and taking into account the history of SA, this will not be an ideal situation for it to follow. Another problem with proving disadvantage lies in the fact that many of these communities or designated groups are minority communities and cannot look to the political process for relief.

Looking at these problems encountered by the Indians, SA would do well to learn from their mistakes. The requirement of proving disadvantage in SA will further segregate and anger its people instead of uniting them.

An important decision to look at to shed light on this issue is the *Motala* case.[34] The facts were as follows. A "gifted" Indian student who had obtained 5 distinctions and a "B" symbol in her matriculation year was refused admission into the medical school. The medical school decided to limit to forty the number of Indian students admitted to its programme. The poor standards of education available to African students under the control of the Department of Education and Training meant that a merit based entrance programme would result in few African students being accepted.

[34] *Motala and Another v University of Natal* (1995) 3 BCLR 374 (D).

It was argued that as the Indian community were also disadvantaged by apartheid, discrimination between African students and Indian students amounted to unfair discrimination. The court held that the admission policy adopted by the medical school was a measure designed to achieve the adequate protection and advancement of a group disadvantaged by unfair discrimination. The court stated that —

> "While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which the African pupils were subjected under the 'four tier' system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of section 8(1) and 8(2) [of the Interim Constitution]."[35]

Taking into account the history of SA and the hierarchy of races in the past, it is clear that people were disadvantaged according to which group they fell into. It was this very hierarchy that had caused the gaps in the labour market. It is submitted that without a reasonable explanation, no distinction between designated groups should be made.[36]

It is suggested that instead of looking at the degree of disadvantage of an individual, one should look at the needs of the specific institute in question. For example, if there is more than one suitably qualified person from a designated group that is suitable for a specific position, the employer concerned should not look at that persons designated status but at the company's specific needs and workforce profile. Keeping in mind that a workforce profile provides a snapshot of the employers company, the employer should look to see which designated group is more underrepresented in that job category. He should then look at his goals and targets as set out in his employment equity plan.

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35 *Ibid* at 383.

36 *Ibid*. In the *Motala* case the judge does not give an explanation as to how the number of 40 was arrived at, the extent to which this operated as a guideline or as a rigid figure, the extent to which the socio-economic backgrounds of students were taken into account, the demographics of the area in which the medical school was located and the extent to which society as a whole benefited from such a decision.

Based on this analysis, he should then decide who would be the best qualified candidate to fulfill these goals. This would seem to be a more suitable position that should be adopted. In this sense at least one will not discriminate between persons from the designated group on the basis of their previous degrees of disadvantage suffered. By adopting the above approach, the appointment of one person from a designated group over another from another designated group has a logical instead of racial basis and does not point to an irrational preference amongst candidates.

Affirmative action in the US focuses on whether it can be shown that each beneficiary of an affirmative action programme is likely to have suffered from what can be called the "cognitive bias" form of discrimination.[37] The cognitive form of bias discrimination relates to a harm caused by an actor who is aware of the person's "race" and is motivated (consciously or unconsciously) by that awareness. Much of the current scepticism about affirmative action may result from this narrow focus. Such a focus makes affirmative action particularly vulnerable in settings like university admissions where decisions based on grades and test scores seem to be immune to cognitive bias.[38]

The cognitive bias-type of discrimination based on caste status in India also poses a serious problem. Looking at the discussion of the case-law in Part III, it would appear that there is a more conscious commitment to eradicating oppression and segregation and to change the basic social structure of the country in India than in the US. One of the obvious reasons is related to the question of the constitutionality of affirmative action in the US. If affirmative action has constitutional backing, then the courts will be more open to the forms of compensatory discrimination as provided for in other countries. This is not to say that courts or even the people will be willing to accept such programmes, but at least with such a backing it will not leave affirmative action programmes vulnerable. Looking at the situation in the US, affirmative action programmes are open to the highest level of scrutiny before it will be considered to be constitutional. Such a high level of inquiry leaves no or very little room for many affirmative action programmes to be considered to be fair discrimination.

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37 *Regents of the University of California v Bakke* (1978) 438 US 265.

38 Cunningham C D Affirmative Action — India's Example (1999) Civil Rights Journal at http://www.findarticles.com/ last visited 15/09/04.

12.4 Analysing the Effect of the US Jurisprudence on Affirmative Action

Affirmative action measures in the US, with specific reference to the Fourteenth Amendment, have been a qualified success at best. As can be seen from the above discussion in Part III, American jurisprudence continues to struggle with and shrink from the core aims of the Fourteenth Amendment. For example, although the SC has allowed affirmative action programmes, it has now adopted such a level of scrutiny which would make any affirmative action programme seem unconstitutional. Should SA follow such a strict level of scrutiny with regard to its affirmative action programmes then not many affirmative action programmes will be regarded as being constitutionally valid.

The US jurisprudence on affirmative action, gives the reader an indication of the indecisiveness surrounding the constitutionality of affirmative action programmes if it is not specifically provided for in a Constitution. The *Bakke*[39] case is an ideal example of such indecisiveness.[40] This case and the *Fullilove*[41] decisions have established a limited constitutional tolerance for remedial classifications but it has not resolved the issues of the constitutional boundaries of affirmative action. Such constitutional jurisprudence leaves the issue of affirmative action vague and uncertain.

The *Bakke* case imposed limitations on affirmative action to ensure that providing greater opportunities for minorities did not come at the expense of the rights of the majority. This case has held that affirmative action was unfair if it led to reverse discrimination. The *Bakke* decision involved the University of California, Davis, Medical School, which had two separate admissions pools, one for standard applicants, and another for minority and economically disadvantaged students. The school reserved sixteen of its one-hundred places for this latter group. The SC ruled that the taking account of a person's race was a legitimate factor in school admissions. However, the use of such inflexible quotas as the medical school had set was not. The

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39 *Regents of the University of California v Bakke* (1978) 438 US 265.

40 Rosenfeld M Affirmative action and justice — A philosophical and constitutional enquiry (1991) at 168.

41 *Fullilove v Klutznick* (1980) 448 US.

SC was split, 5 to 4, in its decision on the *Bakke* case and addressed only a few of the many difficult issues that had arisen about affirmative action.

So although in some cases the courts upheld voluntary affirmative action measures, it struck down other programmes. [42] While the *Bakke* case struck down strict quotas, in the *Fullilove* decision, the SC ruled that some modest quotas were perfectly constitutional. The Court upheld a federal law requiring that fifteen percent of funds for public works be set aside for qualified minority contractors. The court stated that "narrowed focus and limited extent" of the affirmative action programme did not violate the equal rights of non-minority contractors. According to the Court, there was no "allocation of federal funds according to inflexible percentages solely based on race or ethnicity".

American jurisprudence shows that even though throughout the 1980's a majority position on the constitutionality of affirmative action had yet to evolve, at least two trends had emerged. Firstly, remedial classifications would be subject to an enhanced or stricter judicial attention and secondly, societal discrimination, despite its reality and legacy, would not be a permissible reference point for race-conscious remedies.

Importantly, the court did decide on a level of scrutiny that should be used when dealing with affirmative action programmes. Thus, the present position of the US SC is that racial classifications of all sorts are "suspect"; that strict scrutiny should be applied to them and that it should be showed that the institution had practiced racial discrimination in the past and the present affirmative action programme is narrowly tailored to remedy that past discrimination. Societal discrimination as such in history or at present is not relevant in validating the affirmative action programme undertaken by any institution. It has to show that discrimination was practiced by it on racial grounds in the past.

Such an analysis by the courts in the *Croson* case has disregarded the intent of the framers of the US Constitution. The intention was that remedial legislation is to be construed in such a manner as not to be restrictive but liberal and flexible to realise its

[42] *United Steelworkers of America v Weber* (1979) 443 US 193.

corrective aims.[43] This higher level of scrutiny adopted by the SC is consistent with the Courts own feeling that a motive-based enquiry should be avoided when the constitutional "stakes are too high".[44] It has been suggested that scrutiny should assess not the intent of the employer of the affirmative action plan but courts should assess whether an official action could be perceived as racially stigmatising.[45]

The use of strict scrutiny to determine the constitutionality of race-based affirmative action measures in the US has undermined their utility to achieve racial equality. Further, an analysis of the various SC decisions shows that the Fourteenth Amendment in general and equal protection in particular has been substantially underachieved.[46] This may be attributed to the feelings of cynicism and uncertainty surrounding affirmative action in general.

(12.4.1) The Cost of Scepticism to Affirmative Action in the USA

The courts in the US have become sceptical of race-based affirmative action initiatives practiced or ordered by the government. As can be seen the SC justices have been divided in their opinions in affirmative action cases. Many reasons may be attributed to these varied opinions. For example, it could relate to their different political beliefs or it could even be related to the difficulties surrounding affirmative action issues. The Court has approached most of the cases in a fragmented and constricted manner by focusing on narrow aspects of the measure or policy rather than dealing with the whole issue in question. This can be seen from several of the courts decisions including the *Bakke* case, which was the closest decision to a landmark affirmative action case.[47]

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43 In striking down a state law excluding blacks from juries, the court emphasised that the Fourteenth Amendment was to be interpreted in a way that implemented its remedial purpose. *Strauder v West Virginia* (1880) 100 US (10 Otto) 303 at 307.

44 See Lawrence The Id, The Ego and Equal Protection — Reckoning with Unconscious (1987) Racism Stan. L. Rev. (39) 317 at 355-62 (Lawrence).

45 *Ibid* at 354-355.

46 Lively D E The Constitution and Race (1992) at 170 (Lively).

47 In this case the Court was split 5-4, and the judges' various opinions were divided.

Further, State and local attempts to remedy societal discrimination have not survived court scrutiny. It would be inappropriate, given the reality of the South African society, and the constitutional goals, to adopt the strict scrutiny standard adopted by the US courts in testing affirmative action programmes. Interpretation of affirmative action measures in the US has largely been left to the courts to decide. Since the constitutionality of affirmative action itself has to be decided by the courts of the US, adopting the approach of these courts would be fatal in SA. One of the main reasons for this is that the South African Constitution specifically provides for measures that are designed to uplift the previously disadvantaged individuals.

It therefore becomes important that when looking at the jurisprudence of other countries, it is imperative that the courts of SA interpret the constitution by looking at its specific aims and goals. Froneman J states in the *Qozoleni v Minister of Law and Order* case that,[48] the courts must attempt to understand the mischief that the new constitutional order was meant to remedy and to extract the constitutional principles or values against which laws can be measured. The CC in *Zuma*[49] accepted this approach with the qualification that the language of the text must not be ignored. However, the court said that "to interpret the constitution as if it were the Income Tax Act and thus frustrate the principles enshrined would be wrong. A contextual approach should be adopted."[50]

In the US, despite the Courts recognising societal wrongdoing and the nation's legacy of discrimination, it has refrained, except in the desegregation era, from doctrine that would challenge established practices or customs.[51] South African courts must always bear in mind its specific history and the wrongs that the constitution is trying to remedy, in interpreting the constitutionality or otherwise of an affirmative action programme. If this is not done then SA will follow the same path as that of the American courts and err in its interpretation of key principles. This will in effect,

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48 *Qozoleni v Minister of Law and Order* (1994) 1 BCLR 75 (E).

49 *S v Zuma* (1995) 4 BCLR 401 (CC) at 412.

50 *President of the RSA v Hugo* (1997) 6 BCLR 708 (CC).

51 *City of Richmond v JA Croson* (1989) 109 S.Ct. 706 at 724. The court took note of the "sorry history of both private and public discrimination in this country".

frustrate the core aims of the equality principle in the South African Constitution and equality in the workplace will not be achieved.

In the interpretation of affirmative action programmes in SA, the standards of review must be open to voluntary affirmative action measures. In the US equal employment opportunity initiatives should be constitutionally permissible if their procedure is not irregular. If this is done then the diversification programmes as contemplated in the *Wygant* decision would be regarded as being constitutional.[52]

The failure of anti-discrimination legislation in the US can also be attributed to its inadequate enforcement or remedial efforts. Without a clear and well accepted constitutional backing the courts, in most circumstances, will not be favourably disposed to affirmative action measures. Looking at the different opinions delivered by the different SC judges one can say that concepts or doctrines that do not have constitutional support is open to attack by competing perspectives. Judicial review has become clouded and complicated, and the original aims of anti-discrimination legislation in the US have been distorted.

Another problem with anti-discrimination legislation in the US is that while the Civil Rights Act permits affirmative action measures it does not require it.

(12.4.2) The Trend Towards a Colour Blind Society in US Jurisprudence

The statement that the American Constitution is colour blind which was expressed in Justice Harlan's dissent in the *Plessey* case has come to be claimed as the law of the land. The US Courts have constantly called for a colour-blind society. Justice Clarence Thomas, the only Black on the court in the *Adarand* decision, and a long-time foe of racial preferences of all kinds, issued his concurring opinion defending the colour-blind principle of racial justice —

> "That these programs may have been motivated, in part, by good intentions, cannot provide refuge from the principle that under our Constitution, the Government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by

[52] *Wygant v Jackson Board of Education* (1986) 476 US 267 at 317.

those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."[53]

In calling for a colour blind constitution, the courts seem to think that the need for remedial legislation is futile. The different histories of compensatory discrimination in the different countries are clear. They have affected everything, including the whole debate on affirmative action. Racism is contrary to overall societal interests, and in order to overcome racism, it is necessary to take account of this social reality called "race".

There remains a hope that SA will one day achieve a society that is blind to a person's colour. However, taking into account South Africa's present aim, that is the achievement of equality, this can only be achieved by taking account of a person's race. If race is made unmentionable even though its presence is pervasive courts may actually impede the progress towards a colour-blind society. In fact, a premature insistence on race neutrality will invalidate initiatives that are required to remedy the consequences of the past discriminatory policies and practices of a country.

Further, the reality is that colour-blind policies often put racial minorities at a disadvantage.[54] For example, colour-blind seniority systems tend to protect white workers against job layoffs, because senior employees are usually white.[55] Likewise, colour-blind college admissions favour white students because of their earlier educational advantages. Unless pre-existing inequities are corrected or otherwise taken into account, colour blind policies will not correct racial injustice, they will reinforce it.

Harry Blackmun once wrote in a US SC opinion that "to get beyond race, we first must take race into account". South Africa's and India's affirmative action policies

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53 *Adarand Contractors Inc. v Pena* (1995) 515 US 200 at 240 Thomas concurring opinion.

54 Plous *op cit* 14 at 210.

55 Ezorsky G Racism and justice — The case for affirmative action (1991).

were fashioned in a similar spirit.[56] In India in order to get beyond caste, the government decided to take caste into account. The problems arose when the percentage for reservation of castes began to outnumber percentages for allocation of persons from non-designated castes.

However, a colour-blind approach to equal opportunity, as attractive as it might seem in principle, is not sufficient to ensure equal opportunity for traditionally underrepresented groups in practice. Neither are Americans nor South Africans colour blind, and subtle biases based on race and culture still pervade both societies and negatively impact members of minority groups. A colour blind society today will not achieve equality or justice.

(12.4.3) The Effects of Ending Affirmative Action Prematurely

Several studies have documented important gains in racial and gender equality as a direct result of affirmative action.[57] For example, according to a report from the US Labor Department, affirmative action has helped 5 million minority members and 6 million white and minority women move up in the workforce.[58] Likewise, a study sponsored by the Office of Federal Contract Compliance Programs showed that between 1974 and 1980 federal contractors (who were required to adopt affirmative action goals) added black and female officials and managers at twice the rate of non-contractors.[59]

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56 The Indian Constitution of 1950 officially abolished untouchability and casteism, but the government soon instituted a policy that reserved jobs and educational opportunities for those of the traditionally oppressed lowest castes. In the early 1950's the state reserved twenty-two and a half percent of all bureaucratic and governmental posts, including Parliamentary seats, at the central and state levels for those formerly designated untouchables in proportion to their percentage of the general population. The aim was to include the socially stigmatised untouchables and tribal peoples in decision-making processes and to guarantee their representation in the political arena. The state also reserved twenty-two and a half percent of the seats in public universities for SC's and ST's, hoping that these groups, long deprived of education, could achieve some measure of equal opportunity.

57 Bowen and Bok *op cit* 17. Also see Murell A J & Jones R Assessing affirmative action — Past, present, and future (1996) Journal of Social Issues 52 at 77-92.

58 Labor Study Reports Reverse discrimination of whites is rare (1995, March 31) New York Times at A23.

59 Citizens Commission Civil Rights Affirmative action to open the doors of job opportunity (1984).

The negative effects of ending affirmative action too early can be seen from the Civil Rights Initiative, Proposition 209.[60] In November 1996, the California voters approved Proposition 209, which amended the California Constitution to prohibit the state and its political subdivisions from "discriminating against, or granting preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting".[61]

Affirmative action in higher education in the US is under greater threat today than at any time since the *Bakke* case.[62] In the wake of the Fifth Circuit's decision in *Hopwood v Texas*,[63] California's Proposition 209,[64] the University of California Regents' SP-1 Resolution,[65] Washington's 1-200 Initiative[66] and the "One Florida plan"[67] a substantial number of the US leading public law schools terminated race-sensitive affirmative action in recent years. The first prohibition on affirmative action occurred when the UC Regents approved SP-1 in July 1995. The prohibition ended race- conscious admissions at the graduate and professional levels beginning on January 1, 1997 and the undergraduate level a year later.[68] This was followed up with

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60 The text of California Civil Rights Initiative, Proposition 209 on the November 1996 ballot, which was passed on November 5th by fifty-four percent of California voters.

61 The Constitution of California Article I §31. See the California Civil Rights Initiative.

62 Basinger Julianne U. Of Cal. Reports on Minority Enrollment (1998, January 30) Chronicle of Higher Education at A28 (Bassinger).

63 *Hopwood v State of Texas* (1996) 518 US 1033.

64 California Civil Rights Initiative, Proposition 209.

65 *City of San Jose et al v Hi-Voltage Wireworks Inc. et al* No. S080318 Ct.App. 6 H018407 Santa Clara County S.Ct. No. CV768694.

66 Washington State Initiative 200 is roughly modelled after California's Proposition 209.

67 Florida legislature approves education component of Governor Bush's "One Florida" initiative, which ends admission programs based on affirmative action in all the state's colleges and universities. The "One Florida" plan, adopted in November 1999 by Governor Jeb Bush's executive order, discontinued race-conscious affirmative action in the Florida public university system beginning in 2000 at the undergraduate level and in 2001 at the graduate and professional levels.

68 *City of San Jose et al v Hi-Voltage Wireworks Inc. et al* No. S080318 Ct.App. 6 H018407 Santa Clara County S.Ct. No. CV768694.

Proposition 209, the amendment to the California Constitution that took effect in January of 1998. Ending race-sensitive admissions at public law schools in California, Texas, and Washington has had significant negative consequences for African Americans, Latinos, and American Indians.[69]

In the 1996 case of *Hopwood v Texas*, there was a challenge to the affirmative action programme at the University of Texas Law School. The Fifth Circuit ruled that diversity[70] was not a compelling governmental interest. This ruling had the effect of prohibiting race-conscious admissions at public and private higher educational institutions in Texas, Louisiana, and Mississippi.

Further, as interpreted by the California SC in a landmark case brought by *Hi-Voltage Wire Works v San Jose*,[71] Proposition 209 bans not just quotas but also race or sex-based "outreach" programmes and "goals and timetables" because they also give preferences by colour or sex.[72]

The 1998 freshman class within the University of California system was the first to feel the effects of the ban on affirmative action.[73] Proposition 209 resulted in approximately forty-three percent drop in African American students admitted to UCLA's 1998 freshman class. The number of Chicano and Latino students admitted decreased by thirty-three percent. Overall, there was a twenty-three and a half percent decrease in the number of minority students admitted at UC in 1998 as compared to the pre-Proposition 209 figures of 1997. [74]

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69 Kidder W C The Struggle for Access from Sweatt to Grutter — A History of African American, Latino, And American Indian Law School Admissions, 1950-2000 (Spring 2003) Harvard Law Review V(19) 1-41 (Kidder) at http://academic.udayton.edu/race/03justice/LegalEd/legaled11e.html last visited 15/12/04.

70 That is, the educational benefits that flow from having racially diverse learning environments.

71 *Hi-Voltage Wire Works Inc. v City of San Jose* 2000 24 Cal. 4th 537.

72 *City of San Jose et al v Hi-Voltage Wireworks Inc. et al* No. S080318 Ct.App. 6 H018407 Santa Clara County S.Ct. No. CV768694.

73 Bassinger *op cit* 65.

74 Kidder *op cit* 72 and see Raza Ali M *et al* The Ups and Downs of Affirmative Action Preferences (1999) at 183 (Raza).

Seemingly, although affirmative action opponents claim that the American society should be colour blind in order to "level the playing field" the dismantling of affirmative action programmes has done nothing but diminish the diversity of California schools.[75]

It is submitted that before equality for all citizens is achieved a call for a colour-blind society does not take into account the history of discrimination in a particular country or there is no proper understanding of the extent of discrimination in the past. Only once people are able to compete on an equal footing will the need for anti-discrimination legislation be void. Until such time a vision of a society that does not take into account a person's skin colour, must remain a dream.

Looking at the decisions in the US SC, the striking down of voluntary affirmative action measures and the emergence of an colour-blind criteria seems to have resulted in a situation where the judiciary will not intervene when minorities complain but it seems that the courts have more sympathy when it is the majority of the population that do complain.[76] The South African courts must act so as to protect all of its citizens from unfair discrimination, minorities or otherwise. SA is unique in that legislation providing for positive discrimination is largely for the majority of the population. The courts therefore have to be extra careful that they do not trample on the rights of the minority in attempting to achieve equality. Not only is the end result important, but the way that this equality is achieved will set the future for this multi-cultural and democratic country.

12.5 The Merit Principle and Equality

Another problem that one faces when debating the constitutionality of affirmative action measures relates to the "suitably qualified" individual. The fact that the Constitution of India specifically provides for affirmative action programmes in an elaborate manner or that the SC of the USA has held affirmative action programmes to be constitutionally sanctioned, has not laid to rest the controversies surrounding this issue. In fact the issue raises questions of great importance to the legal theory and

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75 Raza *op cit* 77 at 184.

76 Lively *op cit* 49 at 171.

philosophy and as such are discussed below. One such problem relates to the merits of the affirmative action candidates. Society demands that only people with merit should be given an appointment or an admission to a specific institute.

The application of the principle, in such matters as admission to institutions of higher education or appointment to the state services will require that the candidates are selected on the basis of their individual merit. This principle assures justice in so far as it allocates the rewards or goods on the basis of an objective criterion having nothing to do with such personal characteristics of an individual as his birth, race, colour, sex, caste, etc. It assures the appointment of the most suitable candidate from amongst a large number for a position.

When looking at the Indian courts approach to this issue, even though they have emphatically rejected the notion of appointing unsuitably qualified candidates to positions or in admissions to universities and colleges, they have endorsed this approach by providing for strict quotas and reservations. The problems relating to this issue then arise with the appointment of an affirmative action candidate on the basis of a quota system.

(12.5.1) Quotas or Reservations and the Merit Principle

In India the use of quotas is condoned by the IC. In SA quotas are strictly forbidden. Although the courts in India themselves condone reservations they agree that one must adopt a cautious approach to reservations. They say that reservations should be kept in check by the demands of competence. One cannot extend the shelter of reservation where minimum qualifications are absent.[77] In SA too, employers are urged to employ a candidate that is suitably qualified and not appoint someone on the basis of tokenism. This is important as persons from the designated groups must be employed on the basis of their ability to do the job and not merely on the basis of the colour of their skin. If someone is employed merely to fill in a quota or on the basis of tokenism then this would be unconstitutional and may even result in unfair discrimination.

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[77] *Pradeep Jain (Dr) v Union of India* (1984) 3(SCC) 654.

If one had to look at the Indian courts interpretation of reservations it would seem that they are not easily persuaded to allow reservations that have no fixed time-frame. In the case of *Indra Sawhney & Others v Union of India & Others*,[78] the court stated that —

> ".....the very idea of reservation implies the selection of a less meritorious person. At the same time, we recognise that this much cost has to be paid if the constitutional promise of social justice is to be redeemed. We also formally believe that given an opportunity, members of these classes are bound to overcome their initial disadvantages and would compete with, and may in some cases excel, members on open competition."[79]

What this should mean for SA is that when one is choosing a suitably qualified person then the employer must take account of various relevant criteria. The employer is not obligated to employ someone merely to fill in a quota. The adoption of the more flexible "numerical goals" in SA will ensure that a suitably qualified candidate will be appointed as opposed to an unqualified candidate to fill in a fixed quota.

The Law Market Commission has explained that what is meant by affirmative action in the South African context is that —

> "[Affirmative action] is not intended to promote cosmetic changes resulting from the hiring of a few members of disadvantaged groups into key positions, nor is it designed to promote black and women employees into positions for which they are not qualified. Rather, it involves a systematic move towards promoting the employment and improving the labour market security of groups previously discriminated against, bolstered by the necessary education and training in co-ordination with extra-market reforms designed to reduce the degree of socio-economic disadvantage of the majority."[80]

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78 *Indra Sawhney & Others v Union of India & Others* (1992) Supp. (3) SCC 217; 1993(1) SCT 448 (SC).

79 *Ibid* at para 836.

80 Labour Market Commission Restructuring the South African Labour Market (1996) at para 434.

In the US the Court's majority opinion in *Grutter* addressed this question directly in asserting that the law school affirmative action programme upheld there did not establish quotas. In the words of Justice O'Connor for the Court —

> ".....as Justice Powell made clear in *Bakke*, truly individualized consideration demands that race be used in a flexible, non-mechanical way. It follows from this mandate that universities cannot establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks. Nor can universities insulate applicants who belong to certain racial or ethnic groups from the competition for admission. Universities can, however, consider race or ethnicity more flexibly as a "plus" factor in the context of individualized consideration of each and every applicant."[81]

Affirmative action programmes should aim at helping the disadvantaged sections of the society enabling them to catch up to the standards of competition set up by the larger society. However, it is submitted, that numerical quotas or reservations are impermissible as they impose unfair burdens on those excluded and they involve the suspension of standards.

In India, quotas and job allocations have not brought equality, dignity, or even safety for India's untouchables.[82] In SA, in order to make certain that affirmative action is constitutional, SA has to reject the idea of strict numerical quotas. These reservations or quotas seem to be baseless and are purely for political gains. Further, rather than leading India towards a "casteless" society, the policy of reservation and quotas seems to have reinforced caste identities. Affirmative action that opens up new opportunities and makes available the resources and the seats in employment and universities is the path that SA should follow. The question remains on how this is to be achieved. One of the ways in which this can be achieved is by ensuring the development of skills.

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[81] *Grutter v Bollinger* (2003) 539 US Docket No. 02-241.

[82] In villages, the social stigma remains too strong to be obliterated by laws alone.

(12.5.1.1) Skills Development

Looking at the ultimate goal of affirmative action; i.e., the achievement of equality, equality is furthered by favouring competence and by creating a favoured group for redressing rooted inequalities. Distributions according to merit or a person's suitableness are consistent with the essential principles of equality. Tokenism and quotas do not achieve this equality.

One of the ways in which SA can circumvent problems relating to quotas or tokenism is by ensuring the development of skills in a market. This is advocated by the SDA of 1998. The SDA recognises that there have been disadvantages in training, education and experience and these are important in relation to equality in employment for the designated groups. In fact it as been argued that the SDA is the life-blood of the EEA with regard to the employment of suitably qualified candidates. It assists the employer in developing the skills of the beneficiaries so that they are able to compete equally and more competently.

The SDA is intended to elevate employment equity above being a mere numbers game to a competency-based exercise. The appointment of designated candidates should also ensure that it is deployment of skills and competencies. It requires South Africans to consciously build the skills and competencies of its workforce or intended workforce.[83] To make this an effective piece of legislation, there has to be a

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[83] Section 2 of this Act captures the purposes of the SDA.
(1) The purposes of this Act are to develop —
(a) the skills of the South African workforce —
(i) to improve the quality of life of workers, their prospects of work and labour mobility;
(ii) to improve productivity in the workplace and the competitiveness of employers;
(iii) to promote self-employment; and
(iv) to improve the delivery of social services;

(b) to increase the levels of investment in education and training in the labour market and to improve the return on that investment;

(c) to encourage employers —
(i) to use the workplace as an active learning environment;
(ii) to provide employees with the opportunities to acquire new skills;
(iii) to employ persons who find it difficult to be employed;

(d) to encourage workers to participate in leanership and other training programmes;

(e) to improve employment prospects of persons previously disadvantaged by unfair discrimination through training and education;

concerted effort on the part of employers to develop skills and make their workforce a viable one instead of subscribing to a numbers workplace. The redistribution of society's goods, resources and services in order to remove or eliminate existing inequalities will ultimately be beneficial to the society as a whole. This does not only refer to the achievement of equality in the workplace but to all other aspects of life as well.

(12.5.2) Problems with Reservations and Quotas

In India, the preoccupation with the reservation system and controversy over the reservation system has caused the government to neglect primary education, poverty, literacy and grass root efforts at both integration and community economic development. Accordingly, there is some concern that the reservation system in India has become symbolic and tokenistic and fails really to address the core problems that lead to so much suffering and ultimately inequality and inter-group tension in that country. Further, reservations have not been accompanied by efforts to train the targeted beneficiaries to actually benefit from access.

Despite the existence of a constitutional directive, the failure to universalise primary education has had all kinds of negative effects including stigmatising the beneficiary groups. Reservation has now become a sword in the beneficiaries' hands which is being demanded by minority religious groups, women, and the *dalits* that have converted earlier to Christianity. If the trend to widen the quantum of reservations in India is not brought to an end, it will contradict the equality principle which is considered to be so fundamental to the Constitution of India.

Additionally, it has been argued that the reservation system has unfortunately provided a platform for extremist right wing political groups that they otherwise might not have. The situation is such that the OBC's category has solidified a social construction that otherwise would not have become solidified and in fact has led to increased civil discord, increased identification within group membership at the

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(f) to ensure the quality of education and training in and for the workplace;
(g) to assist —
  (i) work-seekers to find work;
  (ii) retrenched workers to re-enter the labour market;
  (iii) employers find qualified employees; and
(h) to provide and regulate employment services.

expense of the building of bridges between castes and classes in that country. It would seem that the reservation system has given caste a kind of political currency that it otherwise would not have had and, therefore, again serves to reinforce inter-group differences rather than to break them down.

The problems with a reservation or quota system have been well documented in Part IV of this thesis. The decisions mentioned therein illustrate the problems arising in the course of implementation of reservation programmes in India. The basic problem in India is that there are too many people in need of the few additional resources. This is not a unique problem to India; however, the over-all policy should be to balance the concept of social justice for the society as a whole.

Another problem with reservations is that even though the courts have agreed on the percentage of reservations allowed, the benefits provided to the backward classes exceed the legal ratio and reasonable limits. For instance, reservations for these classes in various educational institutions and in government jobs exceed beyond sixty nine percent of the total. In 1963 the SC articulated a dictum when it observed that "speaking generally and in a broad way a special provision should be less than fifty percent but how much less than fifty percent would depend upon the prevailing circumstances in each case".[84] However, in 1986 the Chief Minister of Andhra Pradesh increased the quotas in various institutions well beyond seventy percent in total. To date, more than half of all government jobs and educational slots, as well as a large number of seats in most state legislatures, are permanently reserved for members of some 2,000 specific castes which is more than half of India's population.

If such high percentages of quotas are set then the needs of the rest of the society will be neglected. This could account for the high level of resentment and violence that is being directed against the untouchables. Such a quota system will divide and destroy the harmony of any society. In the US experience, it has been shown that group quotas have the effect of stigmatising legitimate achievements. In fact people who have been appointed in senior positions are uncertain whether they were appointed on

[84] See the case of *Indra Sawhney & Others v Union of India & Others* (1992) Supp. (3) (SCC) 217.

merit or purely as part of a quantitative target.[85] It has been argued that this uncertainty could result in these candidates being demotivated and unproductive.[86]

However, the US Courts have rejected the system of quotas. In rejecting set quotas, the American courts in the 1978 *Regents of the University of California v Bakke* SC case set limited parameters for educational affirmative action. According to this SC judgment, colleges could use race and ethnicity as a factor in admissions but could not designate set numbers of spaces for members of specific ethnic and racial groups.

In the *Richmond*[87] case for example, the minority set-aside programmes would seem to deny certain citizens the opportunity to compete for a fixed percentage of public contracts based solely upon their race. This would be unfair discrimination as no-one should be denied equal employment opportunities based solely upon that persons race. Other characteristics should and must be taken into account to make affirmative action measures constitutional.

Looking at the aims of affirmative action, the main focus is on education and job allocations. Affirmative action policies require that active measures be taken to ensure that blacks and other minorities enjoy the same opportunities for promotions, salary increases, career advancement, school admissions, scholarships, and financial aid. From the outset, affirmative action was envisioned as a temporary remedy that would end once there was a level playing field for all Americans.

However, amid its good intentions, by the late 1970's deficiencies and problems in the policy arose. The main issue was that of reverse discrimination. This was illustrated by the *Bakke* case in 1978. The SC in that case outlawed inflexible quota systems in affirmative action programmes, which in this case had unfairly discriminated against a white applicant. In the same ruling, however, the Court upheld the legality of affirmative action *per se*.

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85 Marx M Affirmative Action Success As Measured By Job Satisfaction (1998) at 33.

86 Sowell T The "Q" Word (1995) Forbes V(155) No.8 61 at 61.

87 *City of Richmond v J A Croson Co.* (1989) 109 S. Ct. 706 at 721.

The Court held that in university admissions decisions, race could be one of the factors considered in choosing a diverse student body. However, the Court also held that the use of quotas in such affirmative action programmes was not permissible. The University of California, Davis Medical School had therefore, by maintaining a sixteen percent minority quota, discriminated against Allan Bakke. The legal implications of the decision were however clouded by the Court's division. Bakke had twice been rejected by the medical school, even though he had a higher grade point average than a number of minority candidates who were admitted. As a result of the decision, Bakke was admitted to the medical school and graduated in 1992.

If one looks at the situation in India some States have more than reached their quotas and in fact it seems that some members of the backward classes are excelling over the other so-called forward class students.[88] These States are however reluctant to remove these classes from the list of backward classes for political reasons. This has lead to the "creamy layer" debate. While pointing out the situation, the Indian Court's made it clear that the situation called for appropriate steps. In India no action has so far been taken in the matter. It is submitted that by not removing the advanced classes from the list of OBC's, they are really doing injustice to the truly backward and deserving classes.[89] The questions of how to identify and remove this advanced group of backward classes arises.

12.6 The Creamy Layer Debate

Some argue as in the case of India, SA, and the US, that middle and upper class individuals, and consequently their children who receive any benefits from affirmative action programmes constitute unfair practices and therefore such persons benefiting from affirmative action programmes are not the intended or real beneficiaries of such programmes. The reason is that because these kinds of opportunities relate to a continuous process of middle and upper class benefiting from affirmative action, this then produces what Indian sociologists refer to as the "creamy layer effect". It would appear that affirmative action usage in this context becomes unfair and creates a form of discrimination in itself.

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88 *Keshavananda Bharathi v Sate of Kerala* (1973) AIR 1461 (SC).

89 *Ibid* at 1485.

It is suggested that training programmes and policies that are developed in the economic, educational and other social conditions context will enable such groups to improve their plight in life, including an equal opportunity to compete in the labour market.[90] This argument both in India's and South Africa's case is similar to the argument against affirmative action in the US especially regarding the African-American community and the creamy layer effect.

In November of 1992, the SC of India[91] affirmed the use of caste as a factor in determining the eligibility for affirmative action, but excluded the creamy layer among the backward classes from eligibility for reservations. The term "creamy layer" has been used in the Mandal judgment to refer to wealthy and influential families in each OBC, but the decision to exclude them has evoked strong opposition form the leaders of the OBC's. Reddy J has opined that —

> "[The proposal of] of an income limit, for the purpose of excluding persons (from the backward classes) whose income is above the said limit ... is very often referred to as "the creamy layer" argument. Petitioners submit that some members of the designated backward classes are highly advanced socially as well as economically and educationally. It is submitted that they….. [are] as forward as any other forward class member….. and that they are lapping up all the benefits of reservations meant for that class, without allowing the benefits to reach the truly backward members of that class. ...[W]e feel that exclusion of such socially advanced members will make the 'class' a truly backward class and would more appropriately serve the purpose and object [of the constitution]. ...[W]e direct the Government of India to specify the basis of exclusion -- whether on the basis of income, extent of holding [property] or otherwise — of [the] 'creamy layer'.....On such specification persons falling within the net of [this] exclusionary rule shall cease to be members of the Other Backward Classes."[92]

The "creamy layer" debate in India is similar to the arguments raised in the US that since America has considerably improved the chances for minority groups and

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90 This includes poor groups who have been discriminated against like the "untouchables" in India, poor black South Africans, and underclass people of colour in the US due to their social place or social status.

91 In what is known as the Mandal Judgment.

92 Opinion of Justice Reddy at para 86, 294 and 396.

women in the political, economic, and educational institutions over the past three decades, affirmative action programmes are no longer necessary.[93] The reasoning behind this school of thought is that since affirmative action programmes have improved the life chances for minority groups and women, especially those who are now in middle to upper classes, such programmes should not benefit them.[94]

In giving its assent to the Government order for implementation of the Mandal Commission report, the SC of India in 1992 not only limited overall reservation to fifty percent (thereby in effect reserving fifty percent for the "forward castes") but also inserted an economic exclusion clause under the name of "creamy layer". The term itself implies that by "skimming off the cream" a rather healthier glass of milk could be made available. The term "creamy layer" was used both to refer to the slightly better off economically among the backward castes (this could not be applied to the *dalits* and *adivasis*) and to better off *jatis* among them.

The problem of the creamy layer debate is not purely an academic debate. In India, the government implements affirmative action benefits to approximately 3743 backward castes among Hindus alone. This is more than eighty percent of the population itself. This percentage excludes the SC's and ST's who are entitled to more comprehensive benefits under the affirmative action initiatives. In the first place, two of the most disadvantaged sections of the population are the former "untouchables" (The SC's) constituting eighteen percent and tribes (ST's) constituting five percent. The IC places both these sections on a higher footing than the others as far as affirmative action is concerned. Both are entitled to representation in all legislatures in proportion to their numbers, and jobs in the government, and admission to educational institutions, both at the central government and the States.

Priority is accorded to them over the OBC's in accessing other benefits such as housing sites in urban areas, surplus arable land, bank loans etc. The SC's and ST's

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93 *Hopwood v State of Texas* (1996) 518 (US) 1033.

94 The advancements of minorities in terms of increased opportunities in the wider society are based on a number of reports. See for example Smith J P and Welch F R Closing the Gap — Forty Years of Economic Progress for Blacks Rand Corporation 1986 and Gerald D Jaynes and Williams Robin Jr. (eds) A Common Destiny — Blacks and American Society (1989).

lists are maintained by the central government while the OBC's lists are maintained by the States. Finally the IC bans the practice of untouchability in any form, and makes its practice in any form an offence. The next category of people who are entitled to affirmative action benefits are the OBC's, all of whom collectively enjoy twenty-seven percent of reservation of government jobs, and admissions to educational institutions.

As one can see from the above system of reservations, it leaves no place for jobs or very few, to persons who do not belong to the backward classes.

In the US, critics of affirmative action argue that such programmes have increased opportunities primarily for a black middle class while creating a polarisation in the black community between a flourishing middle class and limited opportunities for poorer blacks or the underclass.[95] In fact it has been argued that the children of middle class families have access to professional opportunities and are differently placed, historically than their parents. Based on this argument then, affirmative action that continues to benefit the children of such middle class families' causes what some may claim as professional inbreeding or the "creamy layer effect".[96] The assumption is that racial discrimination has been eradicated for middle class blacks and that the poorer blacks' experiences relate more to class culture and not racial discrimination.[97] In India, the principle of compensatory discrimination is meant to be applicable to ethnic or non-class social groups or communities who have been, for various historical reasons, systematically excluded from wealth and positions of power in society. This does not apply to the processes of simple class stratification.

In the US, traditionally disadvantaged minorities have improved their political identity and power, to some extent at least. It has therefore been argued that the giving of special jurisprudential attention therefore becomes more difficult to justify

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95 Wilson Julius Wilson The Declining Significance Of Race (1978).

96 Landry Bart The New Black Middle Class (1987).

97 For a critical analysis of this argument see Feagin R Joe & Porter Aaron Affirmative Action and African Americans — Rhetoric or Practice (1995) Huboldt Journal of Social Relations V(21) 40.

on the grounds of process defect.[98] It would seem that evidence shows that some blacks in recent years have increased their influence in the political system. The CRA of 1991[99] passed by Congress illustrates how a group that was once entirely excluded from the legislative process now actively and successfully participates in alliances that yield political accomplishments.[100]

Experience in the US and India has shown that some persons in designated groups that were once previously disadvantaged are now very successful. It has been suggested that justified special measures in the past, in light of the racist history of America and the discriminatory practices of India, may now prove to jeopardise the representative process as citizens seem to be on a more equal standing with each other.

Even though India has some recommendations on how to exclude the "creamy layer" from benefits these recommendations are not helpful in that no specific criteria are set for the exclusion of these persons from preferential treatment. Therefore, as the Indian government do not have specific criteria for the excluding the creamy layer they are still allowed to benefit under the preferential treatment policies even though they are no longer depressed and backward. It should be borne in mind that criterion to determine such progression and subsequent expulsion from the designated group should not be based exclusively on economic factors, unless the economic advancement is so high that it necessarily means social advancement.

However, in the midst of racial and minority progress, one must not lose sight of how larger expressions of discrimination occur and *de facto* conditions re-appear, but it just operates in a different social, economic, and political context.

It is submitted that, simply because a few of the minorities in SA, have more than reached their equality status does not mean that this is enough to veto anti-

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98 Lively *op cit* 49 at 177.

99 See section 1745 of the 102nd Congress of the First Session (November 1991) Lexis: Genfed Library Bills File.

100 *City of Richmond v J A Croson* (1989) 109 S.Ct. 706 at 721.

discrimination legislation. The cases in the US SC have shown that even where employers with a pervasive history of discrimination have employed voluntary affirmative action programmes, the courts have frustrated their efforts. This is the situation even where evidence of past discrimination is evident and equitable representation in the workforce has not been achieved.

Further, like affirmative action in the US, reservation policies in India create opportunities for talented individuals by drawing them from lower caste groups. The experience in the US shows the critical role to be played by a leadership class drawn from an oppressed community. The civil rights movement reflects the very best that the US had to offer in terms of blacks fighting for access to opportunity.[101] In India too, it was such members of the "creamy-layer" who fought for access even though they also benefited from such gains. It has been argued by Porter that one should not take for granted the continued supply of such leaders. Further, he states that if India has glass ceilings for talented women and minorities like that in the US, then one must consider whether or not there are sufficient numbers even from the creamy-layer group in positions of power to help or to secure institutional access for others by creating or maintaining equality of opportunity.[102]

Porter further argues that —

> "This is one reason why the stabilization of middle and upper-classes are important in terms of affirmative action. Continuing to help disadvantaged groups increase their opportunities in the larger social, political, and economic system can also serve as a way to keep the system honest. In other words, being a watch dog is a great public service, rooted in a rich democratic tradition. That is, when the majority party is in positions of power, in a democratic society, the minority party is allowed

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[101] Martin Luther King, Jr. and Charles Hamilton Houston came from privileged backgrounds, and black college students from across the country who fought for poor blacks in the South regarding their civil right to vote are critical examples of how blacks have given back to their indigenous communities in terms of access issues.

[102] Porter A Why the "Creamy Layer" Should Not Be Excluded from Affirmative Action Programs An Essay on Leadership and Responsibility in Social and Political Context (1997) (Porter) at http://law.wustl.edu/Conferences/Equality/Govart4 last visited 11/11/2004.

representatives in the system to maintain a level of fairness by being a watchdog, even if that means fighting for their interest."[103]

In SA there would seem that there is an ever increasing division between the educated or upper class designated groups and the poor from those groups. There is no data or research on SA which has a scientific basis for a discussion on the impact of affirmative action policies in expanding and creating a creamy layer effect in terms of black participation in the economy of the country.[104]

A problem with this creamy layer debate for South Africans is that, it can be argued, that there are some persons from the designated groups in SA who are actually quite wealthy. If one had to remove them from affirmative action measures, the question is how this should be done. This would lead to the situation whereby persons will have to prove their disadvantaged status in order to benefit under the affirmative action programmes. As discussed earlier on in this chapter, proving ones disadvantage or right to benefit under these programmes will be no more a solution than eradicating affirmative action measures altogether. Further, in SA, the government should obviously specify the basis of exclusion, if and when the time does come that a group has advanced to a stage where they are able to compete on an equal footing with the rest of the citizens of SA.

In India, the costs to the nation of inserting the "creamy layer" exclusion clause have been considerable. Financial and administrative costs have mounted with the continual national and State-level Government commissions designed to set up criteria for determining a "creamy layer", with continual court cases focussing on this issue. The ISC has even forced States such as Kerala, whose own experts had determined that there was no "creamy layer" in the State, to find one, regardless or be liable for contempt of court. All of this has added little to the information available about caste and occupation in India but has certainly stalled implementation of the Mandal Commission recommendations.[105]

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103 *Ibid.*

104 *Ibid.*

105 As discussed in Chapter Eleven.

Further, if for example these persons belonged to a certain racial group, the question arises as to whether the legislature would then have to remove the entire group from the benefits of affirmative action because of the advanced status of these individuals. The aim of the EEA and the Constitution of SA is to ensure that affirmative action programmes will act as a "deliberate and sustainable interim strategy" aimed at enhancing the abilities and capacities of disadvantaged groups to enable them to compete on an equal footing with those who benefited from the apartheid system.[106] The aim is to ensure that the group as a whole will be able to compete on an equal footing and not just a few individuals.

In any society there are those that are very rich and there are those that are extremely poor. Only once all persons from a designated group have the tools or skills to compete equally can they, in clear conscious, be removed from the list of designated groups. However, at this stage in SA, one should not have to prove their disadvantage as it will not be beneficial to the South African society as a whole.

Kenneth Smallwood has noted that white America benefited from huge federal affirmative action plans for whites only. Such programmes laid the foundation for much white prosperity and African American inferiority in resources and opportunities in the modern US.[107] Therefore, a few decades of affirmative action do not negate centuries of discrimination nor make a serious dent in the means of production or political economy.

Leslie Carr in *Color-Blind Racism* uses a Marxist perspective in order to provide insight into how inequality persists. Carr claims that the foundation of the US society was based on capitalistic interests and maintaining that interest through the means of production can operate simultaneously with a societal superstructure which uses racist ideologies that perpetuate inequality. Carr notes that people respond to economic forces or "the mode of production of material life" and describes how social

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106 Mkhwanazi D New Breed of Managers needed in a new South Africa 1998 Human Resource Management (V) 9 No. 9 pp14-17.

107 Smallwood Kenneth W The Folklore of Preferential Treatment Southfield (1985).

behaviour, law, and policy are rooted in that base.[108] As Oliver Cox avers in his work — "the control by whites of the dominant culture relates to the way racist ideology and racial inequality emerged".[109] Carr further contends that "colour-blindness is not opposite of racism, it is another form of racism".[110]

As civil rights legislation and affirmative action directives helped increase the opportunities for minorities and women in US institutions, the abstract idea of capitalistic economic advancement gave rise to the ideology that every individual can achieve the American dream.[111] The further belief is that these advancements for minorities and women in particular occurred in a race or gender neutral way and that inequality does not exist for these groups particularly in classes of the creamy-layer. Carr asserts that this abstract ideological view is an exact inversion of social reality as the US model.[112] Race discrimination still permeates the American society and affects the experiences of creamy-layer groups in the US. Porter states that "the use of colour-blindness reflects a sub-component of how a larger racist dynamic operates in the social fabric".[113]

Further, it has been argued that there should be caution in assuming that new status positions for members of lower castes or classes or designated groups will fully increase their class positions and negate social stigmas.[114] According to the African American intellectual, W E B Dubois, there remains a problem of racial stigma in

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108 Carr G Leslie Color-Blind Racism (1997) at 1-3 (Carr).

109 See generally, Cox Oliver Caste, Class, and Race — A Study in Social Dynamics (1948).

110 Carr *op cit* 111 at x.

111 This ideology was forecast by the assimilation theories developed by influential early sociologists. In the works by Milton M Gordon Assimilation in American Life — The Role of Race, Religion, and National Origins (1964); Glazer Nathan Affirmative Discrimination — Ethnic Inequality and Public Policy (1975). For a critical view of such assimilation theories see Joe Feagin and Aaron Porter White Racism (February 1996) Choice at 903-914.

112 Carr *op cit* 111 at 9-11.

113 Porter *op cit* 105.

114 *Ibid.*

terms of how blacks are perceived by whites in ways that affect their meaningful participation in the wider society. Dubois states that —

> "..... between me and the other world there is ever an unasked question: unasked by some through feelings of delicacy; by others through the difficulty of rightly framing it. All, nevertheless, flutter round it. They approach me in a half-hesitant sort of way, eye me curiously or compassionately, then instead of saying directly, how does it feel to be a problem? They say, I know an excellent colored man in my town.... To the real question, how does it feel to be a problem? I answer seldom a word."[115]

What is evident here is that the general pattern of social stigma and race discrimination will continue "notwithstanding how well-off a black person is".[116] Porter argues that even though many talented blacks have reached high levels of status, race still plays a key role in how they are defined and perceived.[117] Even though affirmative action may tend to undermine the self-esteem of women and racial minorities, in some cases[118] interview studies and public opinion surveys in the US suggest that such reactions are rare.[119]

It must be born in mind that inequality can persist behind a caste-free or colour-neutral society. It has been argued that under the societal myth of a colour blind society, members of the so-called "creamy-layer" groups will not only be limited in the way that affirmative action can help this group, but also continue to suffer the effects that social stigmas have on racial or caste identities.[120]

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115 DuBois W E B The Souls of Black Folk (1982) at 43-44.

116 See Fredrickson The Black Image in the White Mind — The Debate on Afro-American Character and Destiny, 1817-1914 *(*1971).

117 Porter *op cit* 105.

118 Heilman M E, Simon M C & Repper D P Intentionally favored, unintentionally harmed? Impact of sex-based preferential selection on self-perceptions and self-evaluations (1987) V(72) Journal of Applied Psychology at 62-68.

119 Taylor M C Impact of affirmative action on beneficiary groups — Evidence from the 1990 General Social Survey (1994) V (15) Basic and Applied Social Psychology at 143-178.

120 Porter *op cit* 105.

(12.6.1) Group vs Individual Rights

Looking at the Indian context it would seem that the express text of the IC provides for group rights in so far as it speaks of special provisions for women and children and for any socially and educationally backward classes of citizens[121] or for the SC's and ST's, reservations of appointments or post in favour of any backward class of citizen, promotion of the educational and economic interests of the weaker sections of the people and consideration of the claim of the members of the SC's and ST's in the making of appointments to services and posts. In view of these express provisions it is very likely that the right to equality in India is not always an individual right. In SA, affirmative action is meant to benefit designated groups, so therefore it is also meant to benefit groups as a whole and not specific individuals.

In the US, on the other hand, the language used in the Equal Protection Clause can plausibly be used to defend both, the claims of the individual equality as well as the claims of the disadvantaged groups. However, looking at the various case discussions, the whole concept of legal rights has been developed in the US in terms of individual rights, and if the equal protection clause is used to provide justice for the groups by creating a quota or reservation the right of discriminated against individuals of the excluded groups is said to be violated.

In the US in the absence of constitutional language used to defend group claims (as is used in Article 15(4) and 16(4) of IC and chapter III in the EEA of SA) the deprivations of individual rights on the basis of group characteristics, race, religion, national origin is nevertheless treated in law as a problem of protecting the rights of an individual. It would seem that not only does the constitutional and legal language of the US advocate a colour blind society and a course for individual equality as opposed to group equality, but looking at the various decisions of the US SC too, Justices defend the right to equality in terms of equality for individuals.[122]

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121 Articles 15(3) and (4) of the Constitution of India.

122 See for example the case of *Regents of University of California v Bakke* (1978) 438 US 265.

Looking at the experiences of the US, focusing on individual rights when assessing the constitutionality of race-based affirmative action programmes can be fatal.[123] The US Supreme Court's emphasis on individual guarantees of equal protection has proven fatal to many race-based affirmative action programmes.[124] The US Supreme Court's pronouncement on race-based affirmative action programmes in *Adarand*, also emphasised the Equal Protection Clause protects persons, not groups.[125]

The endorsement of affirmative action in SA is supported by a Bill of Rights' with specific emphasis on the protection of group rights as well as individual rights.[126] However, it is submitted that affirmative action is meant to benefit groups as a whole and not specific individuals from within these groups. As such it is further submitted that when looking at the specific situation of SA, only where a class or group *as a whole* has advanced to such a level as to be able to compete on an equal footing with the rest of the non-designated classes, castes or groups then equality of status is achieved. The problem still remains on how this is determined.

If one looks at the Constitution of India, one will find that the concept of group equality in so far as it speaks of special provisions for women and children and for any socially and educationally backward classes of citizens or for the SC's and ST's, reservations of appointments or posts in favour of any backward class of citizens, promotion of the educational and economic interest of the weaker sections of the people, and consideration of the claims of the members of scheduled castes and scheduled tribes, in the making of appointments to services and posts. In view of these express provisions the right to equality is not always an individual right.

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123 *Ibid* at 61 — where the court stated that "the fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment".

124 See *Regents of University of California v Bakke* (1978) 438 US 265 at 320, *City of Richmond v JA Croson Co.* (1989) 488 US 469 at 469 and *Adarand Constructors Inc. v Pena* (1995) 115 S.Ct. 2097 at 210.

125 *Adarand Constructors Inc. v Pena* (1995) 115 S.Ct. 2097 at 210.

126 Abdelrahman Aliaa Affirmative Action in the United States and South Africa — Why SA should not follow in our footsteps (1999) New York Law School Journal of International and Comparative Law V(19) No.1 195 – 214 at 206.

In practice, one sees that most legislations, particularly in the area of social welfare, take into account groups and not the individual. For example, labour legislations safeguarding the interest of industrial workers does not take into account the non-industrial worker, though he may be more in need of such safeguards than the former. The legislation proceeds on the assumption that the industrial workers as a class or group must be protected from the oppression of a class of employers, i.e., the industrialists. Similarly special treatment to veterans and their children in matters of job or admission to educational institutions is given as members of a group regardless of the disadvantage suffered by individuals. Special provisions are similarly made on the ground of group characteristics or handicaps.[127]

It is submitted that what can be stated with some certainty is that only once substantive equality is achieved can a group then be removed from the sphere of protective discrimination. This removal from the protective sphere of discrimination should not be based on the advancement of a few individuals.

One of the more serious omissions of the EEA was the failure to provide guidelines on how to approach the various designated groups when it comes to recruitment; selection; promotion and so on. The EEA gives indirect guidelines in the form of section 42 which refers, among others, to the demographic profile of the national and regional economically active population. This task was left to the Commission for Employment Equity which was mandated to research and report to the Minister on, among other issues, "the norms and benchmarks for the setting of numerical goals in various sectors".[128] The intention was for the Minister to issue such guidelines in the form of regulations after being so advised by the Commission for Employment Equity.

So there is still a need for clarity and guidance on how to approach the setting of targets and the implementation of employment equity around the designated beneficiary groups. If the EEA was more specific in how to achieve its numerical

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[127] Singh *op cit* 7.

[128] Section 30(2)(b) of the EEA.

target it would assist the government in determining if at any stage whether a certain group has been sufficiently advanced to remove them from the sphere of protective discrimination. The failure to issue such guidelines may lead to abuse and complaints of bias in favour of some groups of "blacks" versus others. If not addressed, this may lead to a redefinition and even narrowing of "black" a few years from now and develop some of the problems experienced in India regarding the creamy layer of society.

12.7 The Constitution and Other Forms of Equality

The South African Constitution establishes a new democratic order based on "human dignity, the achievement of equality and the advancement of human rights and freedoms". The expression "equality" itself cannot be defined in a single manner and does not only have one connotation attached to it. Indeed, there is a range of ways that one can actually articulate the idea of equality and different writers and judges are inclined to emphasise some forms of equality, rather than others, as of having overriding importance. Some examples include, but are not limited to, equality before the law; equality of basic human rights; economic equality or equality of consideration for all persons; or equality of opportunity.

Looking at Chapter Nine and the various cases discussed therein, it would seem that the notion of the value of dignity lies at the heart of the CC's equality right analysis. The judges therefore stress the importance of dignity as being central to the right to equality. They have acknowledged in many of its decisions that the majority of South Africans are indigent and therefore for equality to be achieved in its entirerity, equality, not only in the workplace but in all spheres of life must be achieved, most importantly, socio and economic equality. This form of equality is seen to give the people of SA the dignity it needs to be able to be equal and compete equally at all levels in life.

(12.7.1) The Advancement of Human Rights and Freedoms — Equality and Socio Economic Rights

The South African Constitution seeks, unlike many other constitutions, to protect socio-economic rights. Socio-economic rights include the right to basic education,

including adult basic education,[129] the right not to be refused emergency medical treatment[130] and the right of a child to basic nutrition, shelter, basic health care services and social services.[131] Even though workplace inequalities are widespread and common, the South African society still faces other challenges in its attempt to bridge the gap between the rich and the poor, but most importantly it needs to improve the quality of life for all its citizens. A more difficult task will be to deal with the systemic racism of socio-economic inequality. The Constitution's Bill of Rights tries to address this problem through a multitude of guarantees including rights to adequate housing, basic utilities and health care, and a clean environment, among others.[132]

The President of the CC has said that "the socio-economic rights in our Bill of Rights represents a commitment to addressing conditions of poverty and inequality in our society".[133] Unless this is done, any endeavour at achieving substantive equality will be fruitless. The President of the CC has further stated in the *Soobramoney v Minister of Health*[134] case —

> "Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring."[135]

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129 Section 29(1) of the South African Constitution.

130 Section 27(3) of the South African Constitution.

131 Section 28(1)(b) of the South African Constitution.

132 The government has made some progress towards ensuring these rights — it has built hundreds of thousands of homes and brought electricity and running water to many impoverished communities.

133 *Soobramoney v Minister of Health, KwaZulu-Natal* (1997) 12 BCLR 1696 (CC) at para 8-9.

134 *Soobramoney v Minister of Health, KwaZulu-Natal* (1997) 12 BCLR 1696 (CC).

135 *Ibid* at para 9.

The right to equality in our Bill of Rights includes "the full and equal enjoyment of all rights and freedoms". This implies that vulnerable and disadvantaged groups should not experience unfair discrimination in accessing and enjoying their constitutionally protected rights, including socio-economic rights. In addition, the equality clause expressly recognises that in order to promote the achievement of equality, legislative and other measures designed to protect or advance individuals or groups who have been disadvantaged by unfair discrimination may be taken.[136]

The unfortunate reality is that attempts to fulfill these socio-economic rights, as well as to monitor and enforce them, have been frustrated by a familiar set of problems; the lack of financial resources and the shortcomings of the state bureaucracy. The constitution of SA implicitly recognises these obstacles, and includes a clause allowing for the "progressive realisation" of the rights it guarantees. It has been left to the courts to decide what that means.

Looking at the decision in the *Walker*[137] case and assessing the way the CC deals with equality at a local level, an important factor is the existence of enormous disparities in the overall quality of facilities and services provided by local authorities. These disparities must be taken into account. It is the duty of local government to eliminate these disparities that are the consequence of the politics of the past. They should however do so in a way that does not trample on the rights of other individuals. The *Walker* decision shows that when the council's officials embarked on a policy of non-enforcement in the townships the right to equality was violated.

This was a policy that was not recorded, not officially authorised by the council and based on *ad hoc* decisions by council officials. This seemed to be the biggest problem in the eyes of the Court —

> "Whilst there can be no objection to a council taking into account the financial position of debtors in deciding whether to allow them extended credit, or whether to

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136 Section 9(2) of the South African Constitution.

137 *City Council of Pretoria v Walker* (1998) 3 BCLR 257 (CC).

sue them or not, such differentiation must be based on a policy that is rational and coherent".[138]

This implies that a policy of selective enforcement of service fee arrears, whereby disadvantaged areas are treated "with a softer hand" is not always unconstitutional, however for such a policy to be constitutional, it would have to carefully formulated, announced and debated in public and implemented in a way which does not seriously impair the rights and interests of other residents of the municipality.[139]

Further, an affirmative action programme must be carefully targeted and fair and it must meet the legal requirements. One of the most important questions though is what will be the forms of affirmative action that will be permitted in the future. The South African courts must be wary of following the higher level of scrutiny adopted by the American courts or the very flexible "carry over rules" of the Indian courts. The attainment of substantive equality in a balanced fashion is the challenge which faces the South African society.[140]

The right to equality proposes a vision that, if correctly implemented, can bridge the enormous chasm that divides the South African society. However, the attainment of a more egalitarian society must be achieved in the structured manner as laid down by the Constitution and the CC of SA.

12.8 Numerical Goals or Quotas? The Better Option

Looking at the experiences of India and America, the quota system is against the spirit of equal opportunity. When a deserving person cannot get admission in a university or a job in a government agency only because he belongs to a certain area, group or class, then he or she is being unfairly discriminated against. Looking at the quota system in India and the US, the quota system put in place to help underprivileged class of people to avail growth opportunities is actually harmful to the growth and

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138 *Ibid* at para 45-68.

139 De Visser Jaap Equality and differentiated electricity rates and selective debt collection — *City Council of Pretoria v Walker* (September 1999) Local Government Law Bulletin V(1) No. 3 at 1-5.

140 Govender *op cit* 32.

progress of the country, particularly to affirmative action programmes. For instance quotas have the following effects —

- It undermines the educational and professional standards of the country;
- It works against well qualified candidates for no fault of their own;
- It segregates the society and pits one group against another; and in return
- Its beneficial value is limited in that it benefits only a very small sub-section of the underprivileged.

Like India and the US, affirmative action in SA is not meant to be a permanent feature. Once equality in the workplace has been achieved then the goals have been reached. Only once this is done, can affirmative action be done away with. However, looking at the experience of the US and India, SA still has a long road ahead. SA's focus should be on the achievement of equality and to always give effect to the Constitution, bearing in mind the history of the country.

The decisions of the Indian SC, mentioned in the previous chapter, illustrate the problems arising in the course of implementation of reservation programmes in India. Under Article 15(4), reservations are being made in favour of backward classes in several elected or representative bodies like Municipalities and Village *Panchayats*. In the South African context, the use of reservations or strictly speaking, quotas, should not be welcomed.

The problem is that the most extensive programme of quotas in the world, the Indian system has encouraged the view that social problems should be solved not by changing people's minds or attitudes, but by encouraging elites to grapple for political power and representation. A lesson for SA here is to take into account that the Indian government, by promoting an open competition for resources, has encouraged longstanding caste and ethnic differences to become more entrenched. Instead of achieving social justice, India's affirmative action policies in the form of reservations have resulted in a country further divided. Further, the morally controversial system of "reservations" and the vice-like grip of the politicians on the political process have led to this continued division in India.

Should the South African government one day come to a decision that the numerical targets of affirmative action is not being achieved quickly enough and that they would want to impose some sort of reservation or quota system, they must take into consideration at what cost are they willing to achieve such results.

Even so, in the Indian context, there is no question of abandoning affirmative action programmes in favour of the socially disadvantaged persons as the designated beneficiaries are still very much disadvantaged. Looking at the history of injustice in SA, abandoning affirmative action programmes in SA will not lead to justice or equality. It is neither practical nor desirable to do so. It would seem that EEO programmes are consistent with and even required by the anti-discrimination principles.[141] Affirmative action is part and parcel of a just society so there should be no question of abandoning affirmative action programmes for the designated groups at present. However, these programmes must be carried out in a way that is constitutionally acceptable. [142]

In India, the need really is to make these affirmative action programmes more effective, instead of confining it to reservations alone. Other programmes as contemplated by SA should be followed. For example, programmes for special training and development of skills and measures to encourage them in pursuing excellence should be taken up. Reservations or quotas alone can never be the answer.

The Indian experience cautions one about the difficulties of assessing affirmative action programmes. Further, it has shown that compensatory discrimination does not necessarily extinguish commitments to merit. On the other hand, it does not automatically produce the sought-after redistribution and it is not costless.[143]

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[141] Ryan S and Evans G Affirmative Action for Women (1984) The Commonwealth Government Canberra V(1) 3 at 15-16.

[142] See Part III of this thesis which sets out the provisions that regulate affirmative action in SA.

[143] Galanter M Competing Inequalities — Law and the Backward Classes In India (1984) at 563.

In SA, the EEA recognises that merely placing persons from previously disadvantaged backgrounds into higher positions will not bring about equality in the workplace. The EEA states that affirmative action measures must be measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workplace of a designated employer.[144] Indeed, the purpose of the EEA is to promote the constitutional right of equality, to eliminate unfair discrimination in employment, to ensure the implementation of employment equity, to redress the effects of discrimination and to achieve a diverse workforce broadly representative of our people.[145]

As discussed in great detail in Part II, although affirmative action's main aim is to ensure that the previously disadvantaged groups are fairly represented in the workforce of a particular employer, the essence of employment equity is to eradicate all forms of unfair discrimination in terms of employment policies. These policies include hiring, promotion, training, remuneration, benefits and retrenchment practices and to initiate steps that will encourage employers to implement programmes to accelerate the training and promotion of historically disadvantaged people.[146]

Employment equity centres on the eradication of unfair discrimination of any kind in hiring, promotion, training, pay, benefits and retrenchment.[147] Affirmative action is not intended to be a permanent measure, as opposed to equity which is an ongoing process and will end once the broader goal of workplace equity has been achieved. However, employment equity is and should be a permanent feature of any workplace in SA. Employment equity measures also relates to the training and development of persons from designated groups. Such measures will ensure that undeserving persons, from designated groups, will not fill positions meant for the suitably qualified candidate. In this way the use of quotas is not sanctioned. The more flexible targets

144 As discussed in Part I of this thesis.

145 Chapter 2 of the EEA.

146 S P A Consultants Implementing equity in The Workplace (1996).

147 Employment equity is the term used in Canada and elsewhere to connote principles and procedures to ensure that the work force becomes representative of the talents and skills of the whole population.

of numerical goals are used in SA to ensure the equitable representation of suitably qualified persons from designated groups.

Advocates of EEO programmes, involving the setting of targets, emphasise that targets are *flexible* whereas quotas are *rigid* —

> "A quota system, applied in the employment context, would impose a fixed number or percentage which must be attained, or which cannot be exceeded; the crucial consideration would be whether the mandatory numbers of persons have been for example, hired or promoted. A goal (or target) on the other hand, is a numerical objective, fixed realistically in terms of the number of vacancies expected and the number of qualified applicants available in the relevant job market."[148]

Thus the incompatibility of a "quota" with the appointment of the "best" candidate lies in its inflexibility. The situation arises whereby in the absence of highly qualified female candidates for example, the achievement of a "quota" requires the appointment of applicants who are less qualified than some male applicants; it sometimes necessitates the appointment of even unqualified applicants. A "target", in the absence of qualified applicants, does not require the appointment of incompetents. A "quota" may sometimes involve the appointment of *unqualified* applicants whereas a "target" does not.

Professor Lauchlan Chipman states that —

> "You appoint from the target group to the extent of the numerical target only if there are sufficient qualified people available to reach that number."[149]

If you don't do so on this basis, then an employer should not appoint an unqualified candidate. By following this approach one is ensuring that employment equity is being carried out in a constitutional manner. Appointment on this basis means that targets are consistent with the merit principle.[150]

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148 Equal Employment Opportunity Bureau Affirmative Action for Women in the Australian Public Service (1984) at 6.

149 Chipman L To Hell with Equality Jan-Feb (1985) Quadrant at 48.

150 The "merit principle" is aimed at the appointment of the best candidate.

However, it is submitted that the lowering of standards or merit is not unfair if one looks at how one can judge merit on an equal basis in a society where opportunities have been and remain unequal. One should ask the question of whether or not it is at all possible for a person from a socially disadvantaged background, who has not had the opportunities of a sound education, to be able compete on an equal footing?

Affirmative action is there to assist such persons. So even though affirmative action may be open to abuse and misuse, this lowering of standards or merit should not become incentives for the ending of affirmative action programmes.

If one had to look at the various decisions of the SC in both India and the US, decisions delivered seem to depend on which side of the political fence a judge sits. Politicians, scholars and the media largely control how affirmative action is presented to the public and debated.[151] In India for a politician to secure a win he has to promise that quotas will not end. Hochschild argues that "in the current American racial culture, affirmative action is more important to participants in the policy debate as a weapon with which to attack enemies in order to win some other battle than as an issue in and for itself".[152]

This is another problem that the South African courts should take into account in their efforts to achieve equality. What this teaches SA is that judges should be impartial and deliver judgments that reflects and gives substance to the meaning of the Constitution of the country. What is needed is a balanced approach, untouched by electoral deliberations or political reasons.

12.9 Why Legislative Measures Have Been a Failure in India

The Constitutional guarantees in the IC, enabling legislation and welfare measures to prevent discrimination and promote opportunities for the social and economic advancement of the untouchables have brought minor improvements. These

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[151] Swain Carol M Affirmative Action — Legislative History, Judicial Interpretations, Public Consensus in America Becoming — Racial Trends and Their Consequences (2000) V(1) 318 at 331 Smelser Neil J, Wilson W Julius and Mitchell Faith (eds) (Swain).

[152] Hochschild J Affirmative action as culture warfare in The Cultural Territories of Race — White and Black Boundaries Lamont M (ed) at 619-620.

improvements have been accompanied by a backlash from the dominant castes in many areas since these people consider any improvement on the position of *dalits* a threat to their own position.[153] The Scheduled Caste and Scheduled Tribes Commission revealed that between 1981 and 1991 atrocities against *dalits* went up by almost twenty-four percent.

Violations against *dalits* are currently punishable by law.[154] This Act and the 1995 Rules which accompany it form an impressive legislative and administrative framework for the protection of *dalits* or "untouchables" in India. Many state governments have also set up special units of government to deal with what is commonly called civil rights protection. However, it is widely accepted that the Act and the special units have failed to provide relief to *dalit* victims of discrimination. Large parts of the Act have been ignored by state governments, usually because of a lack of political will, the reluctance of officials to acknowledge social injustices, caste bias in the workforce, and the absence of any institution to monitor systematically the implementation of the legislation.

Yet another reason for the failure of anti-discriminatory legislation in India relates to its people's deep religious and fatalistic beliefs — beliefs relating to *karma* and *dharma*.[155] This has led to the lower castes accepting the discriminating treatment as the life God has set for them. Importantly even if the lower castes change their beliefs they cannot change their castes as a persons caste is something that they are born into; an Untouchable will always be an Untouchable.

Most importantly, social justice or "compensatory discrimination" programmes in India have gotten stereotyped around the theme of "reservation" in the public sector. It would seem that people in India equate compensatory discrimination programmes to two issues. Firstly, that social justice programmes are more or less equivalent to reservations and that reservations are limited to employment in the public sector as

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153 The Human Rights Watch Broken People — Caste Violence against India's Untouchables (1999).

154 The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act 1989.

155 See Part II of this thesis for an explanation of these terms.

well as seats in educational institutions. Secondly, even more crippling to affirmative action measures, is the idea that reservation is at odds with the "merit" principle. This notion stems from the belief that employers have to give up on or "relax" certain standards of merit in order to do social justice for the SC's, ST's and OBC's.

The Indian experience shows clearly that compensatory discrimination efforts or social justice programmes must not be limited to education and the public sector. It is important to realise that SA, as a truly modern and democratic society requires the conscious creation of opportunities for all of its citizens, and a truly competitive society cannot afford to waste any talent. They require policies that take account of every sector in a modern and growing economy.

India has various laws against individual discrimination on the basis of caste.[156] There is a policy for the socio-economic upliftment of the lower castes, by the provision of free education till graduation, reservation of admission seats in institutions for higher education and a fifty percent quota in government jobs with faster promotions.[157] In spite of these affirmative actions, identification and discrimination based on castes is quite common in the Indian society.

Changing the law is much easier than changing people's beliefs. It is submitted that in SA too, changing people's attitude and beliefs towards affirmative action candidates will be a mightier task than implementing affirmative action measures. The general attitude towards an appointment from a designated group leaves people with the feeling that the said appointee is not qualified or even not deserving of that position. People from the non-designated groups usually feel cheated. Even where a person is appointed solely on merit they are still looked upon as an affirmative action candidate by other employers, if that person belongs to a designated group.

The situation in SA is such that persons from designated groups are stigmatised. They are seen as people who are given hand-outs from employers and are not truly

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156 For example Article 17 of the Constitution of India.

157 Articles 16 and 334 of the Constitution of India.

deserving of a position. Changing peoples mind set or attitudes is really difficult. Thomas states that —

> "It is naïve in the South African milieu to hope that mere contact in the workplace and in the city streets can overcome ingrained prejudices that have developed over years of *apartheid* rule. It requires intensive, even engineered social or non-hierarchical work-related contact between people of different race groups from executive to junior levels, where they are able to explore background of one another, and discuss perceptions, fears, mistrusts and general life experiences. Such strategies could assist in the development of greater co-operation and a more egalitarian workforce. The process and methodologies for achieving such a state may include discussion groups, social occasions, value workshops…….Specialist trainers in the field of "attitude change" should also be used where issues surrounding prejudices cannot be addressed through conventional methods."

If employment equity is going to achieved then it is up to all South Africans to make it work. Employers, Government and the Courts in SA must ensure that affirmative action measures are carried out in a fair manner, that sensitivity towards different groups is fostered and that equality is achieved. Every South African has a duty to ensure that racial hatred is no longer allowed to fester in this democratic country. However, tolerance of different cultures, languages and people must be a goal every employer should aim to achieve in his workplace. If diversity is to be achieved then this is of utmost importance.

Should an individual feel aggrieved, they can approach the court to determine whether or not their right not to be discriminated against has been unduly trampled upon. Therefore even though the Constitution of SA allows for affirmative action measures for designated groups, it also makes provision for individuals who believe that they have been unfairly discriminated against to take their grievances to court.[158] Should a person feel that they have been unfairly discriminated against and they do not fall under the designated groups they may nevertheless bring an action against the employer for unfair discrimination. It must be borne in mind that every right is subject to the Constitution and the Constitution provides for a limitations clause.[159]

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[158] Chapter 2 of the South African Constitution.

[159] Section 36 of the South African Constitution.

Notwithstanding the many failures surrounding affirmative action measures there has been progress made in the decades for the upliftment of the downtrodden and women, socially, economically and educationally. However, it has not yet reached a level of satisfaction. New laws must be promulgated taking into account the progress, the pitfalls and failures of affirmative action.

Successive governments in independent India have used positive discrimination as an instrument for furthering specific political ends. Part of the explanation for this development is that India's political parties have found that the caste-based selection of candidates and appeals to the caste-based interests of the Indian electorate to be an effective way to win popular support.[160] In fact, politics in India has devolved into a culturally rewarding system with lower caste elites struggling for power, while larger social issues including discrimination and illiteracy continue unaddressed. What is tantalising about positive discrimination in India is that it is not just a question of furthering social justice; it is also a question of maintaining a certain balance of power between different groups in society.

Further, India's affirmative action policies have made caste identities more prominent when the intent was to diminish stratification by caste. Though advances have been made in the political representation of the lower castes, in many ways India today is a society more driven by the system of caste than it was just a few decades ago. The country's extreme policies of caste preferences are the culprit.

For SA not to become even more divided the lesson here is when to end affirmative action. According to Grogan "once society was 'normalised' affirmative action would once again constitute unfair discrimination".[161] Affirmative action and other redistributive social policies aim to reduce the interpersonal hierarchies that characterise relations among ethnic, racial, and gender groups. These hierarchies are both cause and consequence of social inequality. Therefore, until such time that these inequalities cease to exist, affirmative action is a must.

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[160] As can be seen for example, the OBC's are such a substantial constituency that almost all parties *vie* for their support.

[161] Grogan J Affirmative Action Affirmed — *George v Liberty Life* (October 1996) Employment Law V(13) No.1 6-8 at 7.

(12.9.1) When Must Affirmative Action End?

Another major feature of the caste system is that by its definition affirmative action was meant to be a temporary measure and is supposed to last only as long as it is needed. In theory, the protective discrimination for the untouchables is to ensure that they have a share of power and opportunity for advancement until such time as they can hold their own without it. The problem is that there have been no guidelines set or established for determining when this goal would be reached. Further, the only provision with a legal time limit on it has been extended each time it was about to expire.

Besides not establishing quotas, the SC has held that affirmative action programmes must be limited in time. Justice O'Connor addressed this question in the Court's majority opinion in the *Grutter* case —

> "The requirement that all race-conscious admissions programs have a termination point 'assure[s] all citizens that the deviation from the norm of equal treatment of all racial and ethnic groups is a temporary matter, a measure taken in the service of the goal of equality itself."[162]

Anti-discrimination legislation in SA allows for employment equity plans to be redrafted every five years. It is proposed that once a company has achieved its numerical targets then it does not have to use affirmative action. However, looking at the broader meaning of what affirmative action measures means;[163] even though affirmative action will end with a company achieving equitable representation in its workforce employment equity will be a permanent and ongoing feature in a workforce.

In fact, no society, least of all a democratic one can dispense with affirmative action measures which are necessary to fight deep-rooted social and economic prejudices and disadvantages. Indeed, democracy demands its implementation. However, it must be borne in mind that affirmative action is not a right that is available to

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[162] *Richmond v J A Croson Co.* (1989) 488 (US) at 510.

[163] See Chapter 5 in Part II for a definition of Affirmative Action and its broader meanings.

everyone. It is a need only for those who have been unequally and unfairly discriminated against in the past and who are unable to progress due to these disadvantages. The need arises out of ones feeling to be able to compete on an equal level free from any obstacles arising out of that persons' immutable characteristics.

12.10 The Governments Role in Ensuring Effective Affirmative Action

Looking at the objectives of affirmative action measures the government of SA should pursue the following goals for affirmative action to be effective. The government's job does not end with the implementation of anti-discrimination legislation. They should create an awareness of the positive contribution that affirmative action can have in the workplace. Employers must be urged by the government to provide sound advice, training, support and assistance to enhance the design and implementation of effective affirmative action policies and strategies and to facilitate the process of organisational transformation. What should be promoted is a step-by-step process to equity in the workplace. The government should assist in building and strengthening the capacity of the public and private sectors to design and implement effective affirmative action programmes or policies.

The government must promote or advocate for standards in affirmative action that reflect the practical demands of equity and productivity. They must monitor and promote the progress and effectiveness of affirmative action. India's experience has shown that affirmative action can be successful. Indeed, affirmative action has had some successes in India. However, the abuse of the system, and the way it has been manipulated by political leaders whose only interest is to gain power for their respective community, has resulted in negative public opinion.

Looking at the experience of the US, as an incentive the OFCCP gives Exemplary Voluntary Efforts and Opportunity 2000 awards to those companies who demonstrate significant achievement in equal opportunity and affirmative action. The South African government too should set conditions that are transformative when they are giving contracts to companies to encourage the use of affirmative action programmes.

(12.10.1) Enforcement and Monitoring

If left unmonitored affirmative action in SA will fall through the gaps. Like the situation in the US and India, one can see that were there is no proper enforcement, affirmative action will fail. In India and the US affirmative action programmes have largely been a failure. One of the reasons seems be the lack of an effective enforcement agency for affirmative action.

In SA, the EEA requires the Director-General to report to the DOL on whether or not an employer is complying with the Act.[164] Whether this is an effective reporting procedure will in the long run have to be established. To ensure successful employment equity measures in SA, at the very least there should be a regular monitoring of the workforce representation of an employer. A comparison of the workforce representation with the relevant labour force representation should be carried out by the government. Employers must take effective action to eliminate employment barriers. A follow-up meeting with employers should be done to identify the causes of under-representation in the particular workforce.

Looking at the problems faced by India the South African government must ensure that the legislature and judiciary work in cooperation for the benefit of the entire population rather than for a particular group. The efficacy and success of affirmative action programmes will depend on the capacity of State institutions and civil society to implement and monitor them in a systematic manner. This will be a major challenge facing both the public and private sectors in the years ahead.

12.11 Affirmative Action — The Right Way and the Wrong Way

There is no uniform model of affirmative action. In the USA and India, the issue is highly controversial. It proceeds from the majority to a minority, has no secure constitutional foundation, and gets caught up in electoral politics. Although affirmative action in the USA has undoubtedly helped a black professional class to grow and enabled women to advance their professional careers it has not significantly improved the lives of the mass of poor people, nor in any major way counteracted sexual oppression.

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[164] Section 21 of the EEA.

In India, affirmative action has certainly helped members of the untouchable and other oppressed groups. Yet it has been criticised for giving people a stake in identifying themselves as members of a group simply because it gives them material advantages. In this case, quota access to universities and state employment. It has been suggested that it has helped in a significant and visible way to open up the economy and the civil service to the backward classes population, but at the price of encouraging a "communal rather than national consciousness".

In SA, we are dealing with a majority, not a minority, which has been subjected not just to prejudice but to state-organised discrimination. Affirmative action came alive at the same time as democracy. It forms an integral part of the new democratic order of the country. Parliamentary democracy, the rule of law and the application of the principles of good government, if properly enforced will improve the lives of the formerly disenfranchised majority.

There is a vast amount of injustice that will be corrected simply by the application of non-controversial principles of good government. Indeed, even though affirmative action is a controversial principle the government and its people will have to work to guarantee that affirmative action is grounded in the general advance of the poor and oppressed, and does not become a mechanism simply for enabling a new elite to emerge.

In short, there is a right way to do affirmative action, and a wrong way. This means two things — affirmative action initiatives must actually work to effectuate the goals of fighting discrimination and encouraging inclusion; and they must be fair; i.e., no unqualified person can be preferred over another qualified person in the name of affirmative action, decisions will not be made on the basis of race or gender except when there is a special justification for doing so, and these measures will be transitional.

Whether an affirmative action programme will works obviously depends on what goal it seeks to achieve. Above all else, the overriding goal of affirmative action must be to provide equal opportunity for all citizens. In pursuing that goal, affirmative action has general justifications which includes the correction of past discrimination,

equitable representation, and promoting diversity, all of which are consistent with the traditional values of equal opportunity, merit and fairness.

As has been shown, affirmative action is an important but delicate policy. Clearly ongoing discrimination needs to be addressed and corrected. Affirmative action initiatives, to be an effective corrective measure, must be well designed and carefully implemented to avoid unintended unfair discrimination of persons falling outside the designated group and to avoid "unintended adverse psychological impact on beneficiaries and others".[165]

The primary justification for the use of race- and gender-conscious measures is to eradicate discrimination. Affirmative action, therefore, is used first and foremost to remedy specific past and current discrimination or the lingering effects of past discrimination. This is used sometimes by court orders or settlements, but more often used voluntarily by private parties or by governments. Affirmative action is also used to prevent future discrimination or exclusion from occurring. It does so by ensuring that organisations and decision-makers avoid hiring or other practices that effectively erect barriers to improvement.

In undertaking such efforts, however, it must be born in mind that two wrongs don't make a right. As has been shown in Part III and IV, illegal discrimination includes unfair or reverse discrimination. Unfair discrimination or reverse discrimination is discrimination not allowed by South African anti-discrimination legislation and is therefore wrong. Affirmative action, when done right or in the constitutionally correct manner is not reverse discrimination. It will however bring about the goals as envisioned in the South African constitution.

As has been discussed, not every form of injustice attracts affirmative action. The special programmes of accelerated capacity building and advancement must be well focused. In the light of South African realities and priorities, there are two areas where a special responsibility to intervene exists, namely in relation to the effects of race and sex discrimination.

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[165] Nacoste W Rupert in Blanchard F A & Crosby F J Affirmative action in Perspective (1989) 104-109 at 108.

SA, however, should not become a nation of groups constantly calculating and demanding that special programmes for this group or that group should exist. The thrust of affirmative action must not be lost in endless efforts to secure more places for members of this or that language group, or people born in this or that region, or persons who went to this or that type of school. The objective must always be to ensure basic fairness. Affirmative action is about removing injustices and not about revenge or extortion. This means that its goals and methods must be equitable.

Furthermore, the prosecution of proven instances of discrimination will not by itself close the opportunity gap. The main reason for this is that biases and prejudices have proven to be too varied and subtle for that. Therefore, to genuinely extend opportunity to all, affirmative steps must be taken to bring under-represented persons, minorities and women into the economic mainstream. The consequences of years of officially sanctioned exclusion are clearly evident in the social and economic problems that are observed today. In some circumstances, therefore, race-and gender-conscious measures can also be justified by the compelling importance of inclusion.

The affirmative action processes should be as inclusive as possible. Those most directly affected, whether positively or negatively, must have a say in how affirmative action should proceed. SA should not turn into a government which steam rolls decisions from the outside, but there should be guarantees of meaningful internal transformation. Trade unions and staff associations should play a particularly important role in ensuring that the most efficacious and least onerous solutions are found.

Affirmative action is sometimes used simply to open institutions and opportunities because doing so will move minorities and women into the economic mainstream, with benefits to them, to those institutions, and to the society as a whole. The principles and processes of affirmative action must be securely located in the Constitution and legislation, and not be dependent on the subjective whims of particular officials. The law should give every encouragement to voluntary forms of affirmative action. The government itself must set an example, and require appropriate affirmative action in para-statals as well as enterprises to which it awards contracts. The processes must be transparent, non-corrupt and accountable to public opinion, Parliament and the courts.

Only by applying these principles properly, affirmative action measures will become effective in ending discrimination and ensure essential fairness to all. The ultimate test of whether an affirmative action programme works is whether it accelerates the eradication of discrimination, and promotes inclusion of everyone in the opportunities that are promised to all citizens in a country in a fair manner.[166]

For an affirmative action programme to be fair, quotas must never be used. Looking at the experiences in India, quotas are intrinsically rigid, and relegate qualifications and other factors to secondary status. In India, affirmative action simply means numerical quotas. Affirmative action does not mean this in the USA and SA. It should never mean numerical quotas in SA. Affirmative action programmes must effectively avoid quotas for inclusion of racial or other minorities. The affirmative action measure must also be limited in duration, and it will be fair if the administering agency periodically reviews the continuing need for the measure. Affirmative action measures and employment equity opportunities demonstrates that affirmative action, when used properly, is consistent with the merit principle.

Further, the means used and the time frame must be proportionate to the ends to be achieved. Affirmative action works best if it is neatly tailored to the particular situation it is intended to deal with and takes appropriate account of the in-house culture of the enterprise being transformed.

It should be noted here that affirmative action is not meant to help blacks because of the colour of their skin, but because they deserve compensation for past and continuing injustices. So to give someone a preference or preferential treatment merely because of the colour of their skin would be an unfair discriminatory practice.

The purpose of affirmative action is to give a country a way to finally address the systemic exclusion of talented individuals on the basis of their gender or race from opportunities to develop, perform, achieve and contribute. Affirmative action is an effort to develop a systematic approach to open the doors of education, employment and business development opportunities to qualified individuals who happen to be members of groups that have experienced longstanding and persistent discrimination.

[166] As a general matter, increases in the numbers of employees, or students or entrepreneurs from historically underrepresented groups are a measure of increased opportunity.

Affirmative action cannot be achieved overnight. It must be done in a systematic manner without unduly trampling upon the rights of individuals.

Bearing in mind the earlier discussion surrounding the suitably qualified candidate, it would be wrong if an unqualified person receives a preference and is thereby, chosen for a job, a scholarship, or a federal contract over a qualified person in the name of affirmative action. For affirmative action to be fair and not become unfair discrimination the term "suitably qualified" or "merit" must be properly defined in terms of the needs of each organisation, and not be used in arbitrary ways that are, in their effect, exclusionary in nature.[167]

Looking at the experiences of India and the USA, an affirmative action programme will not be fair if creates a quota; creates preferences for unqualified individuals; rejects or selects any employee or student solely on the basis of race or gender without regard to merit; if it creates circumstances of unfair discrimination; or continues even after its purposes have been achieved. Affirmative action will work if it is flexible, it is fair and more importantly, it will remain a useful tool for widening economic and educational opportunity.

12.12 Conclusion

The chapters have shown that affirmative action is a complicated issue and provides no easy answers. The issue has historically been and continues to be plagued by ambiguity surrounding the concept and by ways in which the various policies have been implemented.[168] The foregoing chapters that examine the scope of affirmative action measures and the treatment of such measures by the CC however, reveals that affirmative action is a significant part of South Africa's anti-discrimination laws. It seems as though affirmative action will continue to be recognised as a lawful means to remedy past discriminatory practices.

Looking at the overall results of affirmative action in both the USA and India, the results are varied. In the US affirmative action has consistently been hailed as reverse

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[167] An established or envisaged ability to get the job done may be a merit test. However, "old-school" connections and "glass-ceiling" requirements are not.

[168] Swain *op cit* 154 at 344.

discrimination and is no longer required in present day America. Affirmative action is no longer considered to be necessary as it is now believed that Americans across the board are all equal and can compete on an equal footing.

In India, whilst affirmative action has had positive effects, it has not helped the intended beneficiaries of these programmes for many reasons.[169] Affirmative action has however enabled a small section of the Indian society to move towards a semblance of economic and social equality. What this has highlighted is that affirmative action alone can never be the only remedy to resolving issues of inequality. Other measures must be taken to better the lives of those disadvantaged by past discriminatory practices. Such measures should include equality and soci-economic advancements, which further includes the advancement of human rights and freedoms, the advancement of dignity and this must all be achieved in a constitutional manner.[170]

In SA for example, such measures include land reform programmes, legal aid assistance to the indigent of SA, housing schemes etc. However, the achievement of equality in the workplace would depend to a large extent on how effective affirmative action measures can be if properly implemented. In the broader sense, affirmative action means to take appropriate steps to normalise the South African society. It amounts to applying the ordinary principles of good government that should have been in operation all the time but which have been suppressed because of racism and apartheid. It signifies the removal of all barriers which have been placed in the way of the majority coming into its own and enjoying full citizenship and economic rights.

Finally Plous, in defence of affirmative action says it best in the following excerpt from his book —

> "Some writers have criticized affirmative action as a superficial solution that does not address deeper societal problems by redistributing wealth and developing true educational equality. Yet affirmative action was never proposed as a cure-all solution

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169 One main reason is that a small number of people in India are the ones to constantly benefit from these programmes are called the "creamy layer" of society.

170 As discussed above.

> to inequality. Rather, it was intended only to redress discrimination in hiring and academic admissions. In assessing the value of affirmative action, the central question is merely this: In the absence of sweeping societal reforms — unlikely to take place any time soon — does affirmative action help counteract the continuing injustice caused by discrimination? The research record suggests, unequivocally, that it does."[171]

Affirmative action does not exist in a vacuum. Rather, the history, legal precedents and statutes form the backdrop against which any affirmative action programme must be viewed.[172] In the long run it would seem as though affirmative action would be more beneficial than detrimental to a country like SA. Moreover, the distribution of jobs and wealth in SA shows that employment and economic inequality still exists between genders and races, which demonstrates a need for affirmative action to reduce the employment and economic divisions over time. Affirmative action is necessary to make amends for discrimination in the past and it promotes equal opportunity and therefore, it is submitted, that affirmative action policies are currently the most effective way of addressing these disparities. Even though inequalities have been a constant part of the histories of the three countries, all countries should strive to create a future where everyone is equal and every person has the same opportunities.

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171 Plous *op cit* 14 at 211-212.

172 Turner *op cit* 45 at 16.