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**CHAPTER 2**

**INTERNATIONAL LAW, EQUALITY AND AFFIRMATIVE ACTION**

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**1 INTRODUCTION**

**2 THE BROADER CONTEXT**

**2.1 International law**

**2.1.1 Introduction**

**2.1.2 United Nations**

*2.1.2.1 Introduction*

*2.1.2.2 United Nations Charter*

*2.1.2.3 Universal Declaration of Human Rights*

*2.1.2.4 International covenants*

(a) Introduction

(b) Non-discrimination

(c) Affirmative action

(i) Affirmative action and non-discrimination

A Non-exhaustive list of grounds of non-discrimination

B Relevance of ground to right

**2.1.3 International Labour Organization**

*2.1.3.1 Introduction*

*2.1.3.2 Declaration of Philadelphia*

*2.1.3.3 Declaration on Fundamental Principles and Rights at Work*

*2.1.3.4 Discrimination (Employment and Occupation) Convention No 111, 1958*

(a) Introduction

(b) Non-discrimination

(c) Affirmative action

(d) Nationality and citizenship

### **3 EQUALITY**

#### **3.1 Different notions of equality**

##### **3.1.1 Introduction**

##### **3.1.2 Formal equality**

##### **3.1.3 Substantive equality**

##### **3.1.4 Equality of opportunity**

#### **3.2 Affirmative action**

#### **3.3 Different values underlying equality**

##### **3.3.1 Introduction**

##### **3.3.2 Dignity**

##### **3.3.3 Remedial or restitutionary**

##### **3.3.4 Redistribution**

##### **3.3.5 Democracy**

### **4 CONCLUSIONS**

### **1 INTRODUCTION**

The concept 'equality' has long been known to humanity and discussions on equality often date as far back as the works of Aristotle, Montesquieu, Locke and Rousseau.<sup>1</sup> The concept 'equality' is also to be found in major national and international documents dating as far back as the American Declaration of Independence<sup>2</sup> and, more recently, in the UN's Universal Declaration of Human Rights.<sup>3</sup> The Constitution of South Africa<sup>4</sup> is the most recent example that can be added to these.

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1 Aristotle, *Ethica Nicomachea*, as referred to in Westen 'Empty Idea of Equality'; Montesquieu *Spirit of the Laws*; Locke 'End of Civil Government'; Rousseau *Social Contract Book*.

2 Of 1776.

3 Of 1948.

4 It lays the foundation for a new era in the country based on the value of *inter alia* equality (Preamble; ss 1; 7(1)(a); 9; 36; 39(1)(a) (see chapter 3 par 3.5.1 below for a detailed discussion on the South African position).

## **2 THE BROADER CONTEXT**

### **2.1 International law**

#### **2.1.1 Introduction**

It is necessary at the outset to recognise that South Africa is part of the broader international community, in that it is a member of the UN and the ILO.<sup>5</sup> The international community has given concrete shape to the idea that every individual has fundamental rights that must be protected by the state.<sup>6</sup> The protection of such rights is nowadays seen as a universal matter and is widely recognised, even where no enactments, conventions or treaties exist under positive law.<sup>7</sup> Such protection has become part of the modern international legal consciousness and of the contemporary law of nations.<sup>8</sup>

#### **2.1.2 United Nations**

##### **2.1.2.1 Introduction**

The UN constitutes an integral part of international politics and is the most important of all international institutions.<sup>9</sup> It was created in 1945 after World War II with the purpose of

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5 Being a member of these organisations has particular practical consequences, as will be indicated below.

6 Interim Report on Group and Human Rights 5; Sieghart *International Law* 15.

7 Interim Report on Group and Human Rights 5.

8 *Ibid.* A particular international trend to protect human rights has been discerned since World War II. Below, it will be seen how this has been reflected in the countries investigated in this study: South Africa (see chapters 3; 4 below), the US (see chapter 5 below) and Canada (see chapter 6 below).

9 Baehr & Gordenker *The United Nations* x and 10; Starke *International Law* 515; Kallen *Ethnicity* 1.

guiding the world into an era of peace, security and wellbeing.<sup>10</sup>

### 2.1.2.2 *United Nations Charter*

The United Nations Charter<sup>11</sup> (hereafter the ‘Charter’) codified the major principles of international relations – from the sovereign equality of states to the basic human rights every person is entitled to. It requires a pledge from all member states to promote ‘respect for, and universal observance of, human rights and fundamental freedoms’<sup>12</sup> and a commitment to take joint and separate action in cooperation with the UN to promote world peace.<sup>13</sup> It subscribes to human dignity and equality and holds *inter alia*:<sup>14</sup>

‘WE THE PEOPLES OF THE UNITED NATIONS DETERMINED

to save succeeding generations from the scourge of war,  
which twice in our lifetime has brought untold sorrow to mankind, and  
to reaffirm faith in *fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women* and of nations large and small, and  
to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained,  
and to promote social progress and better standards of life in larger freedom ...

AND FOR THESE ENDS

... to employ international machinery for the promotion of the economic and social advancement of all

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10 Baehr & Gordenker *The United Nations* 1; Starke *International Law* 515-7.

11 Signed by representatives of 50 countries on 26 June 1945 and currently with almost 200 member states (*Basic Facts about the UN* 3). South Africa, the US and Canada were all founding members when they joined in 1945. South Africa was, however, excluded from the General Assembly as from 1974 owing to its apartheid practices (Van Jaarsveld *Van Riebeeck tot Vorster* 569), but was readmitted in 1994 (Baehr & Gordenker *The United Nations* 110; *Basic Facts about the UN* 214).

12 Article 55(c).

13 Article 56.

14 Preamble; Chapter I, Article 1(1).

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

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peoples ...

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HAVE RESOLVED TO COMBINE OUR EFFORTS TO ACCOMPLISH THESE AIMS' (own emphasis).

The Charter also holds as one of its purposes<sup>15</sup>

'[t]o achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and ... *promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ...*' (own emphasis).

It thus focuses on equality and dignity. It provides for non-discrimination on four grounds, namely race, sex, language and religion. No provision was made for affirmative action at that stage.

The Charter established six main organs, including the Economic and Social Council (hereafter the 'ES Council'), to manage the operations of the UN.<sup>16</sup> The ES Council mainly initiates studies and reports with regard to international economic and social matters and coordinates the work of the specialised agencies of the UN.<sup>17</sup> The ILO (discussed below) is such an agency.<sup>18</sup>

### 2.1.2.3 *Universal Declaration of Human Rights*

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15 Chapter I Article 1(3).

16 Chapter III, Article 7(1); Chapter X, Articles 61(1) to 72.

17 The specialised agencies related to the UN by special agreements are separate, autonomous organisations which work with the UN and one another via the coordinating machinery of the ES Council. The agencies report on an annual basis to the ES Council (Chapter IX, Articles 55 to 60 of the Charter; *Basic Facts about the UN* 273).

18 *Basic Facts about the UN* 12, Chapter X, Article 62(1) of the Charter (see par 2.1.3 below). The ILO participates in the work of bodies supervising *inter alia* the International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966, the International Covenant on Civil and Political Rights concluded in 1966, the Convention on the Elimination of All Forms of Discrimination against Women adopted in 1979 (see par 2.1.2 below), the International Convention on the Elimination of All Forms of Racial Discrimination adopted in 1965 (see par 2.1.2.4 below) and the Declaration on the Rights of Disabled Persons adopted in 1975. The ILO Office sends reports and information to the various bodies responsible for the application of UN conventions relevant to the ILO mandate (see par 2.1.3 below).

As its main, first step of practical importance in the field of human rights, the UN adopted the Universal Declaration of Human Rights<sup>19</sup> (hereafter the ‘Declaration’), which pledges to promote<sup>20</sup>

‘universal respect for and observance of human rights and fundamental freedoms’.

It holds that the peoples of the UN have reaffirmed their faith in fundamental human rights, in the dignity<sup>21</sup> and worth of the human person, and in the equal rights of men and women.<sup>22</sup> It proclaims the Declaration as ‘a common standard of achievement for all peoples and all nations’,<sup>23</sup> and emphasises that<sup>24</sup>

‘[a]ll human beings are *born free and equal in dignity and rights*’ (own emphasis).

The Declaration thus sets out the three main principles of human rights: freedom, equality and dignity.<sup>25</sup> It shifted some of the emphasis of international law from its concern exclusively with the state, to greater attention to the individual (‘the peoples’).<sup>26</sup> It holds certain rights to be ‘inalienable rights of all members of the human family’ and makes it clear that

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19 Adopted on 10 December 1948.

20 Preamble of the Declaration.

21 See also the Preambles of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which similarly subscribe to these values (par 2.1.2.4 below). Links between individual rights and human dignity are commonly assumed nowadays (Henkin ‘Human Dignity’ 210-1).

22 Preamble of the Declaration.

23 *Ibid.*

24 Article 1 of the Declaration.

25 Kallen *Ethnicity* 1.

26 Baehr & Gordenker *The United Nations* 101.

everyone must be respected without distinction of any kind.<sup>27</sup> More grounds of possible discrimination (than found in the Charter) were added, namely colour, political or other opinion, national or social origin, property, birth or other status.<sup>28</sup>

The Declaration, although not legally binding, has become the foundation for establishing legal norms to cover international behaviour with regard to the rights of individuals.<sup>29</sup> The ideological roots of dignity and non-discrimination can therefore be said to be international.<sup>30</sup>

#### 2.1.2.4 *International covenants*

##### (a) Introduction

The general principles of the Universal Declaration of Human Rights have been expressed in various forms at international level. For example, the International Covenant on Economic, Social and Cultural Rights<sup>31</sup> and the International Covenant on Civil and Political Rights<sup>32</sup> were founded on the Declaration.<sup>33</sup> The first-mentioned deals primarily with collective

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27 Chaskalson 'Human Dignity' 197. It was held that equality was built into the Declaration's text, as many of the worst violations of human rights in the world's history were the result of discrimination directed at different times and places at groups such as slaves, women, races differing in skin colour from that of a dominant group, religious, ethnic or linguistic groups, members of hereditary castes or social classes and groups holding unorthodox political opinions (Sieghart *International Law* 17-8).

28 Article 2.

29 Baehr & Gordenker *The United Nations* 101; Chaskalson 'Human Dignity' 197.

30 Hodges Aeberhard 'Affirmative Action' 459; Chaskalson 'Human Dignity' 197; Sieghart *International Law* 17.

31 See fn 18 above. The Preamble of the Covenant refers to the recognition given in the UN Charter to the '*inherent dignity* and of the equal and inalienable rights of all members of the human family, and repeats the assertion that these rights 'derive from the inherent dignity of the human person' (own emphasis).

32 See fn 18 above. The Preamble of the Covenant holds that fundamental rights 'derive from the *inherent dignity* of the human person' (own emphasis).

33 The African Charter on Human and Peoples' Rights (adopted by the Heads of African states and the Head of the Organization of African Unity on 26 June 1981), the first regional human rights treaty, was also based on the Declaration.



societal rights, defined as rights due to all people in a society and which are the responsibility of governments to provide.<sup>34</sup> The latter deals with individual rights, namely freedoms and responsibilities which all individual citizens must be allowed to exercise.<sup>35</sup> Specific instruments with regard to discrimination have been adopted, such as the International Convention on the Elimination of All Forms of Racial Discrimination<sup>36</sup> and, in later years, the Convention on the Elimination of All Forms of Discrimination against Women.<sup>37</sup>

(b) Non-discrimination

All of the above instruments generally emphasise the principles of dignity and equality<sup>38</sup> and contain non-discrimination clauses imposing a duty on member states.<sup>39</sup> The non-discrimination clauses do not require that all people be treated alike in all circumstances. Instead, they lay down that people are entitled to protection from<sup>40</sup>

'man-made and avoidable impositions of oppressive power which would restrict the development of their individual potentials'.

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34 Kallen *Ethnicity* 2.

35 *Ibid.*

36 Proclaimed by the General Assembly of the UN on 20 November 1963 and adopted in 1965 (Articles 1(4) and 2(2)). This Convention is the only one that defines racial discrimination, but it does not apply to 'distinctions, exclusions, restrictions, or preferences ... between citizens and non-citizens' (Article 1) (see Glaser & Possony *Victims of Politics* 23-4).

37 Adopted by the UN in 1979. Ratified by South Africa on 15 December 1995. Both conventions have been ratified by South Africa and Canada, but not by the US.

38 They therefore do not follow a simplistic philosophy of egalitarianism, but primarily protect individual integrity and dignity (Sieghart *International Law* 18).

39 See Articles 2; 3; 26 of the International Covenant on Economic, Social and Cultural Rights and Articles 2; 3 of the International Covenant on Civil and Political Rights.

40 Sieghart *International Law* 18.

Equality of treatment is required only in respect of fundamental human rights which are inherent in individual humanity and which are necessary to enable people's personal diversity to develop and manifest itself. International documents, such as the International Covenant on Civil and Political Rights, expressly acknowledge that rights can be limited in the interest of individuals and the broader community.<sup>41</sup>

(c) Affirmative action

Affirmative action is recognised in international instruments as a duty on member states. For example, the International Convention on the Elimination of All Forms of Racial Discrimination stresses the importance of proactive measures against racism and provides the basis for future tests as to the acceptability of such measures.<sup>42</sup> It follows a holistic approach in this regard and includes the notions of: (a) necessity; (b) proportionality to the aim to be achieved; and (c) time limits for affirmative action measures.<sup>43</sup> As such, it provides:<sup>44</sup>

*'Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved (own emphasis).*

The Convention thus explicitly indicates the nature of affirmative action: (a) affirmative action does not constitute discrimination; and (b) affirmative action is a temporary notion. In

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41 The South African Constitution and the Canadian Charter of Rights and Freedoms follow international law, in that both recognise that rights are not absolute and may be limited (see chapter 3 par 3.5.1.3(c); chapter 6 par 3.6.2.4 below). The American Constitution is different, as it sets out the rights as if they were absolute (see chapter 5 pars 3.2.2.2; 4.1 below).

42 Articles 1(4); 2(2) (see Glaser & Possony *Victims of Politics* 23-4).

43 Hodges Aeberhard 'Affirmative Action' 459.

44 Article 1(4).

addition, there is a duty on state parties<sup>45</sup>

'... when the circumstances so warrant, [to] take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the *maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved*<sup>46</sup>(own emphasis).

The International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights likewise require state parties to adopt and implement policies to eliminate discrimination.<sup>47</sup> The Convention on the Elimination of All Forms of Discrimination against Women similarly provides:<sup>48</sup>

'Adoption by State Parties of temporary social measures aimed at accelerating *de facto* inequality between men and women shall not be considered discrimination as defined in the present Convention, but shall in *no way* entail as a consequence the *maintenance of unequal or separate standards*; these measures shall be *discontinued* when the objectives of *equality of opportunity and treatment have been achieved*' (own emphasis).

States meet their obligations in terms of the covenants and conventions in varying degrees.<sup>49</sup> Generally, however, the extent of the protection envisaged in the original Charter

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45 Article 2(2). The Convention does not deal with identification of members of a particular racial or ethnic group, but it has been held that, if no justification to the contrary exists, this should be based on self-identification by the individual concerned (General Recommendation VIII of the Committee on the Elimination of Racial Discrimination as referred to in UNESCO Final Report Prevention of Discrimination par 14).

46 The temporary nature of affirmative action is emphasised again.

47 Article 2 of both Covenants.

48 Article 4(1).

49 States fulfil their international obligations in ways appropriate to their own legal systems. In some states, once the government signs a treaty, the action immediately comes into effect in its domestic

– to protect human rights ‘without distinction as to race, sex, language or religion’ – has been broadened to include disabled people, the elderly and homosexuals, and affirmative action for these groups – although not for all – is commonly found.<sup>50</sup>

(i) Affirmative action and non-discrimination

Of great importance is the fact that international law has laid down guidelines for judging distinctions made in terms of an affirmative action policy. The UNESCO Final Report Prevention of Discrimination<sup>51</sup> provides the basic tenets in this regard. It holds that the relationship of affirmative action to the principle of non-discrimination, as the reverse formulation of equality, is particularly important. Non-discrimination may be seen as a legal technique to counteract unjustified inequality, founded on the basis that no state may legitimately disadvantage any person arbitrarily. Non-discrimination and affirmative action may, however, clash with each other if not carefully framed. Whereas the non-discrimination principle removes factors such as race and sex from decision-making processes, affirmative action seeks to ensure substantive equality by taking those very same factors into account.

Also, affirmative action policies, in seeking to bring about equality, may use extreme and/or irrelevant measures or distinctions to achieve their objectives in a particular situation. To avoid this, affirmative action policies must be carefully scrutinised (and controlled) so as not to undermine the principle of non-discrimination itself. In this regard, international law holds that evaluating distinctions introduced in the framework of an affirmative action policy should be the same as evaluating distinctions under the non-discrimination clauses of international instruments.

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law. In others, domestic legislation has to be enacted to give effect to the treaty (Banton *Discrimination* 41). In many countries (such as South Africa and Canada), protection against discrimination is provided for in the national constitution and is subject to interpretation in constitutional law (see chapter 3 par 3.5.1; chapter 6 par 3.6 below). In others, the protection has to be provided by way of a particular statute passed by the legislature (as is the case in the US)(see chapter 5 par 3.5 below).

50 Banton *Discrimination* 53.

51 Paragraphs 81 to 100; 112.

It is clear that, in international instruments, only discrimination that is regarded as 'arbitrary' or 'unjust' discrimination is prohibited.<sup>52</sup> 'Distinctions', in contrast, is a neutral term which is used when it has not yet been established whether a differential treatment may be justified or not. The term 'differentiation' points to difference in treatment, which has been deemed to be lawful. Consequently, not every different treatment is prohibited, but only that which results in discrimination. This raises the question as to when differential treatment becomes unacceptable (and discriminatory), or when a distinction can be justified.

Generally, no discrimination (in the sense described above) is allowed against any person on the basis of sex, race, colour, language, religion, political or other opinion, membership of a racial minority, or birth or other status. Discrimination in this sense is seen as a failure to respect the principle of equal treatment.<sup>53</sup> When two people are considered comparable, but are not treated equally, this is considered discriminatory. In practice, however, inequalities are often found as a result of systemic discrimination practised over many years on the basis of, for example, race, sex, membership of an ethnic minority, and disability. To treat such people as being equal to those who have not been subjected to disadvantage would not make sense. Therefore, affirmative action measures have to be implemented to re-establish a balance in such a society, as part of a broader effort to eliminate all inequalities. In other words, without intervention for a period of time, it would not be possible to assist or protect the groups previously discriminated against and consequentially eliminate inequality. Different treatment, in this sense, is acceptable. Thus affirmative action measures are generally not seen as discriminatory, as the term 'discrimination' is exclusively used to connote 'arbitrary', 'unjust' or 'illegitimate' distinctions.<sup>54</sup> In this regard, it has been held:<sup>55</sup>

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52 See chapters 4; 6 below for the South African and Canadian positions, which follow this international approach.

53 Held to be a fundamental principle of democracy.

54 UNESCO Progress Report Prevention of Discrimination 2; UNESCO Final Report Prevention of Discrimination par 91(a).

55 UNESCO Final Report Prevention of Discrimination par 112.

'Affirmative action should be centred on taking measures expected to meet the *particular needs* of the category it is intended to favour, rather than on restricting the benefits of the measures on the basis of the element which distinguishes that category from the other members of the population, but which is not relevant to the right concerned. It is through the *choice, timing and location* of the measures, that the policy can favour the target category without violating the rights – including the right to equal protection of the law without discrimination – of people not belonging to that category. In no case may a person be deprived of a basic right on the pretext that doing so would help *particularly* disadvantaged groups better to overcome the consequences of past discrimination' (own emphasis).

However, not every measure taken in pursuit of affirmative action should be accepted as legitimate because of the fact that the object of the distinction is to improve the situation of the disadvantaged group or individuals.<sup>56</sup> Pointers which should be taken into account in making a determination as to whether or not a given difference in treatment contravenes the non-discrimination principle are set out below.

#### A Non-exhaustive list of grounds of non-discrimination

The grounds for non-discrimination in the various international instruments are all non-exhaustive. This implies that other 'unlisted' grounds exist. A distinction based on such an unlisted ground may be arbitrary. At the same time, some distinctions based on some of the listed grounds are not necessarily legitimate. The ground on which a distinction is based is nevertheless important in determining whether the distinction is arbitrary or not.

#### B Relevance of ground to right

However, it is not the ground itself that is decisive, but the relationship or the connection between the ground and the right in regard to which the distinction is practised. There must be a 'sufficient connection' between the right and the ground. In other words, the ground must be

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56 UNESCO Preliminary Report Prevention of Discrimination par 62.

'relevant' for the specific right in regard to which the distinction is practised. The general aim pursued by the law under scrutiny is not decisive. The 'relevance' of the particular ground with respect to the particular right is the decisive criterion. A distinction introduced by law in the pursuit of a perfectly legitimate goal can nevertheless be discriminatory and, as such, can constitute an infringement of a human right if the ground on which the distinction is based is 'irrelevant' to the right in question. It has been held that particular weight must be attached to the substitution of the word 'irrelevant' for the word 'arbitrary'. The difference lies in the *level* at which the illegitimate character of the distinction has to be assessed. If this level were to be positioned in relation to the general aims of the law, the assessment would be purely political. The whole point, it is argued, is that a legal rule is not necessarily legitimate because it pursues a legitimate goal. The law, as a technique used to attain certain goals, has to respect certain inherent requirements.

The most fundamental of these requirements is respect for the equality principle, which prohibits the introduction of distinctions based on grounds which are 'irrelevant' to the particular right. While still requiring a value judgement, which can be influenced by political motives, the evaluation of the relevance of the ground by assessing the connection between the ground and the right concerned, is a judicial act. The previous identification of the ground (on which the distinction is based) and the matter (in which the distinction is practised) as a right, reduces the political element to a minimum and safeguards the judicial character of the evaluation. In essence, then, affirmative action policies are admissible only insofar as they do not contravene the principle of non-discrimination.<sup>57</sup> Put differently, the principle of non-discrimination establishes the limits to affirmative action.

The UN, its conventions and guidelines provide the broader context of the study. The ILO, as a specialised agency of the UN with a standard-setting function in employment law, will now be considered.

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57 UNESCO Final Report Prevention of Discrimination par 112. This argument will be used with regard to the question whether citizenship can be a requirement to benefit from affirmative action in South Africa (see chapter 4 par 2.3 below).

### **2.1.3 International Labour Organization**

#### **2.1.3.1 Introduction**

The ILO is a universal organisation originating from the aftermath of the Industrial Revolution in nineteenth-century Europe and North America.<sup>58</sup> Although this revolution brought about economic development, this was at the cost of humans, and thus the idea of protective international labour legislation originated. Arguments in favour of international labour legislation basically included: (a) the necessity of improving the lot of the working masses; (b) the political importance of consolidating social peace in industrialised countries; and (c) the equalisation of international competition.<sup>59</sup> All of these, and the elimination of discrimination in respect of employment and occupation as a fundamental right, were written into the 1919 Constitution<sup>60</sup> when the ILO was officially established at the Peace Conference in Paris after World War I. At that stage, the ILO was associated with the League of Nations, the forerunner of the UN.<sup>61</sup>

The ILO serves to promote social justice for workers everywhere.<sup>62</sup> In essence, it: (a) formulates international policies and programmes to help improve working and living conditions; (b) creates international labour standards in the form of conventions and recommendations which serve as guidelines for national authorities in implementing its

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58 *The ILO* 4. It thus originated much earlier than the UN.

59 *Ibid.*

60 Later clarified in the Declaration of Philadelphia in 1944.

61 Part Thirteen of the Treaty of Versailles (*The ILO* 4); *Basic Facts about the UN* 189; Sieghart *International Law* 438; Starke *International Law* 517; 543-4.

62 Constitution of the ILO Preamble; Constitution of the ILO Annexure: Declaration concerning the Aims and Purposes of the ILO, Article II; Starke *International Law* 544; Sieghart *International Law* 438.



policies;<sup>63</sup> (c) carries out programmes of technical cooperation to help member states<sup>64</sup> worldwide in making its policies effective in practice;<sup>65</sup> and (d) engages in training, education and research to help advance these efforts.<sup>66</sup>

The ILO's tripartite composition, which is unique among agencies affiliated to the UN, comprises of employers' organisations, workers' organisations and governments of its member states, all with an equal voice at ILO conferences.<sup>67</sup> The International Labour Conference meets annually to discuss social and labour questions. ILO conventions are international treaties and place a binding obligation on member states that ratify them, to put their provisions into effect.<sup>68</sup> Recommendations are non-binding instruments which set out guidelines for national policy and action.<sup>69</sup> Both conventions and recommendations are intended to have a concrete impact on working conditions in workplaces all over the world.<sup>70</sup> Member states must periodically report on the measures taken to apply – in law and in practice – the conventions ratified by them.<sup>71</sup>

### 2.1.3.2 Declaration of Philadelphia

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63 Since the ILO was founded, more than 350 conventions and recommendations have been adopted.

64 Currently, the ILO has 174 members. South Africa had to withdraw in 1964 owing to its apartheid policies (ILO Special Report on Apartheid (1992) 101), but rejoined in 1999. Both the US and Canada, the two comparators for this study, are members of the organisation.

65 In this way, the ILO took on its universal character.

66 *Basic Facts about the UN* 274.

67 Constitution of the ILO, Article 7 (see Starke *International Law* 544; *The ILO* 7).

68 *Basic Facts about the UN* 275.

69 *The ILO* 14.

70 *Op cit* 5; 14.

71 *Op cit* 5. The ILO has been recognised as being successful because of, *inter alia*, a very effective supervisory system for the application of standards. In this regard, a Committee of Experts (set up in 1926), composed of independent jurists, examines government reports on the application of conventions ratified by them and presents its own report to the Conference annually (*ibid*; Sieghart *International Law* 438). Its mandate has recently been broadened to cover reports on unratified conventions and recommendations as well (*The ILO* 5).

After World War II, the International Labour Conference adopted the Declaration of Philadelphia<sup>72</sup> which, to this day, sets out the aims and objectives of the ILO. The Declaration commences with a reaffirmation of the fundamental principles on which the ILO is based.<sup>73</sup>

*'labour is not a commodity, ...*

poverty anywhere constitutes a danger to prosperity everywhere;

the war against want requires to be carried on with unrelenting vigour within each nation and by continuous and concerted international effort in which the representatives of workers and employers, enjoying equal status with those of governments, join with them in free discussion and democratic decision with a view to the promotion of the common welfare' (own emphasis).

Very importantly, it also states that<sup>74</sup>

*'all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity ...'* (own emphasis).

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72 On 10 May 1944.

73 Part I(a); (b); (c). It is said that the Declaration anticipated, and set the tone for, the UN Charter and the Universal Declaration of Human Rights (*The ILO 5*) (see pars 2.1.2.2; 2.1.2.3 above).

74 Part II(a).

Consequently, conventions after World War II focused on human rights, such as freedom of association, and on the elimination of forced labour and discrimination.<sup>75</sup>

### 2.1.3.3 *Declaration on Fundamental Principles and Rights at Work*

In 1998, the ILO adopted the Declaration on Fundamental Principles and Rights at Work.<sup>76</sup> The Declaration reaffirmed the constitutional principle of the elimination and suppression of discrimination in the world of work. It holds that<sup>77</sup>

'... in seeking to maintain the link between social progress and economic growth, the guarantee of fundamental principles and rights at work is of particular significance in that it enables the persons concerned to claim freely and on the basis of *equality of opportunity* their fair share in the wealth which they have helped to generate, and to achieve fully their human potential' (own emphasis).

The Declaration marked a universal reaffirmation of the obligation of every member state of the ILO to respect, promote and realise principles concerning fundamental rights which are the subject of ILO conventions, even if these had not been ratified. These include *inter alia* the Discrimination (Employment and Occupation) Convention No 111 of 1958.<sup>78</sup>

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75 *The ILO 6.*

76 *Ibid.*

77 Par 5 of the Declaration.

78 And the Freedom of Association and Protection of the Right to Organize Convention No 87 of 1948; the Forced Labour Convention No 29 of 1930; the Right to Organize and Collective Bargaining Convention No 98 of 1949; the Equal Remuneration Convention No 100 of 1951; the Abolition of Forced Labour Convention No 105 of 1957; the Discrimination (Employment and Occupation) Convention No 111 of 1958; the Minimum Age Convention No 138 of 1973; the Worst Forms of Child Labour Convention No 182 of 1999.

### 2.1.3.4 *Discrimination (Employment and Occupation) Convention No 111, 1958*

#### (a) Introduction

An agreement establishing the relationship between the ILO and the UN was approved in 1946.<sup>79</sup> The ES Council of the UN requested that the ILO be tasked with undertaking a study of discrimination in the area of employment and occupation.<sup>80</sup> This led the ILO to include the issue of discrimination in the agenda of the International Labour Conference in 1955.

Subsequently, the Discrimination (Employment and Occupation) Convention No 111 (hereafter 'ILO Convention 111') and ILO Recommendation 111<sup>81</sup> were adopted by the International Labour Conference.<sup>82</sup>

These were the first instruments to address the issue of the prohibition of discrimination in the workplace and of affirmative action in the workplace in an international context. ILO Convention 111 reads as follows:

#### 'Article 1

1. For the purpose of this Convention the term "discrimination" includes -

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing *equality of opportunity or treatment* in employment or occupation;

(b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies. ...

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79 In terms of Chapter IX, Article 57(2). See *Basic Facts about the UN* 274; Starke *International Law* 544.

80 ILO Survey Equality in Employment and Occupation (1988) 2.

81 Of 1958.

82 ILO Survey Equality in Employment and Occupation (1988) 2. While the US has not ratified ILO Convention 111, South Africa ratified it on 5 March 1997 and Canada ratified it on 26 November 1964.

3. For the purpose of this Convention the terms “employment” and “occupation” include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment. ...

Article 5

...

2. Any Member may, after consultation with representative employers’ and workers’ organizations, where such exist, determine that other *special measures* designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are *generally recognized*<sup>83</sup> to require special protection or assistance, shall not be deemed to be discrimination.’

ILO Recommendation 111 contains provisions similar to those of ILO Convention 111.

(b) Non-discrimination

ILO Convention 111 is directed at the application of the general principles of dignity, equality and freedom proclaimed in the Universal Declaration of Human Rights.<sup>84</sup> It requires ratifying states to adopt and implement, with the cooperation of organised business and labour, a national policy designed to promote equality of *opportunity and treatment*<sup>85</sup> with a view to eliminating discrimination. No employment, and no occupation in the broadest sense of the term, is excluded from the scope of ILO Convention 111, which applies to all workers – nationals and foreigners.<sup>86</sup> Not only is access to training, to employment and to particular occupations covered, but also the whole range of conditions of employment.

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83 The italicised words are not clarified, except that the composition of the ILO suggests that this would involve a degree of consensus between employers’ and workers’ organisations (Tarnopolsky & Pentney *Discrimination and the Law* 4-144; ILO Report Committee of Experts (1963) 195).

84 ILO Survey Equality in Employment and Occupation (1988) 2.

85 See par 3 below for a discussion of the various notions of equality.

86 ILO Survey Equality in Employment and Occupation (1988) 3; 15-6.

(c) Affirmative action

ILO Convention 111 explicitly recognises 'special measures' for the purposes of special protection or assistance for certain groups of people. The wording is clear: affirmative action is *not* discrimination under the Convention.<sup>87</sup> Furthermore, these measures must be determined by states only after consultation with representative employers' and workers' organisations.

ILO supervisory bodies, when verifying whether ratifying states have adopted such 'special measures', have generally welcomed affirmative action.<sup>88</sup> Such bodies consider them part of national policy to overcome past or present workplace discrimination and have confirmed that such measures are not discrimination for the purpose of ILO Convention 111. It has been held that the Convention itself makes it clear that proactive steps have to be accepted as 'legitimate tools' in the fight against unfair discrimination. This logic flows from the realisation that the statutory prohibition of discrimination is not enough to make it disappear in practice.<sup>89</sup>

Supervisory bodies have not taken sides in the debate on whether special measures should be aimed only at giving all groups a level playing field (equality of opportunity) on which to compete, thereafter leaving the outcome to merit, or whether the measures should actually ensure an equal outcome (substantive equality).<sup>90</sup> They accept that, while the text of ILO Convention 111 provides for 'equality of opportunity and treatment', with the aim of eliminating

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87 Measures of this kind are found in all countries. In some countries, special measures have also been taken for the benefit of categories of people for whom special protection or assistance is recognised to be necessary for reasons of social or cultural status: the direct aim of such measures may be to combat discrimination to which these categories have been subjected in practice (ILO Report Committee of Experts (1963) 195). It has been stressed that it is important for the proper application of ILO Convention 111 that any special measure of this type should 'really pursue' an aim of protection or assistance (*ibid*).

88 Hodges Aeberhard 'Affirmative Action' 460.

89 *Op cit* 461.

90 *Ibid*.

discrimination, the ways of doing so should largely be left to each country's discretion.<sup>91</sup>

Some pointers have, however, been given on the general nature of affirmative action. For example, the Committee of Experts has held that affirmative action measures should be designed to restore a balance and should therefore be proportional to the nature and scope of protection needed by the specific target group.<sup>92</sup> Once adopted, the special measures should be re-examined periodically in order to ascertain whether they are still needed, and whether they are functioning effectively.<sup>93</sup>

(d) Nationality and citizenship

The grounds of *nationality and citizenship* are *not* explicitly covered in ILO Convention 111.<sup>94</sup> Even though ILO Convention 111 is of general application and covers all workers, irrespective of citizenship, there has been a long-standing awareness by the ILO that there is a need to adopt instruments specifically protecting migrant workers. Even though ILO Convention 111 does not cover discrimination on the basis of nationality, it does extend to grounds which may form the basis for discrimination in practice against migrant workers<sup>95</sup> and

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91 *Op cit* 462.

92 *Ibid* referring to ILO Survey Equality in Employment and Occupation (1996) pars 134ff.

93 *Ibid*. Recently, it was mooted that the time might be right for an international labour convention on affirmative action (*op cit* 464). It was suggested that: (a) the concept be defined; (b) the temporary nature thereof be highlighted; (c) it be clarified that affirmative action is not reverse discrimination; (d) the limitations of its aims be outlined; (e) examples of methods proportional to those aims be given; (f) guidance on the relative claims of individual and group damage be given; and (g) a stand be taken on the egregious nature of the discrimination that is sought to be overcome with such measures. This idea has, however, not received a great deal of support and has not been taken any further.

94 Although the ground of citizenship was considered for inclusion in Convention 111 in 1958 (ILO Survey Equality in Employment and Occupation (1996) 96)), it was rejected at its first discussion. It was recently recommended that a protocol, supplementing ILO Convention 111, be adopted to include *inter alia* nationality as a ground on which discrimination is prohibited, owing to widespread discrimination against workers on the basis of their nationality (ILO Report Migrant Workers 18). This recommendation has however not yet been taken any further.

95 See ILO Survey Equality in Employment and Occupation (1996) 97-8. Migrant labour may lead to competition between nationals in the host country's labour force and migrant workers who are willing

their families, for example race, colour, religion, national extraction or social origin.<sup>96</sup> Although nationality is what often leads to discrimination against foreigners, the others are also relevant factors.<sup>97</sup> In this regard, the ILO has adopted several instruments intended to ensure that migrant workers have equality of opportunity and treatment, as well as protection against discrimination.<sup>98</sup>

### **3 EQUALITY**

#### **3.1 Different notions of equality**

##### **3.1.1 Introduction**

Different notions of equality exist. These various notions provide further background for the study. It is important to distinguish between these, as they are fundamentally different and utilise affirmative action measures differently, if at all.

##### **3.1.2 Formal equality**

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to work for lesser conditions. This may reinforce sentiments of racism and xenophobia (ILO Report Time for Equality at Work 31)

96 ILO Report Migrant Workers 159.

97 ILO Report Time for Equality at Work 3.

98 See, for example, the Migration Statistics Recommendation No 19 of 1922; the Maintenance of Migrants' Pension Rights Convention No 48 of 1935; the Migration for Employment Convention No 66 of 1939; the Migration for Employment Recommendation No 61 of 1939; the Migration for Employment Convention (Revised) No 97 of 1949; the Migration for Employment Recommendation (Revised) No 86 of 1949; the Protection of Migrant Workers (Underdeveloped Countries) Recommendation No 100 of 1955; the Migrant Workers Convention (Supplementary Provisions) No 143 of 1957; the Equality of Treatment (Social Security) Convention No 118 of 1962; the Maintenance of Social Security Rights Convention No 157 of 1982.



Formal equality holds that the law is neutral and that the state must act as a neutral force in relation to its citizens, favouring no one above another.<sup>99</sup> It sees the function of the law as being limited to protecting individuals against intentional prejudice on the grounds of, for instance, race and sex.<sup>100</sup> Any attempt to attach rights to group membership, rather than to the individual, is bound to degenerate into a 'crude, political struggle' between groups seeking favourite status.<sup>101</sup> Formal equality thus focuses on the rights of the individual as an individual (that is, the merit principle)<sup>102</sup> and market freedom.

Formal equality can be traced back to the Aristotelian concept of equality, which requires that like cases be treated alike, and unlike cases differently, in proportion to their likeness or difference.<sup>103</sup> The focus of this notion is on non-discrimination. It assumes that all

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99 Dupper 1 278; Fredman 1 154-5. Fredman provides the basic principles for the notion of the state as a neutral force. State neutrality is generally achieved by the prohibition of state preferences for any one group and is expressed through the notion of formal equality before the law. Beyond this, neutrality is furthered by a focus on fairness as consistency, namely that like should be treated alike. Going hand in hand with state neutrality is the promotion of the values of individualism and autonomy. Individualism is furthered by respect for the individual (the merit principle) regardless of group membership. Autonomy is furthered by freeing the person to make his or her own choices. These principles are expressed through law in the form of a prohibition on discrimination, which makes it unlawful to treat one person less favourably than another on grounds such as race or sex. But, the main problem with discrimination is that a person is subjected to detriment precisely because he or she is attributed with stereotypical qualities based on a 'denigratory notion' of his or her group membership. Although it seems logical to respond to the problem of discrimination by requiring that each person be treated as an individual, this apparent commitment to 'neutrality' disguises an insistence on a particular set of values based on those of the dominant culture. This is because the basic premise, namely that there exists a 'universal individual', is flawed. Although everyone has attributes which are independent of group identities, each person's affinity, sense of history and identity, mode of reasoning and expression of feelings, are constituted partly by group relations. In practice, then, the abstract individual is clothed with the attributes of the dominant culture, religion or ethnicity. The dominant group is seen as a 'universality', rather than for its own cultural, religious or ethnic specificity. This results in denigration of the real value to the individual of his or her own group identity and values and creates strong conformist pressures. The value of difference is therefore negated. The author maintains that the same criticism holds true for a neutral vision of justice as consistency.

100 Fredman 2 383.

101 *Ibid*, referring to Abram 'Affirmative Action' 1321.

102 Vizkelety 2 289. In essence, it views individual ability and merit as the only relevant factors required to achieve success in society.

103 Kentridge 'Equality' 14-3, referring to Aristotle *Ethica Nichomachea* Book V.3 1131a-b, quoted in Westen 'Empty Idea of Equality' 542-3.

people are equal bearers of rights<sup>104</sup> and it views inequality as an aberration which can be eradicated simply by treating all people in the same way.<sup>105</sup>

Formal equality is therefore blind to structural inequality. It ignores actual social and economic disparities between people and sets standards that appear to be neutral, but which, in truth, embody a set of particular needs and expectations that derive from socially privileged or dominant groups.<sup>106</sup>

Reliance on formal equality may therefore exacerbate inequality precisely because it does not take into account existing inequalities, but only the dominant group's expectations.<sup>107</sup> It in fact disregards patterns of disadvantage among certain groups in society.<sup>108</sup> For example, it ignores the fact that women are frequently relegated to jobs at the bottom of employment, and with little job security, and that they are consistently paid lower wages than men.<sup>109</sup> If all people are treated the same in terms of the dominant group's judgements, people who suffered 'disadvantage' not experienced by the dominant group may not be recognised, not to mention being protected and advanced accordingly.<sup>110</sup> Formal equality thus denies the fact that institutions and other social structures often 'harbor subtle forces that favour those who already enjoy the advantages of wealth, education, and social standing, and exclude those who do not'.<sup>111</sup> Incapable of breaking such cycles of discrimination, formal equality has often been viewed as an 'abstract ideal'.<sup>112</sup> In consequence, formal equality views any action that explicitly

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104 De Vos 'Equality for All' 67; Dupper 2 24.

105 De Waal, Currie & Erasmus *Bill of Rights Handbook* 200.

106 De Vos 'Equality for All' 67. It has also been said that it is linked to a given standard dominant in law and does not seek to criticise traditional and/or dominant legal thinking (Wentholt 'Formal and Substantive Equal Treatment' 56-7).

107 De Vos 'Equality for All' 67. Put differently, an apparently neutral criterion, applied equally to two individuals, can therefore, in fact, exacerbate inequality, because its neutrality conceals a bias towards the social or group attributes of one of them (Fredman 1 157).

108 Vizkelety 2 289.

109 *Ibid.*

110 *Op cit* 290.

111 *Op cit* 289.

112 *Op cit* 289-90.

or implicitly uses, for example, race and sex as a criterion for decision making as unlawful, whether directed against or in favour of a disadvantaged group.<sup>113</sup> It rejects affirmative action on moral grounds and does not require 'active' treatment of people.<sup>114</sup> Affirmative action thus does not feature at all in the notion of formal equality.

### **3.1.3 Substantive equality**

Substantive equality, in contrast to formal equality, takes the Aristotelian value further and holds that equality is not simply a matter of likeness.<sup>115</sup> It is, equally, a matter of difference.<sup>116</sup>

'That those who are different should be differently treated is as vital to equality as is the requirement that those who are like are treated alike. In certain cases it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.'

This notion holds, first, that talents and skills are distributed uniformly, that is, that men and women, and whites, blacks and other ethnic groups, have, on average, the same skills and talents.<sup>117</sup> Thus, implementing the notion of equality of *opportunity*<sup>118</sup> would be expected to result in equal outcomes, in the sense that men, women, whites, blacks and ethnic minorities would be represented in positions of influence and power in proportion to their total strength

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113 Dupper 1 278; Fredman 2 383.

114 Wentholt 'Formal and Substantive Equal Treatment' 56.

115 Kentridge 'Equality' 14-3.

116 *Ibid*; Vizkelety 2 291; Wentholt 'Formal and Substantive Equal Treatment' 58. See also Dworkin 1 227 who holds that the right to equality means 'to be treated as equals', but that this does not always mean 'to receive equal treatment'.

117 UNESCO Final Report Prevention of Discrimination par 35.

118 See par 3.1.4 below.

in society.<sup>119</sup> Following this reasoning, it means that any large disparities in result must necessarily be due to the existence of systemic or structural discrimination resulting from certain practices.<sup>120</sup>

Secondly, the notion distinguishes itself sharply from the notion of formal equality. In this regard, it recognises the extent to which opportunities are determined by individuals' social and historical status, including race and gender, as part of a group/s, as opposed to the formal notion which is directed at the individual.<sup>121</sup> Substantive equality thus recognises that discriminatory acts do not occur in isolation – they are part of patterns of behaviour towards groups, such as women, blacks and disabled people.<sup>122</sup>

Thirdly, as the prohibition of unfair discrimination or the 'non-discrimination principle' is in itself insufficient to achieve true equality in a historically oppressed society, 'hard' affirmative action measures are required.<sup>123</sup> These would typically include quotas, goals and reservations for disadvantaged people.<sup>124</sup> Such measures will distribute social goods on the basis of, for example, race and sex. The goal of affirmative action is then to 'bring people up to a level where they can begin the competition more equal in those respects needed to

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119 UNESCO Final Report Prevention of Discrimination par 35.

120 *Ibid.*

121 Dupper 1 280; Du Toit et al *Labour Relations Law* 430; Brodsky 'Constitutional Equality Rights' 246-7. Substantive equality is therefore less likely to be individualistic than formal equality (Vizkelety 2 290). It allows for the examination of social and economic patterns which affect disadvantaged groups, such as high levels of unemployment, poor educational backgrounds and pervasive poverty, and also for the improvement of the remedies developed as a solution to these problems. Under the notion of substantive equality, the indicia of discrimination are also less specific. Isolated instances of prejudice and other overt expressions of bias are not the only manifestations of discrimination. It views the exclusion of certain groups as the cumulative result of a network of policies and practices that are unconsciously woven into the very fabric of institutions – also called 'systemic discrimination' (*op cit* 291). Further differences between formal and substantive equality are, *inter alia*, that the latter recognises that treating all people in a formally equal way is not going to change past patterns of discrimination, because inequality needs to be 'redressed' and not 'simply removed' (Kentridge 'Equality' 14-5).

122 Banton *Discrimination* 8.

123 Davis et al *Fundamental Rights* 59; Vizkelety 2 291; Adam 'Affirmative Action' 231; UNESCO Final Report Prevention of Discrimination par 33.

124 UNESCO Progress Report Prevention of Discrimination par 87.

compete', or to allow groups 'to reach the same "starting line" as the rest of the population'.<sup>125</sup> Affirmative action measures therefore, in essence, seek to correct imbalances where factual inequalities exist. Such measures must then also inevitably lead to proportional representation of groups in, for example, the workplace.<sup>126</sup>

Fourthly, in order to implement affirmative action measures, the notion of substantive equality perceives the state as having a duty to act positively to correct the results/effects of discrimination.<sup>127</sup> It rejects the idea of a neutral state (in contrast to the notion of formal equality) and maintains that a refusal to intervene is itself a positive statement of state support for continuing societal discrimination.<sup>128</sup>

Fifthly, and lastly, a substantive or a 'rich idea' of equality views equality as the participation by, and inclusion of, all groups (which is, in effect, democracy) and requires valuing difference and, at times, treating groups relevantly differently.<sup>129</sup> Substantive equality – the most complete notion of equality relative to the other notions – therefore seems to be the best suited to achieve true equality. It considers discrimination against groups which have been historically disadvantaged to be qualitatively different from discrimination aimed at remedying that disadvantage.<sup>130</sup> A measure that favours relatively disadvantaged groups at the expense of those who are relatively well off is not discriminatory, since the consequence of such a measure is, eventually, a more equal society.<sup>131</sup>

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125 Vizkelety 2 291-2.

126 UNESCO Progress Report Prevention of Discrimination par 90.

127 Dupper 1 280. See De Vos 'Equality for All' 68 who holds that this approach allows the courts to adopt a remedial or 'contextual approach' by taking into account the role of the law in creating and maintaining structural inequalities and disadvantages between groups, based on perceived differences. It acknowledges that inequality results from complex power relations in society and seems to view law as having an important role in 'reordering' these power relations to ensure that all individuals are treated as if they have the same moral worth. 'Disadvantage', here, is equated not with the different treatment of individuals who are born free and equal, but rather with some harmful impact which the differentiation might have on the complainant. In this instance, a determination of harm can be made only within the historical context of the country (see chapter 4 fn 176 below).

128 Dupper 1 280.

129 Fredman 1 157.

130 Dupper 1 280.

131 *Ibid.*

### 3.1.4 Equality of opportunity

Between the two models of formal equality and substantive equality, the notion of equality of opportunity is found.<sup>132</sup> This notion focuses on the individual and on securing fairness for the individual. It reflects respect for efficiency, merit and achievement on a qualified basis.<sup>133</sup> It basically relies on two points. On the one hand, it maintains that talents and skills are not distributed uniformly throughout the human race.<sup>134</sup> On the other, it recognises that structural discrimination exists and distorts the life chances of individuals because of their group membership.<sup>135</sup>

Equality of opportunity therefore combines the individual and social features of discrimination. It recognises that true equality cannot be achieved if individuals begin the race from different starting points.<sup>136</sup> Race- and sex-based policies may thus be used as transitional remedial measures, but only to equalise the starting points of role players.<sup>137</sup> Once this has been achieved, the focus returns to the individual. Or, put differently, only after individuals enjoy equality of opportunity in this sense do they deserve to be treated on the basis of individual merit, without regard to race or sex.<sup>138</sup> This notion explicitly rejects policies which aim to correct imbalances in the workplace by way of quotas or targets whose purpose is equality of outcome.<sup>139</sup> Rather, it holds that substantive equality is unacceptable unless it is the 'natural result' of equal opportunities. It is thus not concerned with the result, except as an indicator of

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132 It has been found that most countries started out with affirmative action programmes consistent with the ideal of equality of opportunities, but, under pressure of political or social motives, gradually replaced this notion with that of substantive equality. Often, the two notions are also confused and legislation does not make it clear which notion of equality it wants to see implemented (UNESCO Final Report Prevention of Discrimination par 38).

133 *Op cit* par 32.

134 *Op cit* par 35.

135 *Ibid.*

136 Dupper 1 279.

137 *Ibid.*

138 Fredman 2 385.

139 *Ibid.*

a flawed process.<sup>140</sup>

Affirmative action within the concept of equality of opportunity will typically allow for measures aimed at skills development (affirmative recruitment) and training in employment, which, in turn, will determine promotion policy and lead to gender- and colour-blind decision making (affirmative preference) – also called ‘soft’ affirmative action (in contrast to the ‘hard’ measures used by substantive equality).<sup>141</sup> These measures will only improve the abilities of women and minorities to compete equally with men and majority groups. Therefore, although these measures may open up more opportunities, they do not guarantee that more women or minorities will in fact be enabled to take advantage of those opportunities, because their capacities may have been limited by the effects of social disadvantage.<sup>142</sup> Such measures also do not guarantee that resources will be available to ensure a genuine equalisation of starting points.<sup>143</sup>

Equality of opportunity has further been criticised on the ground that the notion: (a) misconceives the entrenched structure of discrimination; (b) will require a lengthy period of time to bring everybody to the same starting line and produce a social order free of traces of past, structural discrimination;<sup>144</sup> (c) has insufficient power to achieve the structural change it seeks to achieve;<sup>145</sup> and (d) concentrates only on specific action in assessing whether there should be legal intervention, while ignoring the broader picture.<sup>146</sup> It is also not clear whether the notion of equality of opportunity is only a narrow procedural obligation, or a broader substantive one.<sup>147</sup> The procedural view of equality of opportunity would involve the removal of barriers such as word-of-mouth recruitment or non-job-related selection criteria. A more

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140 UNESCO Final Report Prevention of Discrimination par 32.

141 *Ibid.*

142 Barnard & Hepple ‘Substantive Equality’ 566ff; Dupper 1 279.

143 Fredman 2 385.

144 UNESCO Progress Report Prevention of Discrimination par 87.

145 Fredman 2 385.

146 UNESCO Progress Report Prevention of Discrimination par 87.

147 Barnard & Hepple ‘Substantive Equality’ 566.

substantive approach to equality of opportunity would require a range of other special measures, or 'positive action', to compensate for disadvantages. These would be similar to affirmative action measures under the notion of substantive equality.

### **3.2 Affirmative action**

It seems, then, that the notion of equality chosen by the legislature determines whether an individual- or group-based approach is followed, and whether certain assumptions are made about a just social order, or whether actual disparities as a result of discrimination are taken into account. This, in turn, determines whether only the non-discrimination principle is applied, or whether, in addition to the non-discrimination principle, affirmative action measures are implemented. If affirmative action is in fact implemented under the notion of substantive equality or under equality of opportunities, the notion of equality chosen also determines the nature of, and the limits to, affirmative action measures.



### 3.3 Different values underlying equality

#### 3.3.1 Introduction

It is generally held that other values underlie equality.<sup>148</sup> These include dignity, restitution or remedy, redistribution and democracy.<sup>149</sup>

#### 3.3.2 Dignity

Dignity as a value (an elusive concept itself and one that is difficult to define with precision) is considered to be what gives a person his or her intrinsic value or worth.<sup>150</sup> This interpretation can be traced back to the philosopher, Kant.<sup>151</sup> He argued that human beings' capacity for rational choice makes them uniquely valuable and confers on them 'dignity'. This capacity then gives rise to a special moral status that separates human beings from all other creatures. Human beings are thus owed a special kind of respect. In particular, they must be treated as ends in themselves, and not as a mere means to someone else's, or society's, ends.<sup>152</sup> Kant held that<sup>153</sup>

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148 Westen 'Empty Idea of Equality' 547-8; 577-8; 592-6 suggests that the idea of equality is 'empty in content'. The author basically argues that, for the principle of 'equality' – the proposition in law and morals that people who are alike should be treated alike and that people who are unlike should be treated as unlike – to have meaning, it must incorporate some external values that determine which people and treatment are alike. However, once these external values are found, the principle of equality becomes superfluous. Equality is thus a 'circular' concept: 'It tells us to treat like people alike; but when we ask who "like people" are, we are told that they are "people who should be treated alike"'. He holds that equality derives its substance entirely from other rights (*op cit* 592). Thus, he argues, equality is an 'empty vessel' with no substantive content of its own (*op cit* 547; 578). And, as equality also tends to cause confusion and logical errors, the idea of equality as an explanatory norm should consequently be abandoned (*op cit* 542; 596).

149 Fredman 1 155.

150 De Waal, Currie & Erasmus *Bill of Rights Handbook* 231; Henkin 'Human Dignity' 210-1; Dworkin 'Taking Rights Seriously' 198-9; Parent 'Constitutional Values' 71.

151 Kant *Moral Law* 96; Melden 'Dignity and Worth' 29-35; Meyerson *Rights Limited* 12.

152 Kant *Moral Law* 96; Jones *Kant's Principle of Personality* 127; Melden 'Dignity and Worth' 30-3.

153 Kant *Moral Law* 996-7; Melden 'Dignity and Worth' 30.

'[t]hat which constitutes the sole condition under which anything can be an end in itself has not merely a relative value – that is, a price – but has an intrinsic value – that is, dignity. ...[m]orality is the only condition under which a rational being can be an end in himself. Therefore, morality, and humanity so far as it is capable of morality, is the only thing which has dignity'.

The importance of the value of dignity is thus unquestionable, and, since dignity is included in the humanity of all people, no one can be excluded from its reach.<sup>154</sup> Consequentially, dignity is 'above all price and so admits of no equivalent'.<sup>155</sup> It is seen as the<sup>156</sup>

'source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow'.

Equality, for example, flows from the right to dignity – as every person possesses human dignity in equal measure, everyone must be treated as equally worthy of respect.<sup>157</sup> Put differently, the right to equality is premised on the idea that every person possesses equal human dignity.<sup>158</sup> Unfair discrimination against people on grounds of personal attributes denies recognition of the very attribute that is common and equal to all, namely human dignity.<sup>159</sup>

The emphasis on dignity underlying equality is compatible with a range of different

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154 Fredman 1 155..

155 Kant *Moral Law* 96-7; Melden 'Dignity and Worth' 30; De Waal, Currie & Erasmus *Bill of Rights Handbook* 231.

156 De Waal, Currie & Erasmus *Bill of Rights Handbook* 231.

157 *Ibid.* See Albertyn & Goldblatt 'Jurisprudence on Equality'; Cowen 'Equality Jurisprudence'; Dlamini 'Equality or Justice'; De Vos 'Equality for All' for criticism of the South African Constitutional Court's jurisprudence in which 'dignity' is used as the main value in interpreting equality (discussed in chapters 3; 4 below).

158 De Waal, Currie & Erasmus *Bill of Rights Handbook* 232.

159 *Ibid.*

approaches to equality. Fredman<sup>160</sup> and McLachlin<sup>161</sup> provide the basic principles for this argument. Dignity, which is often linked to the freedom of the individual to make choices (as pointed out above), could support a minimal notion of equality as equal freedom or absence from state interference and is consistent with wide divergence in wealth and quality of life. Dignity could also entail policies which aim to achieve equal welfare among individuals, or, alternatively, an equal share of the resources distributed by the economic structure. Alternatively, dignity could entail the development of human potential based upon individual ability. For individuals who can achieve significantly once the burdens of stereotyping and stigma are removed, this notion holds great promise. But for those whose capacities are either naturally limited or have been limited by the effects of cumulative disadvantage, equality conditional on merit is not as promising.

### **3.3.3 Remedial or restitutionary**

The remedial or restitutionary value connotes that equality is aimed at compensating individuals for the harm and detriment caused by prejudice and the ongoing effects of past discrimination. This value can, at one end of the spectrum, provide an individualistic vision, which entails that an individual victim be compensated by the person at fault. At the other end, it can also provide for a group-based approach which does not focus on individual merit and individual fault, but is aimed mainly at removing discriminatory barriers, regardless of who or what has been responsible therefor. At the end of this spectrum, the remedial value merges with the value of redistribution.

### **3.3.4 Redistribution**

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160 Fredman 1 155-6. Fredman 1 provides the basic reasoning for the values underlying equality discussed in pars 3.3.3; 3.3.4; 3.3.5 below. See also Spann 1 8-9; Young *Politics of Difference* 15-33; 45; UNESCO Final Report Prevention of Discrimination par 106. Liddle 'Affirmative Action' 848-50 provides some of the basic reasoning for the remedial and redistribution values underlying equality discussed in pars 3.3.3; 3.3.4 below.

161 McLachlin 'Most Difficult Right' 22ff.

Equality as redistribution aims to redress previous disadvantage and ensure equal distribution of social goods (often associated with substantive equality). This notion, however, is vague in that it does not always specify the content of the 'results' of the process. It is unclear whether representation of the designated groups is measured in terms of jobs, representative positions or wealth. In the workplace, a focus on better representation of the targeted groups in higher-status jobs may be said to be the easiest to quantify and justify in distributive terms. But, it may be more difficult to know how to distribute money or resources. It is argued that the distributive paradigm, because it focuses on the allocation of material goods, ignores social structures such as decision-making power, the division of labour and culture, and the symbolic meanings attached to people and things. Consequentially, it is held that the focus should instead be on structures which exclude people from participating in determining their own actions. This reasoning then leads to the last value underlying equality, namely democracy.

### **3.3.5 Democracy**

In this regard, equality laws aim to eliminate flaws in (mostly majoritarian) democracies. Given that past discrimination or other social mechanisms have blocked the ways of participation by minorities (or a majority as in South Africa), legal rights, particularly equality laws, are needed both to compensate for the absence of the political voice and to open up avenues for greater participation in the future.

## **4 CONCLUSIONS**

In the preceding discussion it was shown that the concept 'equality' can be traced as far back as the writings of philosophers of the sixteenth century. Further, international law was reviewed and it was shown that the concept has been used since early times, for example in the UN Charter. It is noticeable that the value 'human dignity' has been used hand in hand with the concept 'equality'. The Universal Declaration of Human Rights for example holds that 'all

human beings are born free and equal in dignity and rights'.<sup>162</sup> These two concepts appear to be intertwined and give meaning to each other.<sup>163</sup>

The International Convention on the Elimination of All Forms of Racial Discrimination<sup>164</sup> and the International Convention on the Elimination of All Forms of Discrimination against Women<sup>165</sup> allow for special 'measures' for the purpose of securing adequate advancement of certain racial or ethnic groups, or individuals and women, in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms. However, such conventions explicitly provide that such measures must not lead to the maintenance of separate rights for different groups, and must not be continued with after the balance has been restored. Once adopted, such special measures should be re-examined periodically to ascertain whether they are still needed and whether they are still effective.

The international exposition of the relationship between non-discrimination and affirmative action is endorsed.<sup>166</sup> In this regard, it was shown that, in practice, factual inequalities are often found as a result of systemic discrimination practised over years on the basis of, for example, race, sex, ethnic minorities and disability. To treat these people as being equal to others who have not been subjected to disadvantage would not make sense. Therefore, affirmative action measures are needed to re-establish a balance in such a society and to eliminate inequalities. Different treatment, in this sense, is acceptable. Further, affirmative action measures are generally not seen as discriminatory, as the term 'discrimination' is used exclusively to connote 'arbitrary', 'unjust' or 'illegitimate distinctions'.<sup>167</sup>

In addition, the relationship or connection between the ground on which a distinction is made and the right in regard to which the distinction is practised is important. There must be a 'sufficient connection' between the right and the ground. The general goal pursued by the law

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162 See par 2.1.2.3 above.

163 The link between dignity and equality will be investigated in later chapters as well (see chapters 3; 4; 5; 6 below).

164 Articles 1(4) and 2(2).

165 Article 4.

166 See pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B above.

167 *Ibid.*

under scrutiny is not decisive. The ‘relevance’ of the particular ground with respect to the particular right is the decisive criterion. Distinctions based on grounds which are ‘irrelevant’ to the particular right are not valid. In essence, then, affirmative action policies are admissible only in so far as they do not contravene the principle of non-discrimination.<sup>168</sup>

It was seen that the ILO promotes social justice for workers.<sup>169</sup> In endeavouring to do this, it creates international labour standards in the form of *inter alia* conventions and carries out programmes of technical cooperation to assist governments in making these policies effective in practice. ILO conventions place a binding obligation on member states that ratify them to give effect to the provisions thereof.<sup>170</sup> The Declaration of Philadelphia, and the recent Declaration on Fundamental Principles and Rights at Work, reaffirmed the principle of the elimination and suppression of discrimination in the workplace.<sup>171</sup> ILO Convention 111 is particularly important as the most comprehensive instrument to address the prohibition of discrimination and to advance affirmative action in the workplace. Supervisory bodies have accepted that, while the text of ILO Convention 111 provides for equality of opportunity and treatment, with the aim of eliminating discrimination, the manner of doing so should be left to each country’s discretion.<sup>172</sup> These bodies have, however, confirmed that affirmative action measures must be proportional to the nature and scope of protection needed and should be re-examined periodically, and that they are temporary.<sup>173</sup> It was further seen that the grounds of *nationality and citizenship* are *not* explicitly covered in ILO Convention 111.<sup>174</sup>

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168 *Ibid.*

169 See par 2.1.3 above.

170 See par 2.1.3.1 above.

171 See pars 2.1.3.2; 2.1.3.3 above.

172 See par 2.1.3.4(b) above.

173 See par 2.1.3.4(c) above.

174 See par 2.1.3.4(d) above.

The three different notions of equality – formal and substantive equality, and equality of opportunity – were subsequently reviewed.<sup>175</sup> It was explained how the concept of affirmative action fits into the structures of the different notions of equality, if at all. The differences between the three notions were emphasised.

It was pointed out that formal equality – an individual-based notion and presupposing a just social order – will not lead to true equality and may exacerbate inequality, because it does not take into account existing inequalities.<sup>176</sup> It became clear that, if all people are treated the same in terms of the dominant group's judgements, people who suffered disadvantage not experienced by the dominant group may not even be recognised, let alone be protected and advanced. Thus, formal equality does not recognise affirmative action at all.

Substantive equality, in contrast to formal equality, was shown to focus on groups and to recognise structural discrimination against groups such as women, blacks and disabled people, and not to presuppose a just social order.<sup>177</sup> It views the 'non-discrimination principle' as insufficient to achieve true equality in a historically oppressed society and requires affirmative action measures. These may include 'hard' measures such as quotas, goals and reservations for disadvantaged people. It was concluded that substantive equality may ensure true equality.

A third notion of equality, namely equality of opportunity, was reviewed.<sup>178</sup> This notion focuses on the individual and recognises that true equality cannot be achieved if individuals begin the race from different starting points. It therefore combines the individual and social features of discrimination and recognises that structural discrimination distorts the life chances of individuals because of their group membership. Affirmative action may thus be used as a transitional, remedial measure until the starting points of people have been equalised. Thereafter, the focus shifts back to the individual. Affirmative action within the concept of equality of opportunity allows for 'soft' affirmative action measures aimed at skills development

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175 See par 3 above.

176 See par 3.1.2 above.

177 See par 3.1.3 above.

178 See par 3.1.4 above.

and training in employment.

It became clear that affirmative action cannot be judged separately from equality. Whereas the concept 'equality' entails a prohibition on discrimination on various grounds, it also embraces affirmative action measures in an effort to achieve equality.

Finally, other values which underlie the principle 'equality' were described.<sup>179</sup> These include the values of dignity, remedy, redistribution and democracy. The value of dignity – associated with Kant – is what is considered to give an individual his or her intrinsic worth. Dignity has been explained as the 'source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow'.<sup>180</sup> Equality, for example, flows from the right to dignity: as every person possesses human dignity in equal measure, everyone must be treated as equally worthy of respect.<sup>181</sup> The second value, remedial or restitutionary, basically entails that equality is aimed at compensating individuals for the detriment caused by past discrimination.<sup>182</sup> The third value, redistribution, aims to redress previous disadvantage as well as to ensure equal distribution of social goods.<sup>183</sup> The fourth and last underlying value is democracy, which focuses on equality laws aiming to eliminate flaws (in mostly majoritarian majorities, but also in the old minority democracy in South Africa) of past discrimination which have blocked the channels for participation.<sup>184</sup>

The focus now turns to South Africa to establish to what extent international law is applied in the country, and what notion of equality is followed in the country. A historical and theoretical exposition of the disregard for the equality of a majority in South Africa will be given. It will be shown how the country started out as a Dutch colony, later seized by the British, and, in time, developed into an apartheid society with racist and sexist laws and

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179 See par 3.3 above.

180 See par 3.3.2 above.

181 *Ibid.*

182 *Ibid.*

183 See par 3.3.4 above.

184 See par 3.3.5 above.



practices. It will also be shown that only recently, in the early 1990s, has the country embraced democracy, the notion of substantive equality and affirmative action in an effort to redress the inequalities of the past.