

---

## TABLE OF CONTENTS

---

<b>Page</b>	<b>Content</b>
iii	<b>SUMMARY</b>
v	<b>ACKNOWLEDGEMENTS</b>
	<b>CHAPTER 1: INTRODUCTION</b>
1	1 POINT OF DEPARTURE AND FOCUS OF STUDY
2	2 BENEFICIARIES OF AFFIRMATIVE ACTION
2	2.1 Introduction
3	2.2 Categorisation to determine beneficiaries
3	2.2.1 Introduction
5	2.2.2 Advantages of categorisation
6	2.2.3 Deficiencies of categorisation
10	2.3 Further criteria in respect of beneficiaries
10	2.4 Identifying beneficiaries
11	<b>3 RESEARCH ARGUMENT</b>
12	<b>4 METHODOLOGY</b>
21	<b>5 REFERENCE TECHNIQUES</b>
	<b>CHAPTER 2: INTERNATIONAL LAW, EQUALITY AND AFFIRMATIVE ACTION</b>
24	<b>1 INTRODUCTION</b>
25	<b>2 THE BROADER CONTEXT</b>
25	2.1 International law
25	2.1.1 Introduction
25	2.1.2 United Nations
25	2.1.2.1 Introduction
26	2.1.2.2 United Nations Charter
28	2.1.2.3 Universal Declaration of Human Rights
29	2.1.2.4 International covenants
29	(a) Introduction
30	(b) Non-discrimination
31	(c) Affirmative action

<b>Page</b>	
33	(i) <u>Affirmative action and non-discrimination</u>
35	A Non-exhaustive list of grounds of non-discrimination
36	B Relevance of ground to right
37	<b>2.1.3 International Labour Organization</b>
37	<i>2.1.3.1 Introduction</i>
39	<i>2.1.3.2 Declaration of Philadelphia</i>
40	<i>2.1.3.3 Declaration on Fundamental Principles and Rights at Work</i>
41	<i>2.1.3.4 Discrimination (Employment and Occupation) Convention No 111, 1958</i>
41	(a) Introduction
42	(b) Non-discrimination
43	(c) Affirmative action
44	(d) Nationality and citizenship
45	<b>3 EQUALITY</b>
45	<b>3.1 Different notions of equality</b>
45	<i>3.1.1 Introduction</i>
46	<i>3.1.2 Formal equality</i>
48	<i>3.1.3 Substantive equality</i>
51	<i>3.1.4 Equality of opportunity</i>
53	<b>3.2 Affirmative action</b>
54	<b>3.3 Different values underlying equality</b>
54	<i>3.3.1 Introduction</i>
54	<i>3.3.2 Dignity</i>
56	<i>3.3.3 Remedial or restitutionary</i>
56	<i>3.3.4 Redistribution</i>
57	<i>3.3.5 Democracy</i>
57	<b>4 CONCLUSIONS</b>

<b>Page</b>		
		<b>CHAPTER 3: HISTORICAL AND THEORETICAL FOUNDATION: SOUTH AFRICA</b>
65	<b>1</b>	<b>INTRODUCTION</b>
65	<b>2</b>	<b>HISTORICAL OVERVIEW</b>
65	<b>2.1</b>	<b>Introduction</b>
65	<b>2.2</b>	<b>Colonialism and slavery</b>
67	<b>2.3</b>	<b>Independence from the British</b>
67	<b>3</b>	<b>LEGISLATIVE FRAMEWORK</b>
67	<b>3.1</b>	<b>Constitution</b>
68		<b>3.1.1 Early case law</b>
68		<i>3.1.1.1 Moller case</i>
69		<i>3.1.1.2 Separate but equal: Rasool case</i>
70		<i>Evaluation of early case law</i>
70	<b>3.2</b>	<b>Apartheid</b>
72	<b>3.3</b>	<b>A first step towards equality: amendments to the Industrial Conciliation Act 28 of 1956</b>
72		<b>3.3.1 Wiehahn Commission</b>
77	<b>3.4</b>	<b>The bridging period</b>
77		<b>3.4.1 South African Law Commission</b>
81		<b>3.4.2 Constitution of the Republic of South Africa Act 200 of 1993 (interim Constitution)</b>
84		<b>3.4.3 Labour Relations Act 66 of 1995 (1995 LRA)</b>
85		<b>3.4.4 Labour Market Commission</b>
88	<b>3.5</b>	<b>The current position: equality as a goal</b>
88		<b>3.5.1 Constitution of the Republic of South Africa Act 108 of 1996 (final Constitution)</b>
88		<i>3.5.1.1 Introduction</i>
89		<i>3.5.1.2 Equality as a value</i>
89		(a) Equality used repetitively
91		(b) Equality and dignity

91	(i)	<u>Dignity</u>
<b>Page</b>		
92	A	Equality flows from dignity
93	(ii)	<u>Dignity as 'cornerstone' and one of the most important rights</u>
94	(iii)	<u>Dignity in the South African apartheid context</u>
94	(iv)	<u>Dignity as motif which links equality</u>
96	(v)	<u>Dignity used to interpret equality</u>
99		<i>Evaluation of equality as a right</i>
100		<i>3.5.1.3 Equality as a right</i>
100	(a)	Non-discrimination
102	(i)	<u>Listed and unlisted/analogous grounds of non-discrimination</u>
104	A	Citizenship as an unlisted/analogous ground of discrimination: <i>Larbi-Odam</i> case
107	B	Political sensitivity
107	(b)	Establishing unfairness of discrimination
108	(c)	Justifying discrimination
109		<i>Evaluation of equality as a value</i>
109		<i>3.5.1.4 Affirmative action</i>
111	(a)	Disadvantage
114		<b>3.5.2 Employment Equity Act 55 of 1998</b>
114		<i>3.5.2.1 Green Paper on Employment and Occupational Equity</i>
117		<i>3.5.2.2 Employment Equity Bill</i>
118		<i>3.5.2.3 Employment Equity Act 55 of 1998</i>
118	(a)	Introduction
119	(b)	Non-discrimination
119	(c)	Affirmative action
119	(i)	<u>Nature</u>
121	(ii)	<u>Content and process</u>

<b>Page</b>	
123	(iii) <u>Beneficiaries</u>
124	A Identifying beneficiaries
125	(d) Interpretation of EEA
125	<b>4 CONCLUSIONS</b>
	<b>CHAPTER 4: THE APPLICATION OF AFFIRMATIVE ACTION IN SOUTH AFRICA</b>
132	<b>1 INTRODUCTION</b>
132	<b>2 BENEFICIARIES OF AFFIRMATIVE ACTION</b>
132	<b>2.1 Disadvantage</b>
132	<b>2.1.1 Introduction</b>
133	<b>2.1.2 Academic opinion</b>
135	<b>2.1.3 Case law</b>
135	<i>2.1.3.1 Actual past disadvantage</i>
135	(a) <i>George case</i>
137	<i>2.1.3.2 Group membership</i>
137	(a) <i>Auf der Heyde case</i>
138	(b) <i>Stoman case</i>
141	<i>Evaluation of disadvantage</i>
141	<i>2.1.3.3 Degrees of disadvantage</i>
141	(a) Introduction
142	(b) Case law
142	(i) <u>Motala case</u>
143	(ii) <u>Stoman case</u>
143	(iii) <u>Fourie case</u>
144	<i>Evaluation of degrees of disadvantage</i>
145	<b>2.1.4 Deficiencies of categorisation</b>
150	<b>2.2 The concepts ‘suitably qualified’ and ‘merit’</b>
150	<b>2.2.1 Introduction</b>
151	<b>2.2.2 Legislation</b>

155	<b>2.2.3 Regulations and codes</b>
<b>Page</b>	
156	<b>2.2.4 Case law</b>
156	2.2.4.1 Introduction
156	2.2.4.2 The best qualified in the designated group should get the job
156	(a) IMAWU case
158	(b) Samuels case
158	(c) Thomas case
159	Evaluation of best qualified in designated group
159	2.2.4.3 Other related issues
159	(a) Management prerogative
161	Evaluation of management prerogative
161	(b) Difference in test scores must be relied on consistently
162	(c) Employer has to provide an opportunity to gain experience
162	(d) Insistence on qualification considered to be unfair where ability has already been established
163	Evaluation of the concepts 'suitably qualified' and 'merit'
165	<b>2.3 Citizenship</b>
165	<b>2.3.1 Introduction</b>
165	<b>2.3.2 Auf der Heyde case</b>
167	<b>2.3.3 A matter of interpretation</b>
167	2.3.3.1 Introduction
169	2.3.3.2 Contextualism and purposivism
169	(a) Introduction
169	(b) Contextualism
171	(c) Purposivism
171	(i) <u>Liberal interpretation</u>
172	(ii) <u>Manifestations of purposivism</u>

<b>Page</b>	
172	A Mischief rule
173	B Provisions are to be construed in the light of the objects they seek to achieve
174	C Teleological approach
175	2.3.3.3 <i>Constitution</i>
179	2.3.3.4 <i>1995 Labour Relations Act and Employment Equity Act</i>
181	<i>Evaluation of interpretation of Constitution, EEA and Auf der Heyde case</i>
185	2.3.3.5 <i>Department of Labour</i>
186	<i>Evaluation of Department of Labour</i>
187	<b>2.3.4 Citizenship as a criterion to benefit from affirmative action: can it be unfairly discriminatory against non-citizens?</b>
187	2.3.4.1 <i>Introduction</i>
187	2.3.4.2 <i>Citizenship as an unlisted ground of discrimination: Larbi-Odam case</i>
188	2.3.4.3 <i>Establishing unfairness of discrimination</i>
191	<i>Evaluation of citizenship as unfairly discriminatory against non-citizens</i>
193	<b>2.3.5 Citizenship as a criterion to benefit from affirmative action: can a distinction be made on the basis of the various ways in which citizenship may be acquired?</b>
193	2.3.5.1 <i>Introduction</i>
193	2.3.5.2 <i>Constitution</i>
193	2.3.5.3 <i>Citizenship Act</i>
195	2.3.5.4 <i>Immigration Act</i>
195	<i>Evaluation of the Citizenship and Immigration Acts</i>
196	2.3.5.5 <i>Notion of 'common citizenship'</i>
198	<i>Evaluation of the notion 'common citizenship'</i>
199	<b>3 CONCLUSIONS</b>
199	<b>3.1 Introduction</b>
<b>Page</b>	

200	<b>3.2</b>	<b>Disadvantage</b>
200		<b>3.2.1 Past personal disadvantage or group membership</b>
201		<b>3.2.2 Degrees of disadvantage</b>
201		<b>3.2.3 Deficiencies of categorisation</b>
202	<b>3.3</b>	<b>The concepts 'suitably qualified' and 'merit'</b>
202	<b>3.4</b>	<b>Citizenship</b>

**CHAPTER 5: THE APPLICATION OF AFFIRMATIVE ACTION IN THE UNITED STATES OF AMERICA**

210	<b>1</b>	<b>INTRODUCTION</b>
211	<b>2</b>	<b>HISTORICAL OVERVIEW</b>
211	<b>2.1</b>	<b>Introduction</b>
212	<b>2.2</b>	<b>Colonialism and slavery</b>
212	<b>2.3</b>	<b>Independence from the British</b>
213	<b>3</b>	<b>LEGISLATIVE FRAMEWORK</b>
213	<b>3.1</b>	<b>Introduction</b>
213	<b>3.2</b>	<b>Constitution</b>
214		<b>3.2.1 Early case law</b>
214		<i>3.2.1.1 Dred Scott case</i>
215		<b>3.2.2 Amendments to the Constitution</b>
215		<i>3.2.2.1 Thirteenth Amendment to the Constitution</i>
215		<i>3.2.2.2 Fourteenth Amendment to the Constitution</i>
217		<b>3.2.3 Separate but equal</b>
217		<i>3.2.3.1 Plessey case</i>
218		<i>Evaluation of early case law</i>
219	<b>3.3</b>	<b>Equality gains support</b>
219		<b>3.3.1 World War II</b>
219		<b>3.3.2 Brown case</b>
220	<b>3.4</b>	<b>Affirmative action needed</b>

220	<b>3.5</b>	<b>Civil Rights Act of 1964</b>
220		<b>3.5.1 Introduction</b>
221		<b>3.5.2 Non-discrimination</b>
222		<b>3.5.3 Affirmative action as a remedy</b>
224		<i>Evaluation of Title VII</i>
224	<b>3.6</b>	<b>Affirmative action for the aged, disabled, war veterans and disabled veterans</b>
226	<b>3.7</b>	<b>Executive Orders</b>
227		<b>3.7.1 Office of Contract Compliance Programs</b>
229	<b>3.8</b>	<b>Definitions for minority groups</b>
232	<b>3.9</b>	<b>Public Works Employment Act of 1977</b>
236		<i>Evaluation of legislative framework</i>
237	<b>4</b>	<b>BENEFICIARIES OF AFFIRMATIVE ACTION</b>
237	<b>4.1</b>	<b>Disadvantage</b>
237		<b>4.1.1 Introduction</b>
238		<b>4.1.2 Identifying beneficiaries</b>
239		<b>4.1.3 Case law</b>
239		<i>4.1.3.1 Introduction</i>
241		<i>4.1.3.2 Past personal disadvantage</i>
242		(a) <i>Bakke case</i>
248		(b) <i>Weber case</i>
249		(c) <i>Stotts case</i>
250		<i>4.1.3.3 Group membership</i>
250		(a) <i>City of Cleveland case</i>
251		(b) <i>Local 28 case</i>
254		(c) <i>Johnson case</i>
255		<i>4.1.3.4 Strong evidence of past discrimination</i>
255		(a) <i>Wygant case</i>
256		(b) <i>Fullilove case</i>

258		<i>Evaluation of Fullilove case</i>
259		(c) <i>Croson case</i>
263		<i>Evaluation of Croson case</i>
264		4.1.3.5 <i>Post-Croson</i>
264		(a) <i>Adarand case</i>
264		<i>Evaluation of Adarand case</i>
265		(b) <i>Grutz and Grutter cases</i>
267		<i>Evaluation of disadvantage</i>
270		<b>4.1.4 Deficiencies of categorisation</b>
276	<b>4.2</b>	<b>The concepts ‘qualified’, ‘unqualified’ and ‘merit’</b>
276		<b>4.2.1 Introduction</b>
277		<b>4.2.2 Legislation</b>
280		<b>4.2.3 Regulations</b>
281		<b>4.2.4 Academic opinion</b>
281		4.2.4.1 <i>Introduction</i>
281		4.2.4.2 <i>Different approaches to merit</i>
284		4.2.4.3 <i>A broader meaning for merit</i>
287		<i>Evaluation of the concepts ‘qualified’, ‘unqualified’ and ‘merit’</i>
288	<b>4.3</b>	<b>Citizenship</b>
288		<b>4.3.1 Introduction</b>
288		<b>4.3.2 Large-scale immigration</b>
295		<i>Evaluation of large-scale immigration</i>
296		<b>4.3.3 US citizenship</b>
297		<i>Evaluation of US citizenship</i>
298		<b>4.3.4 A matter of interpretation</b>
298		4.3.4.1 <i>Introduction</i>
299		4.3.4.2 <i>State classifications</i>
299		(a) <i>Early case law: alienage not justifiable</i>

299	(i)	<u><i>Strauder case</i></u>
300	(ii)	<u><i>Yick Wo case</i></u>
301	(iii)	<u><i>Raich case</i></u>
302	(b)	World War II: alienage justifiable
302	(i)	<u><i>Hirabayashi and Korematsu cases</i></u>
303	(c)	Recent case law: alienage not justifiable
303	(i)	<u><i>Hernandez case</i></u>
304	(ii)	<u><i>Richardson case</i></u>
305	(iii)	<u><i>Bakke case</i></u>
307	(d)	Political function: alienage justifiable
308		<i>Evaluation of state classifications</i>
309		<i>4.3.4.3 Congress' classifications</i>
309	(a)	Early and recent case law: alienage not justifiable
309	(i)	<u><i>Chinese Exclusion case</i></u>
310	(ii)	<u><i>Matthews case</i></u>
310	(iii)	<u><i>Fullilove, Croson and Adarand cases</i></u>
311		<i>Evaluation of Congress' classifications</i>
312	<b>5</b>	<b>CONCLUSIONS</b>
312	<b>5.1</b>	<b>Introduction</b>
313	<b>5.2</b>	<b>Disadvantage</b>
313	<b>5.2.1</b>	<b><i>Past personal disadvantage or group membership</i></b>
314	<b>5.2.2</b>	<b><i>Deficiencies of categorisation</i></b>
315	<b>5.3</b>	<b>The concepts 'qualified', 'unqualified' and 'merit'</b>
315	<b>5.4</b>	<b>Citizenship</b>
		<b>CHAPTER 6: THE APPLICATION OF AFFIRMATIVE ACTION IN CANADA</b>
321	<b>1</b>	<b>INTRODUCTION</b>
323	<b>2</b>	<b>HISTORICAL OVERVIEW</b>
323	<b>2.1</b>	<b>Introduction</b>

323	<b>2.2</b>	<b>Colonialism and slavery</b>
325	<b>2.3</b>	<b>Independence from the British</b>
326	<b>3</b>	<b>LEGISLATIVE FRAMEWORK</b>
326	<b>3.1</b>	<b>Introduction</b>
326	<b>3.2</b>	<b>British North America Act of 1867</b>
327		<b>3.2.1 Early case law</b>
327		3.2.1.1 <i>Bryden case</i>
328		3.2.1.2 <i>Tomey Houma case</i>
328		3.2.1.3 <i>Quong-Wing case</i>
328		<i>Evaluation of early case law</i>
329	<b>3.3</b>	<b>Equality gains support</b>
329		<b>3.3.1 World War II</b>
330		<b>3.3.2 Canadian citizenship</b>
330		<b>3.3.3 Affirmative action</b>
331	<b>3.4</b>	<b>Canadian Bill of Rights of 1960</b>
332	<b>3.5</b>	<b>Canadian Human Rights Act of 1978</b>
332		<b>3.5.1 Introduction</b>
332		<b>3.5.2 Non-discrimination</b>
333		<b>3.5.3 Affirmative action</b>
334		<b>3.5.4 Canadian Human Rights Commission and Tribunal</b>
334		3.5.4.1 <i>Introduction</i>
336		3.5.4.2 <i>Case law under the Human Rights Act</i>
336		(a) <i>Introduction</i>
337		(b) <i>Affirmative action as a remedy</i>
337		(i) <u><i>Canadian National Railway case</i></u>
339		<i>Evaluation of Canadian National Railway case</i>
339		(ii) <u><i>National Capital Alliance, Hebert and Knuff cases</i></u>
340		(c) <i>Disadvantage</i>
<b>Page</b>		

340	(i)	<u>Athabasca case</u>
342		<i>Evaluation of Athabasca case</i>
342	<b>3.6</b>	<b>Canadian Charter of Rights and Freedoms of 1982</b>
342		<b>3.6.1 Introduction</b>
345		<b>3.6.2 Interpretation</b>
348		<b>3.6.3 Non-discrimination</b>
351		<i>3.6.3.1 Enumerated and analogous grounds of non-discrimination</i>
352	(a)	<i>Andrews case</i>
352	(b)	<i>Corbiere case</i>
353	(i)	<u>Citizenship as an analogous ground</u>
353	A	<i>Andrews case</i>
357	B	<i>Lawcase</i>
358		<i>Evaluation of Law case</i>
360	C	<i>Lavoie case</i>
362		<i>Evaluation of citizenship as an analogous ground</i>
362		<b>3.6.4 Justifying discrimination</b>
363		<b>3.6.5 Affirmative action</b>
363		<i>3.6.5.1 Introduction</i>
364		<i>3.6.5.2 Disadvantage</i>
364	(a)	Enumerated and analogous 'origins' of, or 'reasons' for, disadvantage
364	(b)	The test for disadvantage
367		<i>3.6.5.3 Case law under the Charter</i>
367	(a)	Introduction
367	(b)	<i>Apsit case</i>
369		<i>Evaluation of Apsit case</i>
370	(c)	<i>Lovelace case</i>
373		<i>Evaluation of Lovelace case</i>
<b>Page</b>		
373	<b>3.7</b>	<b>Employment Equity Act of 1985</b>

373	<b>3.7.1 Introduction</b>
374	<b>3.7.2 Abella Report</b>
375	<b>3.7.3 Employment Equity Act</b>
375	3.7.3.1 Introduction
377	3.7.3.2 Non-discrimination
377	3.7.3.3 Affirmative action
377	(a) Nature
378	(b) Content and process
380	(c) Beneficiaries of affirmative action
381	(i) <u>Identifying beneficiaries</u>
383	<b>3.8 Federal Contractors Program</b>
384	<i>Evaluation of legislative framework</i>
386	<b>4 BENEFICIARIES OF AFFIRMATIVE ACTION</b>
386	<b>4.1 Past personal disadvantage or group membership</b>
386	<b>4.1.1 Introduction</b>
386	<b>4.1.2 Abella Report</b>
386	4.1.2.1 Introduction
387	4.1.2.2 Affirmative action as a response to systemic discrimination
388	(a) Group membership
393	(i) <u>Women</u>
394	(ii) <u>Native people</u>
394	(iii) <u>Visible minorities</u>
395	A Definition of visible minorities
396	(iv) Disabled people
396	<i>Evaluation of Abella Report on disadvantage</i>
397	<b>4.1.3 Employment Equity Act</b>
397	<b>4.1.4 Deficiencies of categorisation</b>
<b>Page</b>	
408	<b>4.2 The concepts ‘unqualified’ and ‘merit’</b>
408	<b>4.2.1 Introduction</b>

409		<b>4.2.2 Legislation</b>
409		<b>4.2.3 Guidelines</b>
410		<b>4.2.4 Academic opinion</b>
416		<i>Evaluation of the concepts 'unqualified' and 'merit'</i>
416	<b>4.3</b>	<b>Citizenship</b>
416		<b>4.3.1 Introduction</b>
417		<b>4.3.2 Large-scale immigration</b>
419		<i>Evaluation of large-scale immigration</i>
419		<b>4.3.3 Canadian citizenship</b>
423		<i>Evaluation of Canadian citizenship</i>
424		<b>4.3.4 A matter of interpretation</b>
424		<i>4.3.4.1 Introduction</i>
424		<i>4.1.3.2 Citizenship as an analogous ground: Andrews and Lavoie cases</i>
424		<i>Evaluation of interpretation</i>
426		<i>Evaluation of citizenship</i>
426	<b>5</b>	<b>CONCLUSIONS</b>
426	<b>5.1</b>	<b>Introduction</b>
428	<b>5.2</b>	<b>Disadvantage</b>
428		<b>5.2.1 Past personal disadvantage or group membership</b>
429		<b>5.2.2 Deficiencies of categorisation</b>
430	<b>5.3</b>	<b>Merit</b>
431	<b>5.4</b>	<b>Citizenship</b>
		<b>CHAPTER 7: SUMMARY, CONCLUSIONS, RECOMMENDATIONS AND PROJECTIONS</b>
434	<b>1</b>	<b>INTRODUCTION</b>
435	<b>2</b>	<b>DISADVANTAGE</b>
<b>Page</b>		
435	<b>2.1</b>	<b>Actual past disadvantage or group membership</b>
435		<b>2.1.1 Current position in South Africa</b>

---

437		<b>2.1.2 Comparative material</b>
437		2.1.2.1 US
439		2.1.2.2 Canada
441		<b>2.1.3 Recommendations and projections</b>
443	<b>2.2</b>	<b>Degrees of disadvantage</b>
443		<b>2.2.1 Current position in South Africa</b>
444		<b>2.2.2 Comparative material</b>
444		2.2.2.1 US
445		2.2.2.2 Canada
445		<b>2.2.3 Recommendations</b>
446	<b>2.3</b>	<b>Deficiencies of categorisation</b>
446		<b>2.3.1 Current position in South Africa</b>
447		<b>2.3.2 Comparative material</b>
447		2.3.2.1 US
449		2.3.2.2 Canada
449		<b>2.3.3 Recommendations</b>
451	<b>3</b>	<b>THE CONCEPTS ‘SUITABLY QUALIFIED’ AND ‘MERIT’</b>
451		<b>3.1 Current position in South Africa</b>
453		<b>3.2 Comparative material</b>
453		<b>3.2.1 US</b>
454		<b>3.2.2 Canada</b>
455		<b>3.3 Recommendations and projections</b>
457	<b>4</b>	<b>CITIZENSHIP</b>
457		<b>4.1 Current position in South Africa</b>
461		<b>4.2 Comparative material</b>
461		<b>4.2.1 US</b>
465		<b>4.2.2 Canada</b>
	<b>Page</b>	
467		<b>4.3 Recommendations</b>
471	<b>5</b>	<b>POSTSCRIPT</b>

xxiii The application of affirmative action in employment law with specific reference to the beneficiaries:  
A comparative study

---

475 **BIBLIOGRAPHY**