

- 1 POINT OF DEPARTURE AND FOCUS OF STUDY**
- 2 BENEFICIARIES OF AFFIRMATIVE ACTION**
 - 2.1 Introduction**
 - 2.2 Categorisation to determine beneficiaries**
 - 2.2.1 Introduction*
 - 2.2.2 Advantages of categorisation*
 - 2.2.3 Deficiencies of categorisation*
 - 2.3 Further criteria in respect of beneficiaries**
 - 2.4 Identifying beneficiaries**
- 3 RESEARCH ARGUMENT**
- 4 METHODOLOGY**
- 5 REFERENCE TECHNIQUES**

1 POINT OF DEPARTURE AND FOCUS OF STUDY

The point of departure and broad theme of this study is the principle of equality. The study accepts affirmative action as a temporary (and thus limited), but important, means to achieve equality.¹ The focus of the study falls on a profile of the beneficiaries of affirmative action in South African employment law, as regulated by the Employment Equity Act (EEA).² The study starts out with a description of the use of categorisation³ to establish the beneficiaries of (or target groups or protected classes under) affirmative action. Core

1 See chapter 2 pars 2.1.2.4; 2.1.3.4; chapter 3 par 3.5.2.3(c)(i); chapter 7 par 5 below.

2 55 of 1998. The Broad-Based Black Economic Empowerment Act 53 of 2003 and the empowerment charters which have resulted under it, are beyond the ambit of the study.

3 See par 2.2 below. Although the focus of the study is not on categorisation as such, some of the advantages and deficiencies of the mechanism are pointed out to refine the mechanism, if found necessary.

concepts in this regard – ‘disadvantage’⁴ and ‘designated groups’⁵ – are discussed. Other concepts – ‘suitably qualified’⁶ and ‘citizenship’⁷ – as further criteria for beneficiaries of affirmative action are also investigated. Essentially, an attempt will be made to establish whether the benefits of affirmative action measures actually reach the intended beneficiaries in South African workplaces.

2 BENEFICIARIES OF AFFIRMATIVE ACTION

2.1 Introduction

Affirmative action measures are meant to protect and advance only ‘disadvantaged’ people. The question, then, is: who are *sufficiently* disadvantaged so as to be beneficiaries? Although some international instruments, such as the Convention on the Elimination of All Forms of Racial Discrimination⁸ and the Convention on the Elimination of all Forms of Discrimination against Women,⁹ are particularly relevant in deciding on the categories of people who should benefit, different countries’ constitutions, and/or national legislation, often identify and define those who should benefit from affirmative action measures by creating special categories that fit the particular historical developments and circumstances of the country¹⁰ and its political goals and intentions.¹¹ The particular history

4 As found in the Constitution of the Republic of South Africa Act 108 of 1996 (hereafter the ‘final Constitution’ or the ‘Constitution’) and chapter III of the Employment Equity Act.

5 As found in the EEA (see chapter 3 par 3.5.2.3(c)(iii); chapter 4 par 2.1 below).

6 As found in the EEA (see chapter 3 par 3.5.2.3 (c)(iii); chapter 4 par 2.2 below).

7 As added by case law (see chapter 4 par 2.3 below).

8 Adopted by the UN in 1965 (see chapter 2 par 2.1.2.4 below).

9 Adopted by the UN in 1979 (see chapter 2 par 2.1.2.4 below).

10 McLachlin ‘Most Difficult Right’ 19; Bastarache ‘Affirmative Action’ 501. Although not discussed in this study, it should be noted that the identity of those doing the categorisation is important, particularly for identifying minority groups that are not part of the dominant societal group. Being the categoriser is to occupy a position of power and to create ‘one side of the comparison as a “difference”, while constituting a particular constellation of attributes as the invisible background norm’ (see Bacchi *Affirmative Action* 80ff). This implies that the dominant group need not notice its own ‘group being’ at all; it apparently occupies a neutral, universal position and is ‘outside’ the process of definition. Also, the categoriser has a particular social identity shared by members of the dominant group in the particular society. What is important is that categorisers are also in

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

of each country therefore determines the beneficiaries of affirmative action.

2.2 Categorisation to determine beneficiaries

2.2.1 Introduction

Generally, in law, special categories or groups are created to benefit from affirmative action. This has been explained as follows:¹²

'As a means of combatting discrimination, law works through the creation of protected classes; this may result in only *rough justice*, since *not all members of a class are equally placed*. ... The creation of privileged classes benefiting from quota hiring has been intended to secure equal treatment for individuals in the *long run*, but as it is never possible to define the classes so *exactly that only the most deserving benefit*, the *short-run results may be open to criticism*' (own emphasis).

Although the criteria for the selection of beneficiaries vary from country to country, such criteria are (almost) always related to the objective of achieving equality in one form or another.¹³ Affirmative action is directed at those people, or groups of people, who, in most cases, have suffered past social, economic, political or educational disadvantage.¹⁴ These people or groups consist of individuals who all have a characteristic in common on which their membership of a particular group is based and who find themselves in a disadvantaged position. Although this characteristic, such as gender, colour, nationality or

charge of offering 'solutions' or remedies to the problem, as well as of laying down the time frame for these. The decision makers are usually a majority and arguments set within existing theoretical and ideological terms of reference are used. The question as to who determines the categories of disadvantaged groups may thus prove to be problematic where minorities are affirmed, as in the United States (US) and Canada. In South Africa, this does not appear to be problematic, as a majority is affirmed by a majority government.

11 Bacchi *Politics of Affirmative Action* 15ff.

12 Banton *Discrimination* 73-4.

13 Faundez *Affirmative Action* 34.

14 *Ibid.*

membership of an ethnic minority, is often innate and inalienable, this is not necessarily always the case.¹⁵ Sometimes, broader developmental and political objectives – unrelated to discrimination and equality – are taken into account.¹⁶ This is the case in, for example, Malaysia, where affirmative action is aimed at the preservation of political power by the indigenous majority, the Bumiputra, with the Indian and Chinese peoples having the economic power.¹⁷ The societal goal of diversity is yet another objective often found nowadays in relation to affirmative action.¹⁸

Past – and present – affirmative action programmes have commonly involved women, blacks, other racial groups, immigrants, poor people, disabled people, war veterans, indigenous peoples, and specific minorities.¹⁹ While minorities are most often the beneficiaries of affirmative action, such as in the United States (US) and Canada, some countries, such as South Africa and Malaysia, have implemented affirmative action for majorities. In South Africa, affirmative action policies primarily protect and advance the black majority population, as well as women who were discriminated against) groups that were disadvantaged as a result of apartheid policies and patriarchy. In Malaysia, affirmative action relates to the preservation of political power for the indigenous majority, as was seen above. Moreover, in practice, it is found that national legislation usually starts with an affirmative action policy that is aimed at a particular disadvantaged group.²⁰ Yet,

15 *Ibid.*

16 For example, groups that have not been victims of past discrimination may be selected as beneficiaries to accelerate their integration into society – present and future discrimination are thus avoided. Protecting the separate identity of a group may also be a criterion, as in the case of programmes benefiting language minorities and aboriginal peoples in Canada (Faundez *Affirmative Action* 34).

17 This is the main reason why Malaysia has not been chosen as a comparator for this study.

18 Particularly in the US (see Hartman *Business Ethics* 477; McCrudden 2 372; Farley 'Multicultural America' 38-9; Gutman *EEO Law* 232; Bennet-Alexander & Pincus *Employment Law* 136-7; Gotanda 'Color-blind Constitutionalism' 60-2; chapter 5 pars 3.8; 4.1.3.5(b); Valuing diversity means: (a) being sensitive to and appreciative of differences among groups that are different from the 'mainstream'; and (b) using those differences as a positive force to enhance efficiency and productivity (Hartman *Business Ethics* 477).

19 United Nations Economic and Social Council (UNESCO) Final Report Prevention of Discrimination par 8.

20 *Op cit* par 10 (see chapter 2 par 3 below).

the policy often expands to include other groups.²¹

2.2.2 Advantages of categorisation

The use of categories or a group notion has certain advantages. First, such an approach is relatively simple. Most people are easily identified as either male or female, or as black or white.²² This ties in with the origin of affirmative action when society first became aware of discrimination and its injustice in the context of white-black relations.²³ Affirmative action was a response to this realisation. Thus it made sense originally to base affirmative action on this socially clear-cut, black-white dichotomy. The addition of women as a targeted or protected group did not significantly complicate matters.²⁴ Secondly, categorisation is an easily monitored system in that all the employer and enforcement agencies have to do is to do a headcount and compare this with the statistics available.²⁵ Thirdly, it presumes that a group-based remedy fits a group-based wrong.²⁶

Over time, however, more and more groups demanded protection, which meant that it was no longer possible simply to do a headcount on the basis of easily identified external characteristics such as race and gender.²⁷ Another complicating factor was the realisation that, apart from simple, 'main-effects' discrimination, a person might also suffer compounded or multiple discrimination.²⁸ The situation of black women in South Africa

21 This is particularly true of the US which started off with affirmative action for black Americans, but eventually extended it to immigrants. The question arose whether these immigrants, who came voluntarily to the US, deserved the same protection as black Americans who were subjected to slavery (see chapter 5 pars 3.8; 4.3 below).

22 Van Wyk Thesis 41.

23 *Ibid.*

24 *Ibid.*

25 *Ibid.*

26 *Op cit* 47.

27 *Op cit* 41; Glazer 'Affirmative Action' 22.

28 Van Wyk Thesis 41. For example, one person may be a female, and old and disabled (ILO Report Time for Equality at Work 36). The intensity or severity of the disadvantage such a person may experience depends on the number and interplay of the personal characteristics that generate discrimination against a person. Furthermore, discrimination has clear life-cycle dimensions (*ibid.*). If no remedial action is taken, disadvantage tends to accumulate and intensify over time, with

illustrates this well. In this regard, it has been argued that: (a) there is a need to understand that complex forms of disadvantage based on race, gender and geographic location form 'distinct categories' of disadvantage which cannot be reduced to the sum of their parts; and (b) the intersectional nature of disadvantage therefore creates different and multiple forms of inequality which cannot be explained or understood simply by reference to one of the grounds, such as gender.²⁹

Compounded discrimination is, however, seldom recognised in legislation. In South Africa, for example, multiple disadvantage is not recognised in the EEA. And, no links are made between the various targeted groups, or subgroups within a targeted group. African women may fall under both the designated group 'women', as well as 'black people'. Thus, groups within groups are found.³⁰ The EEA does not indicate whether an employer has to take this into account, and, if so, how this will be put into practice. In recognising multiple disadvantage, on the one hand, the number of protected groups may, of course, exceed manageable numbers³¹ and lead to an increase in administrative costs.³² Recognising multiple discrimination, on the other hand, may lead to more effective policies for combating this particular phenomenon.³³

2.2.3 Deficiencies of categorisation

Notwithstanding the fact of categorisation as a useful and advantageous

negative repercussions for life after work and for society in general. Gender inequalities in social security, for example, reveal the serious consequences of discrimination against women throughout their working life. Examples of these are: (a) women's interrupted careers, lower pay, shorter periods of contribution to funds, and earlier retirement, with the result that social protection benefits are, on average, lower for women than for men; (b) women are often excluded from company pension and health plans as a result of their lower status or insufficient years of service; (c) in the case of mandatory retirement schemes, women receive lower pensions than men, with the pension being calculated on the basis of the longer life expectancy of women (*op cit* 36-7).

29 Albertyn & Goldblatt 'Jurisprudence of Equality' 253.

30 It can thus be said that little attention is given to the fact that lives are not 'neatly packaged' as 'women', 'blacks' and so on (Bacchi *Politics of Affirmative Action* 24).

31 Van Wyk Thesis 41.

32 Faundez *Affirmative Action* 35. In addition, some countries do not have the technical know-how and ability to administer a programme for multiple disadvantage.

33 ILO Report Time for Equality at Work 37.

mechanism, the main arguments against affirmative action are often directed at the very notion of categorisation. Categorisation's limits and accompanying definitions are not always clear. Moreover, its workings are not necessarily exact and all-encompassing.³⁴ At the one end of the continuum is the argument that affirmative action measures are under-inclusive in that they do not reach the members of the group most in need of them.³⁵ It is often found that the better-off, those least in need (the best organised, most visible or most popular groups) within the categories, or those who actually do not need the assistance provided by the programme, are benefited.³⁶ Generally, those who are better educated and who are well connected in the first place, and therefore need less assistance in securing a job or promotion, benefit.³⁷ This is a very practical problem. It may cause the deepening of divisions within the targeted groups³⁸ and may stigmatise its beneficiaries. It is thus not recognised that disadvantaged people display degrees of disadvantage *within* groups. For example, while all blacks were oppressed and disadvantaged by apartheid in South Africa, not all were equally affected. Differences within categories may therefore be 'masked'.³⁹

In contrast, it has been argued that the advancement of, for example, *any* black person benefits all black people, because the group as such is then better represented. This may be true, because such advancement provides role models for other blacks.⁴⁰

34 Related issues such as: (a) whether it is possible to refuse to consider individuals as members of groups; (b) whether membership of a group can be acquired or obtained by marriage, religious conversion or integration; (c) how to classify children from mixed relationships and marriages; (d) the fact that only some people qualify to be members of certain groups; and (e) the fact that members of groups who do not observe the rules of groups may ultimately be expelled; are not addressed in this study (see Faundez *Affirmative Action* 35; Banton *Discrimination* 78-9).

35 Van Wyk Thesis 43; Abram 'Affirmative Action' 1321; Banton *Discrimination* 73-4.

36 Van Wyk Thesis 43; Bacchi *Politics of Affirmative Action* 27; Hodges Aeberhard 'Affirmative Action' 442; Kennedy 1 62; UNESC Final Report Prevention of Discrimination par 11; Banton *Discrimination* 73-4. This is particularly notable in India where members of scheduled castes and tribes are eligible for a fixed quota of places in educational institutions and jobs, regardless of their economic circumstances (Faundez *Affirmative Action* 35).

37 Adam 'Affirmative Action' 240.

38 Faundez *Affirmative Action* 35.

39 La Noue & Sullivan 1 917.

40 Smith 1 246.

Also, it has been argued that the mostly younger women who are nowadays benefiting from affirmative action are doing so at the expense of the previous generation, who were discriminated against to a much larger degree.⁴¹ This is because young women today have reaped the benefits of feminism and live in an era in which women are encouraged to further their education and have professional careers. In this regard, it may be said that affirmative action then improves the position of women as a group, which will now have even more suitable role models (similar to the racial argument above).⁴²

In practice it has been found that affirmative action aimed at women will often benefit white, middle-class women more than lower-class women from other ethnic backgrounds.⁴³ This may be due to the fact that middle-class white women have generally attained fairly high educational qualifications, which is not the case for minority women in the US and Canada, and for black women in South Africa. And, when affirmative action benefits a broad category, such as Hispanics or Asian Americans (in the US), some ethnic groups within those categories will be advantaged more than others, because they already rank highly in terms of economic, educational and occupational status.⁴⁴ This may lead in turn to yet 'another' disadvantaged 'minority' within the minority.⁴⁵ In other words, affirmative action programmes may create new disadvantaged groups. Indeed, it has been found that members of majority groups who miss out on a desired social good as a consequence of affirmative action are likely to come from the bottom of the white or male distribution, whereas the minority members who benefit are likely to come from the top of the minority or female distribution.⁴⁶

Thus, affirmative action may well shift the social burden from one group to another, or from one subgroup to another.⁴⁷

41 *Ibid.*

42 *Ibid.*

43 UNESCO Final Report Prevention of Discrimination par 11. See also Banton *Discrimination* 73-4. No findings in this regard have been made in South Africa, but it seems likely that this phenomenon will be encountered here as well.

44 UNESCO Final Report Prevention of Discrimination par 11.

45 *Op cit* par 12.

46 *Ibid.*

47 *Ibid.*

At the other end of this continuum, it has been argued that the categories are over-inclusive in that all people in a category are deemed to be disadvantaged.⁴⁸ In other words, what is not recognised is that, *within* a protected group, some people may *in fact not* have been disadvantaged. This is generally not recognised by categorisation.

Disadvantaged people also display degrees of disadvantage *between* groups.⁴⁹ For example, it is argued that Indian and coloured people were less disadvantaged than blacks under apartheid in South Africa.⁵⁰ It has been mooted that African women have been, and are, the most disadvantaged members of South African society and that any affirmative action programme should address this fact systematically. It was in fact recommended that they be targeted as a special category under affirmative action programmes,⁵¹ but this has not materialised.

Another deficiency of categorisation is that it means emphasising commonalities and downplaying differences *between* the categories. A last deficiency relates to the fact that categories are often seen as 'interest' groups and are set in competition with one another.⁵² Criticism in this regard is that a 'zero-sum' mentality or 'hierarchies of oppression' are created, which suggests that there is a finite number of opportunities for 'others'.⁵³ If a member of one group obtains a position, this is seen as being at the expense of another group.⁵⁴

This creates particular problems for groups experiencing multiple disadvantage.⁵⁵

48 La Noue & Sullivan 1 913; 924; Kallen *Ethnicity* 237-8.

49 Bacchi *Politics of Affirmative Action* 28; Banton *Discrimination* 78.

50 Andrews 'Affirmative Action' 52.

51 *Op cit* 61 fn 17 (see also chapter 3 pars 3.4.1; 3.4.4; 3.5.2.1 below).

52 Bacchi *Politics of Affirmative Action* 24.

53 *Ibid*; Thomas 'Employment Equity' 250.

54 Bacchi *Politics of Affirmative Action* 24.

55 *Ibid*.

2.3 Further criteria in respect of beneficiaries

Over and above using categorisation to determine the broad groups of beneficiaries of affirmative action, it is often found that national laws set further specific requirements for the beneficiaries of affirmative action. This is so because the reasons for affirmative action are generally narrowly linked to the history of a particular country, and consequently cater for a very particular society.⁵⁶ These further criteria are not always clearly articulated/stated. Nor, if stated, are their meanings always clear. In South Africa, for example, only those members of designated groups who are 'suitably qualified' may be appointed under affirmative action.⁵⁷ The meaning of this concept is, however, not clear.

2.4 Identifying beneficiaries

Definitions of racial groups or disabled people who are to benefit from affirmative action are often based on definitions used for purposes of carrying out the census in respect of a particular population.⁵⁸ Over and above this, definitions for purposes of affirmative action programmes are often combined with the individual's willingness to self-identify as a member of a specific group. This approach – favoured in South Africa, Canada and the US – recognises and respects the individual's right to privacy.⁵⁹

Self-identification, however, presents certain problems. It may result in undercounting and thus affect the effective application of affirmative action.⁶⁰ Also, if some individuals are accounted for as white and others as black, some people must be

56 See par 2.1 above.

57 Sections 15; 20 of the EEA.

58 Faundez *Affirmative Action* 36.

59 *Ibid.* Banton *Discrimination* 78 (see chapters 3; 5; 6 below for the South African, American and Canadian positions).

60 Undercounting, though undesirable, is, however, not of great consequence if the affirmative action policy does not penalise for not complying with goals, as is the case in Canada. In contrast, the Office of Federal Contract Compliance Regulations (hereafter 'OFCCP regulations') in the US provides for severe penalties in this regard.

borderline.⁶¹ Globalisation, large-scale immigration and inter-marriage over centuries have blurred these once very exact and clear racial lines. Accordingly, modern scientific theory points out that it no longer categorises races in exact, distinct groups, as was done in earlier years.⁶² Similarly, there are people with disabilities who do not wish to draw attention to these and who choose not to identify themselves as such. It may therefore be complex in some instances to establish whether or not an individual belongs to a target group.⁶³

3 RESEARCH ARGUMENT

Ten years after the new democratic dispensation came into being, South Africa is still in transition from a hierarchical to an egalitarian society. With only six years⁶⁴ having elapsed since the coming into operation of the EEA's affirmative action provisions, affirmative action in the workplace is still in its infancy.

Some concepts relating to the beneficiaries of affirmative action in the workplace – the focus of this study – have proved to be unclear. Moreover, some definitions are totally absent. For example, in terms of the Constitution, affirmative action measures can be applied only to those people who have been 'disadvantaged' by unfair discrimination.⁶⁵ But 'disadvantage' is not defined. The EEA, which regulates affirmative

61 UNESCO Final Report Prevention of Discrimination par 12. It thus appears that it is not purely a matter of self-identification in respect of categories (Banton *Discrimination* 78). A person could assign himself or herself to one colour or racial category, but be treated by others as if belonging to a different one. It may be no use for an individual to count himself or herself as a member of a group if he or she is not accepted as a fellow member by others. Although acceptance by members of the group may be regarded as an important factor, it has been said that it can never be the sole factor (Faundez *Affirmative Action* 36).

62 Banton *Discrimination* 48. Moreover, race, or ethnic and national origin, does not possess the same clarity of definition as gender – while it is difficult for a person to belong to more than one gender class, assignment by race and ethnic and national origin is more flexible.

63 UNESCO Final Report Prevention of Discrimination par 14.

64 Chapter III of the EEA, dealing with affirmative action, came into operation on 1 December 1999.

65 Section 9(2) of the Constitution.

action in the workplace, also uses the term 'disadvantage',⁶⁶ but does not define it either.

In addition, while certain concepts have been defined, they still require interpretation. For example, the EEA creates categories of people, namely 'designated groups',⁶⁷ who are the beneficiaries of affirmative action. It further lays down the specific requirement for such beneficiaries to be 'suitably qualified'.⁶⁸ From a reading of the EEA, these two concepts are not entirely clear and need to be researched. A third requirement, not found in either the Constitution or the EEA, namely citizenship as a prerequisite for benefiting from affirmative action, has been added by case law.⁶⁹

4 METHODOLOGY

The study is conducted in the broader context of international law.⁷⁰ At the outset, attention is given to the treaties and guidelines of the United Nations (UN) and the International Labour Organization (ILO), both of which South Africa is a member state.⁷¹ These institutions provide particular guidelines on equality and affirmative action. In this regard, it is important to note that the Constitution holds that, when interpreting the Bill of Rights, a court must consider international law.⁷²

The various notions of equality, and the applicability of affirmative action in each of these, if at all, will be set out as background to the study.⁷³ The different values underlying equality are explained.⁷⁴

66 Section 2 of the EEA.

67 Sections 1; 2(b); 13; 15; 16; 20; 42 of the EEA.

68 Sections 15; 20 of the EEA.

69 See par 4 below.

70 See chapter 2 below.

71 See chapter 2 pars 2.1.2; 2.1.3 below.

72 Section 39(1)(b) of the Constitution.

73 See chapter 2 pars 3.1 below.

74 See chapter 2 par 3.3 below.

Thereafter, the focus shifts to South Africa.⁷⁵ A historical and theoretical exposition of the country's denial of equality to a majority and its subsequent endeavours to attain equality is given. While only an overview is given on apartheid legislation, the current South African legislative framework is set out in detail, with the main focus falling on the Constitution, as this lays the basis for equality and affirmative action. This exposition shows that the country has embraced the notion of substantive equality, a definite move away from traditional apartheid laws and practices in the early 1990s.⁷⁶

In the following chapter, the focus is on the beneficiaries of affirmative action in the workplace in South Africa, which is regulated by the EEA.⁷⁷ The EEA requires that affirmative action must redress the 'disadvantages' experienced by people from 'designated groups'.⁷⁸ In other words, it creates special categories of people that must benefit from affirmative action. While 'designated groups' are defined to mean black people, women and people with disabilities,⁷⁹ the Act does not create any hierarchical order for the groups in implementing affirmative action. The concept 'disadvantage' is not defined in the EEA. The particular issue whether, having been categorised as disadvantaged, people who are members of these categories are presumed to be de facto disadvantaged and entitled to benefit from affirmative action, or whether further evidence of disadvantage is required, is considered. In other words, is membership of a categorised group sufficient to benefit from affirmative action, or is past personal disadvantage required, despite membership of a categorised group? An attempt will be made to clarify this concept against the background of the Constitution and academic writing. Further, the deficiencies of categorisation as encountered in South Africa will be described. In particular, multiple disadvantage, a concept not recognised by the categorisation system of the EEA, will be considered. Broader factors, other than membership of a designated group, for possibly identifying beneficiaries of affirmative

75 See chapter 3 below.

76 See chapter 3 pars 3.4.2; 3.5.1.2; 3.5.1.3 below.

77 See chapter 4 below.

78 Sections 2; 13; 15; 19; 20 of the EEA.

79 Section 1 of the EEA.

action will be discussed.

The concept 'suitably qualified' as a requirement for benefiting from affirmative action will be investigated and interpreted. The reasons for the adoption of this concept will be established, and an attempt will be made to establish what it means and how it is established.

Citizenship as a possible requirement for benefiting from affirmative action has been mooted in South African case law.⁸⁰ In this regard, neither the Constitution nor the EEA explicitly requires citizenship as a requirement in order to benefit from affirmative action. The relevant case law will be evaluated against an interpretation of the Constitution, the Labour Relations Act (1995 LRA), and the EEA. To provide a basis to evaluate the case law, modern theory on the interpretation of statutes will be employed. In addition, some guidance by the Department of Labour with regard to the issue of citizenship in the context of affirmative action is considered. Two arguments are considered in this regard: (a) whether citizenship as a criterion for benefiting from affirmative action may be argued to unfairly discriminate against non-citizens; and (b) whether a distinction can be made in respect of the beneficiaries of affirmative action on the basis of the various ways in which citizenship may be acquired. The Citizenship Act⁸¹ and the notion of common citizenship⁸² will be evaluated and discussed to find answers to these questions.

Again, an attempt will be made to establish whether the benefits of affirmative action measures actually reach intended beneficiaries in the workplace.

In the next two chapters,⁸³ comparative research is undertaken with the main aim of ascertaining whether the systems being compared will lead to a better understanding of the South African legal system, and whether such systems offer possible solutions in situations where there is a lack of clarity in the South African system.⁸⁴ In this regard, it must be noted that the Bill of Rights authorises courts, when interpreting the Bill of Rights,

80 See *Auf der Heyde v University of Cape Town* (2000) 8 BLLR 877 (LC); *University of Cape Town v Auf der Heyde* (2001) 22 ILJ 2647 (LAC).

81 No 88 of 1995.

82 Section 3(1) of the Constitution.

83 See chapters 5; 6 below.

84 See *Van Zyl Regsvergelyking* 17ff.

to consider foreign law.⁸⁵ It has been held that the best that the South African Constitutional Court could do was⁸⁶

‘to create an approach that was valid for ... South Africa, interpreting our constitutional text in the light of our reality, *yet picking up from other constitutions those transportable ideas that were most valuable and accepted internationally*’ (own emphasis).

Nevertheless, it has been held that, when considering how the question of equality had been dealt with in other countries⁸⁷

‘[w]e [South Africa] were trying to find *basic principles*, an approach, a perspective, which would *guide* us in our quest to *protect fundamental human rights* and enable us to do so in a *manner which resonated with our Constitution and our historical circumstances*’ (own emphasis).

Although it is clear that ideas may be borrowed from the jurisprudence of other countries, it is also clear that heavy reliance will have to be placed on South Africa’s own unique circumstances and that the Constitution will have to be used as the main form of guidance.

It is nevertheless submitted that comparison with other countries may prove useful at this early stage of implementing affirmative action. The findings must, however, be interpreted in context. For this reason, main similarities and differences between South Africa and the countries compared are described and interpreted.

The US⁸⁸ and Canada⁸⁹ have been identified as countries with which to compare the South African position. These two countries have been chosen for particular reasons. Both countries have in common with South Africa a commitment to the rule of law and the

85 Section 39(1)(c) of the Constitution.

86 Sachs ‘Equality Jurisprudence’ 81.

87 *Op cit* 78.

88 See chapter 5 below.

89 See chapter 6 below.

quest for equality.⁹⁰ All are multicultural and multiracial democracies.⁹¹ And all share a history of colonialism,⁹² discrimination against indigenous peoples, slavery and patriarchy. In this sense, all three countries are part of the worldwide struggle for freedom, equality and human rights for victims of colonialism, slavery, racism and exploitation.⁹³ Moreover, all are member states of the UN and the ILO and are therefore bound by the same international laws on equality. Also, in all these countries, women constitute a majority and have been targeted to benefit from affirmative action.

Importantly, Canada holds views on equality that are similar to those of South Africa.⁹⁴ Canada, in particular, is very similar to South Africa as regards the structure and development of an indigenous equality jurisprudence. The US, though officially adhering to the notion of equality of opportunity, has adopted a broader approach to equality in practice,⁹⁵ but has, throughout history, intermittently expressed its preference for a more

90 See chapter 5 par 3; chapter 6 par 3 below for expositions of the legislative frameworks of the US and Canada. At the outset, it is, however, necessary to note that there is no equivalent to the equality clause of the South African Constitution (s 9(1) and (2)) in the US Constitution, where equality issues are dealt with in terms of the Fourteenth and the Fifth Amendments to the US Constitution. The politics of the US Supreme Court have played a large part in the development of judicial theories of equality and how to accommodate affirmative action. The Court has largely adopted an anti-discrimination approach to equality which renders affirmative action an exceptional measure that the state must support as a justifiable breach of equality rights (Peirce 'Progressive Interpretation of Subsection 15(2)' 266). In contrast to the position in the US, s 15(1) and (2) of the Canadian Charter of Rights and Freedoms is very similar to s 9(1) and (2) of the South African Constitution (see chapter 6 par 3.6 below).

91 Jain 3 98.

92 In 1578, concessions were granted by the monarch of the British Empire to explore and take possession of foreign countries (Bekink *South African Constitutional Law* 51). The northern Americas, of which present-day Canada and the US were part, were invaded by the British. The US gained independence from the British in 1776 (see chapter 5 par 2.3 below), while Canada became independent only about a century later in 1867 (see chapter 6 par 2.3 below).

93 See Asmal 'Human Rights' 511.

94 McLachlin 'Most Difficult Right' 21ff.

95 Administrative agencies have interpreted the concept of affirmative action broadly. The Equal Employment Opportunity Commission (EEOC) guidelines, for instance, define affirmative action as 'action appropriate to overcome the effects of policies or bars to equal opportunity'. Another example is that of the OFCCP regulations which set out the purpose of affirmative action programmes under the contract compliance programme as being to 'ensure equal employment opportunity by institutionalising the contractor's commitment to equality in every aspect of the employment process'. But it has been said that the emphasis on individualism in the US has, arguably, prevented the realisation of substantive equality (McLachlin 'Most Difficult Right' 21) (see chapter 5 pars 4.1.1; 4.1.3 below for a discussion of the US position; chapter 6 pars 3.5; 3.6; 3.7 below for a discussion of the Canadian position).

individualistic notion.

With regard to the US specifically, the development of the constitutional debate in the country is important for its experience of 40 years since legislative intervention on affirmative action. The comparative value of US equality laws therefore lies in the fact that many aspects thereof have been tried and tested, though not always in a consistent and transparent way and with varying support from the politicians. The US experience has had an impact on the design of affirmative action programmes in many other countries and may help structure the debate in South Africa.⁹⁶

Although differences exist between the US and South Africa, there are sufficient similarities for purposes of a comparison of affirmative action between the two countries. Both countries: (a) have experienced the dispossession of their native populations and have experienced slavery under British colonisers; (b) have an African component of the population that has traditionally suffered from discrimination; (c) have other ethnic minorities such as coloureds and Indians, and Native and Hispanic Americans, who have suffered from discrimination; (d) are faced with the problem of racial discrimination, which runs deep within their respective societies; (e) reflect a continuing struggle for freedom, justice and equality; and (f) illustrate both how the legal system can operate as a tool to oppress blacks and how it can operate to reduce oppression.⁹⁷ The polarisation process between white and black in South Africa has basically been the same as in the US (and Canada), but with the colour lines being more clearly drawn in South Africa as a result of the small number of whites in relation to blacks.⁹⁸ Furthermore, a survey of the literature shows that affirmative action developments in South Africa feature many of the same themes found in the US experience.

Among the main differences between the two countries are the following: (a) the groups that have benefited under affirmative action in the US are minorities, whereas, in

96 McCrudden 2 376.

97 Higginbotham 'Affirmative Action' 188-90; Glaser & Possony *Victims of Politics* 201.

98 Glaser & Possony *Victims of Politics* 205.

South Africa, they constitute an indigenous majority.⁹⁹ In the US, it appears that a large middle class could absorb disadvantaged minorities with relative ease and without severe consequences for the economy, which is not the case in South Africa; (b) because of the secure political and economic power of whites in the US, accommodation of the demands of minorities has not substantially diminished white power, which is in direct contrast to South Africa, where the opposite is the case. In addition, the US embarked on large-scale, organised immigration projects that resulted in many minority groups from around the world settling in the country. Another difference is to be found in the fact that, while affirmative action in South Africa enjoys constitutional protection, this is not the case in the US. The Fourteenth Amendment to the US Constitution lays the basis for equality. It guarantees that 'equal protection of the laws' will not be denied, but has no explicit prohibition on discrimination or authorisation for affirmative action. Constitutional discrimination and affirmative action jurisprudence have therefore been judicially developed, whereas, in South Africa, the Constitution forms the basis of non-discrimination and affirmative action.¹⁰⁰

Canada has been chosen for various reasons: (a) it has the same common law background as South Africa;¹⁰¹ (b) the South African and Canadian Constitutions are similar in content and structure – both codify human rights and state that they are subject to limitation in certain limited circumstances; and (c) South African discrimination law has been developed in close association with that of the former.¹⁰² The South African EEA is

99 In South Africa, Africans comprise more than 70 percent of the total population. In the US, racial minorities comprise 21 percent of the US population (Jain 1 348). See Delgado 2 1230 who points out that, in about 2050, Caucasians will cease to be the largest segment of the US population; Farley 'Multicultural America' 39 who points out that the rapidly growing population of Spanish origin will numerically outnumber the American black population in 10 years. These factors may have consequences for the categorisation of beneficiaries of affirmative action.

100 Kentridge 'Equality' 14-6.

101 Sachs 'Equality Jurisprudence' 79.

102 See Sachs 'Equality Jurisprudence' generally. Canadian jurisprudence has sometimes borrowed from that of the US, as the latter has many more years of experience with affirmative action. Although, basically, Canada's employment equity policy has been influenced by the conceptual framework for affirmative action as implemented in the US, and though it was initially thought that lessons could be learnt from the US experience, Canada from the outset set a course that differed from that adopted in the US with regard to affirmative action (Vizkelety 1 225; Bevan 'Employment Equity' 443; Jain & Verma 'Managing Workforce Diversity' 35; Peirce 'Progressive Interpretation of Subsection 15(2)' 265; Tarnopolsky & Pentney *Discrimination and the Law* par 4.11) (see chapter

based on Canada's Employment Equity Act (CEEA).¹⁰³ Because of the fact that the latter closely resembles the Canadian concept and structure of employment equity, it seems obvious that much can be learnt from the Canadian experience. The CEEA is substantially reviewed every five years. Again, many lessons can be learnt from this.

Other similarities, similar to those between the US and South Africa, exist between Canada and South Africa for purposes of a comparison **between the two countries**. For example: (a) both countries have ethnic minorities of non-white people who suffered discrimination.¹⁰⁴ In Canada, these minorities include blacks (including African, Haitian, Jamaican and Somali minorities), Chinese and South East Asians (including East Indian, Pakistani and Sri Lankan minorities), Arabs (including Armenian, Egyptian, Iranian, Lebanese and Moroccan minorities), Filipinos and East Asians (for example Cambodian, Indonesian, Laotian and Vietnamese minorities), Japanese, Koreans and Latin Americans.¹⁰⁵ In South Africa, such minorities include coloureds and Indians; (b) both countries' histories reflect a continued struggle for equality and illustrate both how the legal system can operate as a tool to oppress people and as a tool to reduce such oppression; (c) racial discrimination is an ongoing problem in both South African and Canadian

6 par 3.6.2 below).

103 Of 1995.

104 The francophone population in Quebec, resulting largely from the original French colonial settlement, comprises about 24 percent of the population (Blanpain *International Encyclopedia* 33-7). The balance of the population consists of Canada's British ancestries and other ethnic minorities, such as blacks and Asians who immigrated to, and settled in, Canada. Small communities of aboriginal peoples are scattered across the country. Canada, while spared the most extreme disparities of wealth and poverty (unlike South Africa), is (like South Africa) not an egalitarian society. Moreover, since the late 1980s, polarisation and inequality have increased (*op cit* 40-3) (also see fn 106 below).

105 Jain 3 80. Racial minorities comprise 10,3 percent of the Canadian labour force and constitute a growing proportion (Jain 1 348; 355; Jain 3 80; *Labour and Employment Law* 932). The number of Canada's adult minority population is projected to triple by 2016, with individual minority groups increasing at different rates (with the West Asian and Arab communities projected to be the fastest growing) (*Labour and Employment Law* 932; Kelly 'Visible Minorities' 5). Canada's population is thus becoming increasingly pluralistic, with 42 percent being of other than French or British origin and with 16 percent being foreign-born (Jain 1 355; Breton 'Intergroup Competition' 291; Kelly 'Visible Minorities' 5). Of the visible minorities, 70 percent identify themselves with the black, Asian or South Asian populations (Agocs 'Canada's Employment Equity Legislation' 258).

societies;¹⁰⁶ and (d) Canada makes explicit provision for equality, non-discrimination and affirmative action in its Charter for Human Rights and Freedoms,¹⁰⁷ as does the South African Constitution.

But substantial differences between the two countries obviously also exist. These include mainly historical, political and social differences. In particular: (a) the aboriginal peoples and the visible non-white people that benefit under affirmative action in Canada are minorities, whereas, in South Africa, black people constitute the majority; (b) whereas Canada has actively recruited immigrants on a large scale,¹⁰⁸ resulting in many visible minorities, this is not (yet) the position in South Africa.

Even though both comparators have minorities that have to be affirmed, the comparison remains valid for South Africa's majority, the reason being that the principles of non-discrimination and affirmative action stay the same for minorities and majorities. What may differ, however, is that, in South Africa, the political power underlying, and support for, affirmative action by a majority, for a majority, will most probably lead to a more liberal and vigorous application of affirmative action, in contrast to, for example, the situation in the US where presidential support has been inconsistent.¹⁰⁹ In this regard, it has been held that: (a) affirmative action needs strong political support from the top to withstand the forces of reaction; and (b) that support for affirmative action from those representing the advantaged minority (in South Africa) or majority (in the US and Canada) carries immense political weight.¹¹⁰ In contrast to America and Canada, the consequences

106 Although the presence in Canada of blacks, Indians, Eskimos and non-white immigrants from, for example, Asia and the Caribbean has always been a potential source of racial friction, the colour issue only came to the fore in the 1960s when larger numbers of non-whites were present in the country (Glaser & Possony *Victims of Politics* 205). Currently, rising levels of racism are being reported (Kallen *Ethnicity* xi and 35; Jain 3 80; Blanpain *International Encyclopedia Canada* 33-37; Chabursky 'Employment Equity Act' 309; Sharpe, Swinton & Roach *Charter of Rights and Freedoms* 5).

107 Section 15, which guarantees equality before and under the law and the right to equal protection and equal benefit of the law 'without discrimination'.

108 See chapter 6 par 4.3.2 below.

109 See Weiss 'We Want Jobs' 51-244 for an exposition of affirmative action under Presidents Kennedy, Johnson, Nixon, Ford, Carter, Reagan, Bush (senior) and Clinton. Under Reagan, Bush (senior) and Bush (junior) support for affirmative action has generally waned (Hartman *Business Ethics* 488).

110 McCrudden 2 376.

of the success or failure of affirmative action in South Africa will, because a majority must be affirmed, greatly affect the economy, foreign investment and global competitiveness.

The comparative study of the laws of the US and Canada entails a brief historical overview of each country, and an investigation of the legislative framework in each country. The criteria to benefit from affirmative action, the concept of disadvantage, the role of qualifications and merit in the affirmative action context, and citizenship as a possible creation to benefit from affirmative action, are covered. A fourth issue, deficiencies of categorisation, is looked into. Case law and academic opinion are included where relevant.

The study concludes with a summary and conclusions, focusing on problems in South Africa.¹¹¹ On the strength of developments in South Africa and in the other systems investigated – the US and Canada – some recommendations are made in order to clarify obscure areas in South African affirmative action law, and to provide an interpretation where needed. Recommendations are made to promote legal certainty and to ensure that affirmative action measures reach beneficiaries as intended by the EEA. Finally, some projections are made to indicate the way forward for affirmative action in South Africa.

5 REFERENCE TECHNIQUES

A complete table of contents is provided at the beginning of the study. The relevant part of this table of contents is repeated at the beginning of each chapter for ease of reference.

Authorities are referred to in footnotes by way of key words taken from the titles of the references. Where there is more than one article or work by the same author, or by authors with the same surname, numbers will be used to distinguish between them. Reference will, accordingly, be made to, for example, McCrudden 1 and McCrudden 2.

111 See chapter 7 below.

The bibliography at the end of this work contains full titles and references. Cases referred to in the text are referred to in full in the first instance, with an abbreviated name in brackets which will be used thereafter. For example, *George v Liberty Life Association of Africa Ltd* (*George*) and, thereafter, *George supra*. Case references are given in the footnotes, and in full in each instance, except where reference is made only in passing to a case.