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**CHAPTER 3**

**HISTORICAL AND THEORETICAL FOUNDATION: SOUTH AFRICA**

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## 1 INTRODUCTION

South African society was, for centuries, deeply divided and unequal. Colonialism, patriarchy and apartheid led to racist and sexist practices and to laws resulting in systemic, structural discrimination and inequality.<sup>1</sup>

## 2 HISTORICAL OVERVIEW

### 2.1 Introduction

The southern African region was originally inhabited by the indigenous Khoikhoi or Khoisan (Hottentots and Bushmen) before colonisation in the seventeenth century.<sup>2</sup>

### 2.2 Colonialism and slavery

When trade expanded between European and Asian countries, the Dutch East India Company established a halfway house at the southern tip of Africa – the Cape – to supply water and essential foodstuffs to ships en route to their trade destinations.<sup>3</sup> In contrast to

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1 Thompson 1 22; O'Regan 'Addressing the Legacy of the Past' 14; Andrews 'Affirmative Action' 49; Cheadle, Davis & Haysom *Constitutional Law* 53-54; De Waal, Currie & Erasmus *Bill of Rights Handbook* 199; Thompson 2 265; Explanatory Memorandum to the Employment Equity Bill 6, referring to the ILO Country Review in 1996 which pointed out that South Africa had the highest levels of inequality of any country in the world for which the ILO had data (see par 3.4.4 below for the inequality findings of the ILO Country Review). The history of colonialism and apartheid has been well documented and needs no repeating here. See, for example, Gann & Duignan 1; Gann & Duignan 2; Jacobs *Environment, Power, and Injustice*; Perry *Apartheid: A History*; Coleman *A Crime against Humanity*; Beck *History of South Africa*; Thompson 2; Worden *Modern South Africa*; Roberts *South Africa 1948-94*. Die Burger 'Verslag: Armoede en die Gaping tussen Ryk en Arm' 19 December 2003 indicated that, at 0,6 percent, the Gini coefficient (which measures inequality on a scale from 0 (totally equal) to 1 (which implies that 1 percent of the population earns 100 percent of the income)) in respect of South Africa for 2004 was one of the highest in the world. This means that 45 percent of South Africans earn a monthly income of R1 871 per family of 4,7 people.

2 Worden *Modern South Africa* 7-8; Thompson 2 6-7; Van Jaarsveld *Van Riebeeck tot Vorster* 3; 14-7; Glaser & Possony *Victims of Politics* 205.

3 In 1652. O'Regan 'Addressing the Legacy of the Past' 14; Thompson 2 xix; 31-69; Worden *Modern South Africa* 9; Van Jaarsveld *Van Riebeeck tot Vorster* 3; 9; 18; 430; Ncholo 'Southern African

Canada and the US, South Africa thus started out as a Dutch, and not a British or French, colony.<sup>4</sup> In time, grain and cattle farming increased, the boundaries of the occupied land were expanded, and the grazing lands of the indigenous people were occupied.<sup>5</sup> The outpost at the Cape gradually developed into a permanent settlement.<sup>6</sup> The first shipload of slaves was imported from Dahomey (on the west coast of Africa) and another shipload of Angolan slaves was captured from the Portuguese.<sup>7</sup> The British, although abolishing slavery in 1807, maintained racial discrimination in law and practice until about 1834.<sup>8</sup>

In 1795, when France declared war on Holland and England, the British took control of the Cape from the Dutch to safeguard the strategic sea route to India. Subsequently, the British restored the Cape to Holland, but reconquered it in 1806.<sup>9</sup> From then onwards, the Cape was a British colony. Further colonies were also established – in the Transvaal, Orange Free State and Natal.<sup>10</sup> British settlers arrived in 1820 and, thereafter, German and French settlers followed.<sup>11</sup> The process of dispossession of the indigenous peoples accelerated in the nineteenth century, with wars being fought in the Eastern Cape between the British and Dutch settlers on the

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Case' 415.

- 4 Hahlo & Kahn *Union of South Africa* 1 (see chapter 5 par 2.2; chapter 6 par 2.2 below).
- 5 Worden *Modern South Africa* 9-13; Thompson 2 6.
- 6 Hahlo & Kahn *Union of South Africa* 3.
- 7 Thompson 2 36; Van Jaarsveld *Van Riebeeck tot Vorster* 31. By the early eighteenth century, most of the slaves came from Mozambique, Madagascar, Indonesia, India and Ceylon (Sri Lanka), whereas, in America, they came mainly from Africa (see chapter 5 par 2.2 below). Later on, large numbers of Chinese workers were imported to work on the mines (Thompson 2 xxi). Indians were imported from 1860 as indentured labourers for the Natal sugar plantations (Hahlo & Kahn *Union of South Africa* 8; Van Jaarsveld *Van Riebeeck tot Vorster* 90; 383-96).
- 8 O'Regan 'Addressing the Legacy of the Past' 14; Van Jaarsveld *Van Riebeeck tot Vorster* 36; 79.
- 9 Hahlo & Kahn *Union of South Africa* 4-5; Thompson 2 xix-xx; 51-2; Van Jaarsveld *Van Riebeeck tot Vorster* 11; 77.
- 10 Worden *Modern South Africa* 12.
- 11 Thompson 2 xx; 55; Worden *Modern South Africa* 12; Van Jaarsveld *Van Riebeeck tot Vorster* 87; 89; Wiehahn Report xx. Eventually, a group of 'coloured' people resulted because of the contact between Europeans, the Hottentots and slaves from various areas (Van Jaarsveld *Van Riebeeck tot Vorster* 14; 18-38; 396-406).

one hand and the indigenous Xhosa people on the other, and, in Natal, between the British and the Zulu Kingdom.<sup>12</sup>

### 2.3 Independence from the British

In time, colonists developed a desire to have an own identity and autonomy. The Cape Colony was granted limited self-government in 1853.<sup>13</sup> The Colonial Laws Validity Act of 1865 was passed to provide for greater powers, but some restrictions remained.<sup>14</sup> Representative and responsible government was granted in 1872.<sup>15</sup> At the beginning of the twentieth century, after the defeat of the two Boer Republics, the British Empire granted parliamentary government to the four colonies, but with the right to vote being given only to white people.<sup>16</sup>

## 3 LEGISLATIVE FRAMEWORK

### 3.1 Constitution

A written constitution (with no bill of rights) based on the British Westminster system was drafted in 1909 and created a unitary state with parliamentary sovereignty.<sup>17</sup> This

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12 O'Regan 'Addressing the Legacy of the Past' 14; Thompson 2 xx; 70-109; Worden *Modern South Africa* 20-1; 25-7; Van Jaarsveld *Van Riebeeck tot Vorster* 54-62; 98-114.

13 Wiechers *Staatsreg* 186-7.

14 Bekink *South African Constitutional Law* 52; Wiechers *Staatsreg* 186-7. It laid down that colonial legislation would be invalid under British law only if it were clear that the British Parliament had intended the law to apply to a specific colony.

15 Wiechers *Staatsreg* 186-7.

16 Thompson 2 xx-xxi; 149-51; Wiehahn Report xxi.

17 South Africa Act of 1909. Thompson 2 150; Worden *Modern South Africa* 29; Van Jaarsveld *Van Riebeeck tot Vorster* 247-69; Bekink *South African Constitutional Law* 51; Wiechers *Staatsreg* 185; 190; Ncholo 'Southern African Case' 415. But still as part of the British Empire with the British Parliament being able to legislate for South Africa (Cockram *Constitutional Law* 19-22). In time, further statutes were enacted that lessened the powers of the British Parliament to legislate for a dominion (which it was termed after 1907). In 1926, Canada and South Africa became part of the British Commonwealth of Nations. This implied that all previous dominions were equal in status,

differed from the system of constitutional supremacy which the country was to enjoy from 1993 onwards.<sup>18</sup> Under the former system, the four colonies became the provinces of the Union of South Africa,<sup>19</sup> but the black peoples of South Africa were not included.<sup>20</sup> Soon the Natives Land Act<sup>21</sup> was passed to limit African land ownership to 'Native reserves' for blacks.<sup>22</sup> A series of segregation laws followed.<sup>23</sup> As early as 1924, a 'civilised labour policy' was implemented to distinguish between 'civilised' white and 'uncivilised' black labour, the main aim of which was to protect poor, white labour.<sup>24</sup>

### 3.1.1 *Early case law*

#### 3.1.1.1 *Moller case*

In an early case, *Moller v Keimoes School Committee*,<sup>25</sup> the interpretation of legislation providing for separate education of children of European descent gives some

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'though united by a common allegiance to the Crown' (Wiechers *Staatsreg* 199-201). Only in 1934 did the South African Parliament pass the Status of the Union Act 69 of 1934, which gave the South African Parliament sovereignty (Cockram *Constitutional Law* 21).

18 See par 3.4.2 below.

19 Hahlo & Kahn *Union of South Africa* 7; 118-27; Wiechers *Staatsreg* 233-7; Thompson 2 150; Van Jaarsveld *Van Riebeeck tot Vorster* 13; Bekink *South African Constitutional Law* 59. Subsequently, the Union became independent of the Commonwealth as a result of the passing of the Republic of South Africa Constitution Act 32 of 1961 (Van Jaarsveld *Van Riebeeck tot Vorster* 318-23). The Act provided that Parliament would be the sovereign legislative authority in and over the Republic, and would have the full power to make laws for the peace, order and good governance of the Republic (s 59(1)). Moreover, the courts could not challenge the validity of an act of Parliament (s 59(2)) (Wiechers *Staatsreg* 247-50).

20 Ncholo 'Southern African Case' 415.

21 27 of 1913.

22 Worden *Modern South Africa* 55. Totalling 7 percent of the area of the (then) Union of South Africa. The Native Trust and Land Act 18 of 1936 increased this to 11,7 percent (Thompson 2 xxi; 163). The reserves became reservoirs of cheap, unskilled labour for white farmers and industrialists. This meant that the majority of black males were absent from the reserves, working in the Union of South Africa. In the late 1930s, large numbers of blacks in the reserves went to the mines where they worked in unskilled positions, with the skilled jobs being reserved for whites (Thompson 2 164-8).

23 Thompson 2 xxi; 154-86.

24 Van Jaarsveld *Van Riebeeck tot Vorster* 365; 413.

25 1911 AD 635.

indication of the pressure exerted on the courts as a result of racial sentiments among the European population.<sup>26</sup>

'As a matter of public history, we know that the first civilised legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, whom the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality ... These prepossessions, or, ... prejudices, have never died out, and are not less deeply rooted at the present day among the Europeans in South Africa, whether of Dutch or English or French descent. *We may not from a philosophical or humanitarian point of view be able to approve this prevalent sentiment, but we cannot, as judges, who are called upon to construe an Act of Parliament, ignore the reasons which must have induced the legislature to adopt the policy of separate education for European and non-European children*' (own emphasis).

It is therefore clear that the descendants of the European settlers limited themselves racially and culturally. They exercised control over the black people, which they 'defined out' of their idea of a nation.<sup>27</sup>

### 3.1.1.2 *Separate but equal: Rasool case*

Later on, the Appellate Division interpreted equality in terms of the 'separate-but-equal' principle. The case of *Minister of Posts and Telegraphs v Rasool*<sup>28</sup> is a good example of this. Here, the respondent (of Indian descent) called into question the instructions of the Postmaster-General to divide the (substantially equal) facilities in post offices into two parts – one for Europeans only and the other for non-Europeans only. Three of the four judges held that the instructions were valid.<sup>29</sup> Two judges held that racial discrimination coupled with equality was no more unreasonable than discrimination between the sexes, or between adults and minors. A third judge held that racial

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26 At 643.

27 Glaser & Possony *Victims of Politics* 376-7.

28 1934 AD 167.

29 At 175-6; 177-8; 181-3.

discrimination was not per se unreasonable. One dissenting judge condemned this type of differentiation and held it to be unreasonable.<sup>30</sup>

### *Evaluation of early case law*

The courts seem to have perpetuated and enhanced the inequality between white and black in early jurisprudence. It moreover appears that there was little hope that the judiciary would go further than the narrow legislation of Parliament, which adhered to 'separate-but-equal' principles.

## **3.2 Apartheid**

Racist and sexist practices and laws, and 'separate-but-equal' practices, were continued with under the apartheid government which came into power in 1948.<sup>31</sup> Legislation provided for racially segregated societies for blacks, whites and coloureds. This was achieved by means of pass laws (controlling the free movement of African people); racial classification; the prohibition of intermarriage between whites and people of other races; separate and unequal education systems, health services and civic amenities (such as parks, beaches, libraries and public transport); and racially segregated, zoned living areas and workplaces.<sup>32</sup> In addition, separate 'homelands' and separate citizenship were created for the black population of South Africa.<sup>33</sup>

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30 At 191-3.

31 Van Jaarsveld *Van Riebeeck tot Vorster* 296-326; Wiehahn Report xxiii-v.

32 O'Regan 'Addressing the Legacy of the Past' 14; De Waal, Currie & Erasmus *Bill of Rights Handbook* 199; Labour Market Report 138-9; Thompson 2 xxi; Worden *Modern South Africa* 83-5; 106-36; Glaser & Possony *Victims of Politics* 376-7. See also the Native Land Act 27 of 1913, which segregated land ownership; the Natives (Urban Areas) Act 21 of 1923 and the later Natives (Urban Areas) Consolidation Act 25 of 1945, which provided for residential segregation in towns; the Native Trust and Land Act 18 of 1936; the Group Areas Act 41 of 1950 and, later, 77 of 1957; the Population Registration Act 30 of 1950; the Reservation of Separate Amenities Act 49 of 1953; the Prohibition of Mixed Marriages Act 55 of 1949. Sexual intercourse between white people and people of colour was penalised by the Immorality Act 23 of 1957.

33 Van Jaarsveld *Van Riebeeck tot Vorster* 453-77. See the Promotion of Bantustan Self-government Act 46 of 1959, which was subsequently replaced by the National States Citizenship Act 26 1970; the Constitution of Bantu Homelands Act 21 of 1971; the Status of the Transkei Act 100 of 1976;



In the workplace, discrimination was institutionalised by the apartheid government by means of laws such as the Industrial Conciliation Act<sup>34</sup> and the Mines and Works Act,<sup>35</sup> which provided for job reservation for whites.<sup>36</sup> Black workers were covered separately by the Black Labour Relations Regulation Act.<sup>37</sup> Moreover, the Wage Act<sup>38</sup> allowed for differentiations in wage determinations based on race and sex, the Group Areas Act<sup>39</sup> restricted, in particular, the mobility of black, women work seekers, and the Unemployment Insurance Act<sup>40</sup> provided for unequal benefits for men and women.

In the public service, discrimination based on sex was allowed in terms of the Public Service Act.<sup>41</sup> Although discrimination on the grounds of sex has not been as visible and widely condemned as discrimination on the basis of race, it has nevertheless resulted in patterns of significant disadvantage.<sup>42</sup> Policies of job reservation for whites and the little training (if any) offered to employed blacks and females placed blacks and females at a disadvantage where skills were concerned.<sup>43</sup> Poverty and inequality thus resulted from

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the Status of Bophuthatswana Act 89 of 1977; the Status of Venda Act 107 of 1977; the Status of Ciskei Act 110 of 1981. The four territories mentioned were granted 'independence' and all blacks were entitled to vote, but only in their homelands. It has been stated that the most essential structural aspect of separate development was the assignment of homeland citizenship to all blacks, and its corollary, the limitation of the right to vote in white areas to South Africans classified as Europeans (Glaser & Possony *Victims of Politics* 357) (see also chapter 4 par 2.3.3.3 below).

34 28 of 1956. Repealed by Act 94 of 1979, previously Act 11 of 1924 and Act 36 of 1937.

35 12 of 1911 and, later, 27 of 1956. The last-mentioned Act excluded blacks from collective bargaining. A (subsequent) separate Act was passed for them, namely the Native Labour Regulation Act 15 of 1911, followed by the Native Labour (Settlement and Disputes) Act 48 of 1953 and the Black Labour Relations Regulation Act 48 of 1953. This last Act was repealed by Act 38 of 1987 (see the Wiehahn Report 665-724 part 6 chapter 3 par 3.23.2 for a general exposition on the discriminatory provisions of the Mines and Works Act and recommendations to amend these at that stage).

36 The mining sector was the first to use the colour bar.

37 48 of 1953.

38 27 of 1925; later, 44 of 1937; and, still later, 5 of 1957.

39 41 of 1950; later, 77 of 1957 (see Thompson 1 22).

40 53 of 1946; later, 30 of 1966.

41 54 of 1957; later, 111 of 1984.

42 *Brink v Kitshoff* (*Brink*) 1996 (4) SA 197 (CC) at par 44.

43 Labour Market Report 139.

apartheid's workings.<sup>44</sup>

The foregoing discussion has sketched the broader historical and legislative pictures. The focus now shifts to some of the major steps taken to bring about equality in South Africa.

### **3.3 A first step towards equality: amendments to the Industrial Conciliation Act 28 of 1956**

#### **3.3.1 Wiehahn Commission**

The Wiehahn Commission<sup>45</sup> ushered in the first major changes in the South African workplace with regard to the attainment of equality. The Commission investigated the South African labour dispensation in the late 1970s with a view to providing more effectively for the 'changing needs of the times'.<sup>46</sup> It took as its points of departure: (a) the use of the labour field in South Africa as the conflict area for the acquisition of social, political and other rights for the workers of the country (as was found in other countries); and (b) the fact that changes in labour laws would have a ripple effect on other spheres of society.<sup>47</sup> It viewed change over a broader front in society as 'essential'. The Commission mainly recommended amendments to the Industrial Conciliation Act.<sup>48</sup> Under this Act, black employees were excluded from the definition of 'employee' and unions with black members were not able to register. They were thus excluded from statutory bargaining and conciliation forums.

As a starting point, the Commission recognised that the South African government had given a clear indication of its intention to pursue a policy of non-discrimination.<sup>49</sup> In

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44 *Op cit* ix.

45 Appointed by the government on 8 July 1977 with Professor NE Wiehahn as Chairperson.

46 Wiehahn Report xxxii.

47 Wiehahn Report Notes par 3.9.9.

48 28 of 1956.

49 Wiehahn Report part 5, par 4.127.11.

consequence, it held it to be imperative that certain standards be set to serve as guidelines for the eventual development of a code of fair labour practices. It recommended that fair and equal employment practices be developed by the (then yet to be established) Industrial Court through the concept of an 'unfair labour practice'. There were two particular reasons for this recommendation. First, the Constitution<sup>50</sup> of the Republic of South Africa (at that stage) was considered not to be an appropriate point from which to address the problem, as it approached the country's constitutional dispensation from a structural point of view and was not sufficiently orientated towards the individual to allow for developments in the desired direction.<sup>51</sup> Instead, the Commission held that the general labour laws were far more appropriate for the enunciation of principles on which a 'code of fair labour practices' could be based. Secondly, the decisions of the Industrial Court, being based on fairness and equity,<sup>52</sup> would, in due course, provide an invaluable source for the unfair labour practice code.<sup>53</sup>

It held, however, that the removal of discrimination could not be achieved by merely repealing laws or simply attempting to curb, or reverse, discriminatory practices and customs by judicial decision.<sup>54</sup> Removal of discrimination, it stated, also involved 'the arduous evolution of different attitudes within the society'.<sup>55</sup> This process, the Commission recommended, should be aided by a programme of public guidance and education.<sup>56</sup> The Commission pointed to evidence which showed that much more 'deliberate and assertive action' against discrimination was called for in a country such as South Africa with its heterogeneous work forces, and stated:<sup>57</sup>

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50 32 of 1961 (and, later, 110 of 1983).

51 Wiehahn Report part 5, par 4.127.11.

52 *Op cit* part 1 par 4.25.14; part 5, par 4.127.17.

53 *Op cit* part 5, par 4.127.12.

54 *Ibid.*

55 *Ibid.*

56 *Ibid.*

57 *Op cit* part 5, par 4.127.14. It is submitted that, although not spelt out in so many words, the first subtle references to the affirmative action measures to be applied in future can be read between these lines.

‘The Commission cannot avoid the conclusion that in *due course* discrimination in the field of labour on the grounds of race, colour, sex, political opinion, religious belief, national extraction or social origin will have to be *outlawed and criminalized* in South Africa’s labour dispensation. It is estimated that less than 20 percent of the labour force in the South African economy at the end of this century will consist of Whites, Coloured and Asians, the vast majority being Black. The outlawing of discrimination will therefore not only be a valid source for the short-term in order to overcome the disadvantages to which Blacks are at present being subjected, but will in the not too distant future also be needed to forestall the likely development of *discrimination against minorities*; a factor to bear in mind in this regard is the *pressures to which South African subsidiaries of transnational corporations are being subjected* (own emphasis).

The Commission however opined that the timing was not right for the introduction of complete, prohibitory measures in South African legislation and suggested that further studies be conducted in this regard.<sup>58</sup>

In the context of what constitutes fairness, the Commission wisely held.<sup>59</sup>

‘It is vain to suppose solutions will always be attained by the logic and general propositions of law: decisions on the grounds of equity or fairness must therefore be regarded as a correction of law where the law is *defective owing to its universality, or where it is silent owing to its conservatism*’ (own emphasis).

The Commission deracialised the Industrial Conciliation Act, and found and

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58 *Op cit* part 5, par 4.127.15. See also the Wiehahn Report Notes, which constitute the Chairperson’s own view and go further than the actual findings. He held that merit should continue to be the overriding criterion when it comes to employment, training, promotion and remuneration (par 3.9.2). Further, equality and equal opportunity must be among the main characteristics of the industrial relations system, with a statutory prohibition on discrimination on the grounds of factors beyond the control of a person, such as skin colour, race and sex, and on the grounds of factors which, according to the society, it would be unreasonable to use as grounds for discrimination, for example religion, citizenship, language and culture (par 3.9.3). He maintained that high standards of achievement must continue to be pursued, as a lowering of standards for the sake of accommodating others would be a disservice to all concerned (par 3.9.4). He concluded that legislation and policy must make it possible for all in the community to share fully in the rights, privileges and responsibilities offered by the industrial society (par 3.9.5).

59 *Op cit* part 5, par 4.127.18.

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

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recommended that<sup>60</sup>

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60 *Op cit* part 5, pars 4.128.1 and 4.129.1.

'the principle of fair employment practices legislation based on the central themes of non-discrimination, equality and equitable and modern employment practices must be *accepted and progressively implemented* (own emphasis).

For these purposes, the amended Industrial Conciliation Act contained the first attempt at a definition of an 'unfair labour practice'.<sup>61</sup> The definition was general and wide in scope. It included *any* labour practice which, in the opinion of the Industrial Court, was an unfair labour practice.<sup>62</sup> It could therefore include unfair discrimination. In 1980, this definition was superseded by an amendment<sup>63</sup> (which also changed the name of the Act to the Labour Relations Act (hereafter the '1979 LRA')) which defined it in more detail, but which still did not include a prohibition on discrimination in so many words. This definition, as slightly amended in 1982,<sup>64</sup> was used by the Industrial Court to bring about fundamental changes to everyday employment practices.<sup>65</sup> It read as follows:

"Unfair labour practice" means -

(a) any labour practice or any change in any labour practice, other than a strike or a lockout or any action contemplated in section 66(1), which has or may have the effect that

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61 As amended by the Industrial Conciliation Amendment Act 94 of 1979 s 1.

62 Since the Wiehahn reforms, statutory forms of discrimination and work reservation have been abolished. For example, industrial council agreements and wage determinations could no longer discriminate against employees on the basis of race, sex or colour. Neither could exemptions granted from wage-regulating measures discriminate on such grounds. Regulations published in terms of the Basic Conditions of Employment Act 9 of 1982 could also not discriminate on these grounds. These prohibitions, however, had a limited effect, as they only regulated minimum conditions of employment. The prohibitions did not prevent an employer from granting a person from one race or sex more favourable terms and conditions of employment than a person of another race or sex, provided that both got the minimum provided. Also, nothing prevented an employer from discriminating on the grounds of race and sex when employing, promoting or dismissing an employee. It is for this reason that the concept of an unfair labour practice constituted an important development (Landman, Le Roux & Piron 'Discrimination in Employment' 72).

63 Section 1(c) of the Industrial Conciliation Amendment Act 95 of 1980.

64 Section 1 of the Labour Relations Amendment Act 51 of 1982.

65 Le Roux & Van Niekerk *Unfair Dismissal* 19. The court's approach was based mainly on policy considerations.

- (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced or jeopardised thereby;
- (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the relationship between any employer and employee is or may be detrimentally affected thereby; or

(b) any other labour practice or any other change in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a).'

The Industrial Court understood its role as being *inter alia* 'to strike down discriminatory practices' and it included unfair discrimination in its interpretation of the unfair labour practice definition.<sup>66</sup>

During 1988, the definition was amended again to include a non-exhaustive list, with fifteen detailed provisions which would constitute an unfair labour practice.<sup>67</sup> For the first time, the definition explicitly provided that<sup>68</sup>

'the *unfair discrimination* by any employer against any employee solely on the grounds of race, sex or creed' (own emphasis)

constituted an unfair labour practice. The definition stated that any discriminatory action in compliance with any law or wage-regulating measure would, however, not be regarded as an unfair labour practice. In addition, it made provision for trade unions to prevent future racial, sexual or religious discrimination in hiring if such discrimination prejudicially affected

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66 Dupper & Garbers 'Employment Discrimination' CC 1-7; Dupper 2 13. See, for example, *SACWU v Sentrachelm* (1988) ILJ 410 (IC); *J v M* 1989 10 ILJ 755 (IC); *Chamber of Mines v Mineworkers Union* (1989) 10 ILJ 133 (IC); *Chamber of Mines of SA v Council of Mining Unions* (1990) 11 ILJ 52 (IC); *Randall v Progress Knitting Textiles Ltd* (1992) 13 ILJ 200 (IC).

67 Labour Relations Amendment Act 83 of 1988.

68 Section 1(i). Applicants for employment were, however, not included under the unfair labour practice definition.

their current members' employment and detrimentally affected the employment relationship.<sup>69</sup>

The Industrial Court interpreted the unfair labour practice definition with reference to the objects of the 1979 LRA. The principal object of the Act was to prevent industrial unrest and promote the resolution of labour disputes.<sup>70</sup> It sought to curtail some of the primary causes of industrial conflict, such as arbitrary and discriminatory employment practices which threatened the job security of employees, and conduct which was adverse to employers' business interests.<sup>71</sup> This definition was, however, repealed in 1991 and replaced with a definition similar to the pre-1988 definition, which was general and all-encompassing.<sup>72</sup>

### 3.4 The bridging period

#### 3.4.1 South African Law Commission

As a result of sustained national and international criticism<sup>73</sup> of apartheid policies, the South African government instructed the South African Law Commission<sup>74</sup> (hereafter the 'Law Commission') to investigate the definition and protection of group rights and the possible extension of the (then) existing protection of individual rights.<sup>75</sup> The Law Commission proposed that all rights should be protected in a bill of rights.<sup>76</sup> Such a bill of

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69 Section 1(o).

70 Rycroft & Jordaan *Guide to South African Labour Law* 128.

71 *Ibid.*

72 Labour Relations Amendment Act 9 of 1991.

73 See, for example, ILO Special Report on Apartheid (1987) 157-180; ILO Special Report on Apartheid (1990) 127-151; ILO Special Report on Apartheid (1992) 94-111; Thompson 2 221-40; Van Jaarsveld *Van Riebeeck tot Vorster* 428.

74 In 1986. Established by the South African Law Commission Act 19 of 1973 with a general mandate to undertake research with reference to all branches of the law of the Republic and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof.

75 Working Paper 25 1. The interim Constitution, which was based on these recommendations, was adopted in 1993.

76 *Op cit* 409.



rights should, *inter alia*, and very simply, contain<sup>77</sup>

[t]he right to equality before the law (non-discrimination)'.

Subsequently, the government announced that it had in principle accepted the protection of individual rights in the form of a bill of rights.<sup>78</sup> The Law Commission thereupon embarked on further investigations to provide a consensual solution based on discussion, consultation and negotiation. Such investigations were undertaken against the background of the Multi-party Negotiating Process (MPNP) during 1993.<sup>79</sup>

In the Law Commission's Interim Report,<sup>80</sup> a draft bill of rights was included. A clause on equality and affirmative action was recommended, thus endorsing both the notions of formal and substantive equality.<sup>81</sup> The Report provided, first, for everyone to have the right to equality before the law, which was interpreted to mean that no legislation or executive or administrative act could directly or indirectly favour or prejudice any person on the grounds of his or her race, colour, sex, religion, ethnic origin, social class, birth, political and other views, disabilities or other natural characteristics.<sup>82</sup> Secondly, it made provision for affirmative action in the following way:<sup>83</sup>

'... the highest legislative body may by legislation of general force and effect introduce such programmes of affirmative action and vote such funds therefore as may reasonably be necessary to ensure that through education and training, financing programmes and employment, all citizens have equal opportunities of developing and realising their natural talents and potential to the full.'

The Law Commission's Final Report reiterated that a bill of rights should contain an

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77 *Ibid.*

78 Interim Report on Group and Human Rights 2.

79 Du Plessis & Corder *Transitional Bill of Rights* 39-40 (see par 3.4.2 below).

80 Interim Report on Group and Human Rights 13.

81 See chapter 2 pars 3.1.2; 3.1.3 above.

82 Interim Report on Group and Human Rights 686.

83 *Ibid.*

equality clause to the effect that every person will have the right to equality before the law and to equal protection of the law.<sup>84</sup> The Report thus again confirmed both the formal and substantive notions of equality in that it provided that unfair discrimination should be prohibited<sup>85</sup> and that affirmative action should be instituted as follows:<sup>86</sup>

'This section shall not preclude measures designed to achieve the adequate and reasonable protection and advancement of persons or groups or categories of persons disadvantaged by unfair differentiation in the past, in order to enable their full and equal enjoyment of all rights and freedoms.'

The Final Report stated that affirmative action measures should apply over a wide range of sectors<sup>87</sup> and that it should benefit blacks and women in particular.<sup>88</sup> The question arose as to whether provision for affirmative action in a bill of rights should not be regulated so as to expressly refer to certain factors on the basis of which discrimination could take place.<sup>89</sup> It was however found that there was merit in the approach that grounds for discrimination should *not* be listed, as even a broad list could never be complete and would

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84 Final Report on Group and Human Rights 13.

85 *Op cit* 16.

86 *Op cit* 137. It was argued that, if affirmative action were to be undertaken with the exclusive aim of addressing the injustices of the past, or to serve as compensation for the struggle against apartheid, it could easily become a dangerous weapon in the hands of politicians (131-2). If, however, affirmative action programmes were undertaken to enhance *human dignity and equality*, and, in so doing, to establish a more just society in which individuals could enjoy their fundamental rights and freedoms, affirmative action would become a juridically defined challenge and task. It was further argued that affirmative action should not be a broad discretionary power in the hands of government, but should be regarded as an affirmation of the right to *equality and dignity*. In this way, it would become a *means* not to detract from other human rights and freedoms, but a juridical instrument for *promoting formal and material equality* through the adoption of laws. Affirmative action as a means of protecting *human dignity* gains a more secure legal basis if it is accepted that the right to *human dignity* is of such a *fundamental nature* that it can never be derogated (131-2) (own emphasis) (also see chapter 2 par 3.3.2 above; par 3.5.1.2(b) below).

87 *Op cit* 132.

88 *Ibid.*

89 *Op cit* 135. Reference was made to the Canadian Charter of Rights and Freedoms in which the affirmative action clause (s 15(2)) refers to specific causes of disadvantage, namely race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability (see chapter 6 pars 3.6.2; 3.6.3; 3.6.5 below).

always exclude certain categories of people.<sup>90</sup> Moreover, it was argued that race as a qualifier for affirmative action was not advisable, but that, if one simply described the beneficiaries of affirmative action as those who were 'disadvantaged', perhaps the groundwork would be laid with 'sufficient elasticity' for the courts to develop socioeconomic criteria for the assistance of those discriminated against in terms of race and gender, and in a way more functional for the gradual attenuation of these special privileges over time.<sup>91</sup>

Although not explicitly stated, it is submitted that the Law Commission envisaged the adoption of affirmative action for both individuals and groups.<sup>92</sup> However, it could also be that the Law Commission left the issue of whether affirmative action is intended for individuals or groups, or both, to be decided by the courts at a later stage.

The Law Commission further opined that, although a specific list of factors relating to discrimination or prejudice, which could be used in determining whether a person was in fact prejudiced in a manner which would justify the introduction of affirmative action, would provide greater legal certainty, this could lead to the exclusion of others who had also been disadvantaged. It could also lead to the racial factor being further strengthened by express reference thereto. Thus it was decided to introduce an affirmative action clause referring to disadvantaged people *in general*, with the only qualification being that prejudice must derive from *historical disadvantages*.<sup>93</sup> It is submitted that this may be interpreted to mean that a specific contextual approach should be followed in the light of the history of apartheid, and that only South African citizens who suffered under these policies should be entitled to the benefits of affirmative action.<sup>94</sup>

### **3.4.2 Constitution of the Republic of South Africa Act 200 of 1993 (interim)**

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90 *Ibid* (see also chapter 4 par 2.1.4 below).

91 *Ibid*.

92 *Op cit* 129-33; 135.

93 *Op cit* 135, referring to comments by Professor C Thompson.

94 Although no explicit reference to citizenship as a requirement for benefiting from affirmative action was made, it is submitted that it is reasonable to draw such an inference in the light of the broad line of argument used in the Report. It is, of course, also possible that historical disadvantage generally – other than as a result of apartheid – could have been intended to be a qualifier for affirmative action (see chapter 4 par 2.3 below).

### **Constitution)**

As a result of *inter alia* the Law Commission's recommendations, the interim Constitution<sup>95</sup> was adopted in 1993. The interim Constitution emerged from the MPNP at the World Trade Centre during 1993 and represented a negotiated transition to democracy.<sup>96</sup> The Negotiating Council, consisting of representatives of all political parties participating in the MPNP, approved the Constitution, whereafter it was enacted by Parliament with a few minor amendments.<sup>97</sup> The interim Constitution contained an equality clause which prohibited unfair discrimination in a non-exhaustive way, listing 14 grounds:<sup>98</sup>

'8(1) Every person shall have the right to equality before the law and to equal protection of the law.

8(2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.'

In addition, explicit provision was made for affirmative action. Because the affirmative action clause was controversial, the wording of the International Convention on the Elimination of all Forms of Racial Discrimination was followed quite closely.<sup>99</sup> The clause, which differed slightly from that suggested by the Law Commission, read as

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95 Constitution of the Republic of South Africa Act 200 of 1993.

96 Mureinik 'Introducing the Interim Bill of Rights' 31; Thompson 2 253-4. People participated in the process of drafting the Constitution in a way that is said to be unprecedented internationally (Pillay 'Workplace Equity' 56).

97 Mureinik 'Introducing the Interim Bill of Rights' 31.

98 The interim Constitution contained Constitutional Principles (set out in schedule 4) which the final Constitution had to comply with. Constitutional Principles I, III and V made it clear that the commitment to equality was crucial. Constitutional Principle V endorsed a substantive notion of equality and held that equality before the law 'includes laws, programmes or activities that have as their object the amelioration of the conditions of the disadvantaged, including those disadvantaged on grounds of race, colour or gender'.

99 Du Plessis & Corder *Transitional Bill of Rights* 144 (see chapter 2 par 2.1.2.4 above).

follows:<sup>100</sup>

'8(3)(a) This section [section 8(2)] shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.'

The procedures in section 8(3)(a) were held not to be subject to limitation in terms of the limitations clause in section 33(1), because section 8(3)(a) did not entrench a 'right' as such.<sup>101</sup> Put differently, affirmative action was seen not to entrench a limitable right, but<sup>102</sup>

'authorises a procedure which *may (but need not) result in entitlements for some people*' (own emphasis).

These 'entitlements' were thus not rights entrenched in chapter 3 of the Bill of Rights and were thus not subject to section 33(1).<sup>103</sup>

The affirmative action clause was inserted in the Bill of Rights as a cautionary measure.<sup>104</sup> In line with the argument that equal laws can result in inequality if applied to people in unequal circumstances, there was a concern that different treatment to remedy past discrimination could constitute a violation of the non-discrimination clause and lead

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100 Law Commission's Final Report on Group and Human Rights 137. Du Plessis & Corder *Transitional Bill of Rights* 144 state that the word 'disadvantaged' was used to connote that the consequences of the discrimination 'must still be felt' at the time of a claim of previous disadvantage and affirmative action. Kentridge submits that section 8(2) supplemented rather than qualified section 8(1). She holds that section 8(3) on affirmative action elucidated, and elaborated on, the right to substantive equality in section 8(1): it was neither a qualification of, nor an exception to, the right to equality (Kentridge 'Equality' 14-7).

101 Du Plessis & Corder *Transitional Bill of Rights* 145.

102 *Op cit* 130.

103 *Ibid.*

104 Davis et al *Fundamental Rights* 59; Kentridge 'Equality' 14-36. During this time, it was suggested that the unfair labour practice definition could act as a regulatory device in respect of affirmative action policies, pending the negotiation of the final Constitution (Thompson 1 45 fn 14). It was mooted that whether or not a particular affirmative action policy pursued by an employer could constitute an unfair labour practice, would depend on the facts of each case. In the abstract, however, it was argued that affirmative action could well be justified in the event of an attack under the unfair labour practice jurisdiction. The unfair labour practice was, however, never used in this regard.

to a limited and formal interpretation of the right against discrimination. The aim of the affirmative action clause was therefore to insulate properly designed affirmative action measures from judicial review.<sup>105</sup> Subsequently, the Constitutional Court held:<sup>106</sup>

‘Section 8 was adopted then in the recognition that discrimination against people who are members of disfavoured groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups to proscribe such forms of discrimination and to permit positive steps to redress the effects of such discrimination. The need to prohibit such patterns of discrimination and to remedy their results are the primary purposes of s 8 and, in particular, ss (2), (3) and (4).’

By way of conclusion it may be stated that, when affirmative action was mooted in the interim Constitution, it was unclear: whether the beneficiaries of affirmative action should be personally disadvantaged or should merely be members of a group; whether any hierarchy existed with regard to affirmative action beneficiaries; what the role of the merit principle in affirmative action was; whether citizenship was required to benefit from affirmative action; what shape affirmative action measures would take; and how affirmative action would apply in practice. But, what was clear was that the notion of substantive equality (as opposed to mere formal equality) was embraced, as the interim Constitution provided for the right to non-discrimination and for affirmative action measures in its equality clause.<sup>107</sup>

### **3.4.3 Labour Relations Act 66 of 1995 (1995 LRA)**

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105 Davis et al *Fundamental Rights* 60; Mureinik ‘Introducing the Interim Bill of Rights’ 46; Du Plessis & Corder *Transitional Bill of Rights* 129. Some of the negotiating parties insisted that affirmative action measures should be referred to as ‘reasonable’ measures. It was however pointed out that the word ‘designed’ required a rational scheme to fulfil the ‘full and equal enjoyment of all rights’. The notion of rationality or reasonableness was thus inherent in the clause as it stood at that stage (Du Plessis & Corder *Transitional Bill of Rights* 130).

106 *Brink* 1996 (4) SA 197 at par 41.

107 See Kentridge ‘Equality’ 14-55; De Waal, Currie & Erasmus *Bill of Rights Handbook* 200-201; Du Toit et al *Labour Relations Law* 431; *Brink* 1996 (6) BCLR 752 (CC); *Prinsloo v Van der Linde (Prinsloo)* (6) BCLR 759 (CC); *President of the Republic of South Africa v Hugo (Hugo)* 1997 (4) SA 1 (CC); *Harksen v Lane NO (Harksen)* 1997 (11) BCLR 1489 (CC); *George v Liberty Life Association of Africa Ltd (George)* (1996) 17 ILJ 571 (IC).

After the interim Constitution came into operation, the 1995 LRA had to be amended to bring it in line with the Constitution.<sup>108</sup> The amended Act codified the body of jurisprudence on unfair labour practices developed by the Industrial Court and separated unfair dismissals<sup>109</sup> from the unfair labour practice definition. It further regulated 'other' unfair discrimination which might occur during the course of employment, and pending the drafting of the EEA which would legislate separately for non-discrimination and affirmative action for the workplace, provided for affirmative action through the 'residual unfair labour practice definition'.<sup>110</sup>

The 'residual unfair labour practice' definition included *inter alia* any unfair act or omission between an employer and an employee that involved<sup>111</sup>

'the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.

An employer was however not prevented from<sup>112</sup>

'adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms ...'.

It appeared that both individuals and groups could benefit from affirmative action under this item, as reference was made to both 'persons' and 'groups or categories of

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108 See the Draft Negotiating Document in the Form of a Labour Relations Bill, which formed the basis of the Labour Relations Amendment Act 12 of 2002.

109 See ss 185 to 189.

110 Item 2 of schedule 7 to the 1995 LRA.

111 Item 2(1)(a) of schedule 7 to the 1995 LRA.

112 Item 2(2)(b) of of schedule 7 to the 1995 LRA.

people'. Although the plural form, 'persons', was used, it is submitted that this was meant to indicate that 'individual' people were also included, *in contrast to* 'groups or categories of people'. As in the interim Constitution, it was not spelt out whether actual, past disadvantage or group membership was required to benefit from affirmative action. Further, no hierarchy of beneficiaries of affirmative action was indicated, no indication as to the application of the merit principle in the affirmative action context was given, and no explicit reference to citizenship as a requirement in order to benefit from affirmative action was made.

#### **3.4.4 Labour Market Commission**

At the same time that the amendments to the 1995 LRA were debated, the Labour Market Commission<sup>113</sup> investigated the development of a comprehensive labour market policy for the country. It had to investigate *inter alia* mechanisms aimed at redressing discrimination in the labour market, including a policy framework for affirmative action in employment.<sup>114</sup> The Labour Market Report recommended that comprehensive employment equity legislation be promulgated as soon as possible.<sup>115</sup> This, it was stated, was necessary as the legacy of apartheid was viewed as 'structural', in the sense that it tended to be self-reproducing and self-reinforcing in the absence of concerted policy interventions to reverse it.<sup>116</sup>

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113 A presidential commission appointed against the background of the Reconstruction and Development Plan and chaired by DH Lewis and MM Ngoasheng. Its terms were to consider an appropriate policy framework for dealing with access to the South African labour market by non-South African nationals, with due regard to the supply of labour, the availability of employment and the imperatives for regional economic cooperation and development (Labour Market Report xiv; 166). Due regard had to be had to the objectives of employment creation, fair remuneration, productivity enhancement and macroeconomic stability. No detailed issues relating to citizenship, broader human rights implications of pursuing certain migration policies or the status of refugees were investigated (*op cit* 165).

114 *Op cit* xiv.

115 *Op cit* 137.

116 Similar to what the Abella Commission found in Canada (see chapter 6 pars 3.7.2; 4.1.2 below).



As a starting point, the Labour Market Commission pointed out that South Africa had the highest levels of inequality of any country in the world. This statement was based on a survey by the ILO Country Review which the Labour Market Commission had requested in order to enable it to conduct its investigation.<sup>117</sup> In 1996, South Africa's skewed income distribution was reflected in the fact that the bottom 20 percent of income earners received a mere 1,5 percent of national income, while the wealthiest 10 percent of households received a full 50 percent of national income. Poverty was overwhelmingly concentrated in the African and coloured populations: 95 percent of the poor were African and 65 percent of Africans were poor. An estimated 33 percent of the coloured population lived in poverty, compared with 2,5 percent of Asians and 0,7 percent of whites. This racial inequality was also reflected in the unemployment figures of the country. Among Africans, unemployment was an estimated 41 percent, among coloureds it was 23 percent and among Asians it was 17 percent. Only 6,4 percent of whites were unemployed. Further, a gender element to inequality was noted, with women having a higher unemployment rate than men.<sup>118</sup> Women's incomes were substantially lower than men's, but the average income for African men was less than that of white women. White women were however in a better position than black women. It was accordingly recommended that specific attention be paid to the position of the latter.<sup>119</sup>

The Labour Market Commission opted for both a formal and substantive approach to equality, recommending that non-discrimination as well as affirmative action measures be included in equity legislation.<sup>120</sup> It held that non-discrimination, or equal opportunity, cannot by itself produce equality in employment within a reasonable time frame:

'This observation provides the fundamental justification for corrective measures for affirmative action.'

It recommended that affirmative action be directed at blacks (namely Africans,

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117 Labour Market Report x; 4-7; 141-3.

118 See the Green Paper on Employment and Occupational Equity in par 3.5.2.1 below for figures in this regard.

119 See also O'Regan 'Addressing the Legacy of the Past' 15.

120 Labour Market Report 140 (see chapter 2 pars 3.1.2; 3.1.3 above).

Asians and coloureds), women and people with disabilities.<sup>121</sup> It is submitted that a group-based approach appears to have been followed with regard to the beneficiaries of affirmative action. In addition, the Commission recommended that consideration also be given to 'means by which other types of legislation could be used to rectify the effects of other forms of discrimination in employment', including discrimination on the basis of age, language, ethnicity, sexual orientation, and marital status.<sup>122</sup> A mixture of affirmative action and employment equity provisions was thus recommended, with the emphasis depending on the nature of the current barriers to employment.<sup>123</sup> It was strongly suggested that employers draw up their own affirmative action and employment equity plans with reference to (at least) race, gender and disability, and that quotas not be implemented.<sup>124</sup> Although it was believed that affirmative action legislation should apply to all employers, the Labour Market Commission accepted that such a programme would be resource-intensive – in the sense that it might require training and other mechanisms of human resource development, which might not be available to newer and small firms. Accordingly, it was recommended that the simplest and least costly way of dealing with these concerns would be for smaller firms (in terms of number of employees and turnover) to be exempted from the requirements of such legislation.<sup>125</sup>

The Labour Market Report viewed the objective of an affirmative action policy or programme as being to increase the rate of progress towards equity in employment.<sup>126</sup> Also, employer-provided training and skills upgrading, designed to compensate for both extra-market discrimination in the provision of education and for past discrimination in training by employers, had to occupy a central position in the strategy.<sup>127</sup>

'This programme is not intended to promote cosmetic changes resulting from the hiring of a few members

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121 *Op cit* 147.

122 *Ibid.*

123 *Ibid.*

124 *Op cit* 149.

125 *Op cit* 150.

126 *Op cit* 140.

127 *Ibid.*

of disadvantaged groups into key positions, nor is it designed to promote *black and women employees* into positions for which they are *not qualified*. Rather, it involves a *systematic move towards promoting the employment and improving the labour market security of groups previously discriminated against, bolstered by the necessary education and training, and in co-ordination with extra-market reforms designed to reduce the degree of socio-economic disadvantage of the majority* (own emphasis).

It is submitted that the words and phrases emphasised in the above quotation show that a group approach to affirmative action was envisaged, although it was not spelt out whether actual past disadvantage or group membership was required to benefit from affirmative action. No hierarchy of beneficiaries was indicated. However, for the first time, an indication was given that people who were 'not qualified' should not be appointed under affirmative action. Further pointers regarding the application of the merit principle in the affirmative action context were not given, but a strong training and education component was built in as part of affirmative action. No explicit mention was made of citizenship as a possible requirement to benefit from affirmative action.

### **3.5 The current position: equality as a goal**

#### **3.5.1 Constitution of the Republic of South Africa Act 108 of 1996 (final Constitution)**

##### *3.5.1.1 Introduction*

The final Constitution completed South Africa's negotiated transition to democracy.<sup>128</sup> It includes equality as a *value*<sup>129</sup> on which the Constitution is built and as a

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128 Laubscher 'Employment Law' 54.

129 See Preamble, ss 1, 7 and 36 of the Constitution. In *Ntai & others v SA Breweries Ltd (Ntai)* (2001) 22 ILJ 214 (LC) it was held that: 'The premium placed on the achievement of equality is evident where this ideal is identified as a value on which the democratic South African state is founded in terms of s 1(a) of the Constitution. In other words, not mere formal equality but substantive equality is the constitutional goal in the sense of outcome of results and not merely

substantive *human right*.<sup>130</sup> Furthermore, it confirms both a formal approach to equality, by outlawing unfair discrimination,<sup>131</sup> and substantive equality, by providing for affirmative action.<sup>132</sup>

### 3.5.1.2 Equality as a value

#### (a) Equality used repetitively

The Constitution explicitly recognises the injustices of the past<sup>133</sup> and sets out the need to establish a society based on democratic values, social justice and fundamental human rights.<sup>134</sup> It sets the scene for a new era in the country based on the values of<sup>135</sup>

‘(a) [h]uman dignity,<sup>136</sup> the achievement of equality<sup>137</sup> and the advancement of human rights and

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equality of treatment ... In this regard s 9(2) of the Constitution also specifically endorses the use of affirmative action ...’.

130 See s 9 of the Constitution. Equality as a right will be discussed in detail in par 3.5.1.3 below.

131 Section 9 (3); 9(4) of the Constitution. For the wording, see par 3.5.1.3 below.

132 Section 9(2) of the Constitution. For the wording, see par 3.5.1.3 below (see chapter 2 par 3.1 above for the various notions of equality).

133 Preamble of the Constitution.

134 *Ibid*. It has been held that the wording, ‘open and democratic society based on freedom and equality’, in the Preamble forms part of a broader hermeneutical statement of purpose which emerged as a compromise between libertarians and egalitarians at the MPNP (Du Plessis & Corder *Transitional Bill of Rights* 53; 140).

135 Section 1(a); 1(b) of the Constitution.

136 Also a right in terms of s 10, the second right in the Bill of Rights: ‘Everyone has inherent dignity and the right to have their dignity respected and protected’. Dignity as a fundamental right has a residual function. It applies where many of the more specific rights that give effect to the value of human dignity do not De Waal, Currie & Erasmus *Bill of Rights Handbook* 232; Leibowitz & Spitz ‘Human Dignity’ 17-6A). No definition of ‘dignity’ is supplied. South African common law however provides a starting point. With its roots in Roman law, the common law bases the protection of human dignity on the law of delict, and, specifically, the *actio iniuriarum* (Leibowitz & Spitz ‘Human Dignity’ 17-5). It has been suggested that the broadest possible understanding of human dignity would be to view it as a function of the protection of all fundamental rights in the Bill of Rights. Thus, an infringement of any of the other rights would simultaneously constitute an infringement of human dignity. Such an approach would comply with the requirement that individuals should be accorded the full measure of the rights in the Bill of Rights. It has however been cautioned that a proper interpretation of the scope of s 10 must distinguish between a purposive approach and a generous approach. In other words, the importance of the right must not be confused with its proper scope (*op cit* 17-6A). It has also been held that the inclusion of ‘dignity’ in the Constitution relates to the

freedoms.<sup>138</sup>

(b) Non-racialism and non-sexism’.

These can therefore be said to be the foundational or core values<sup>139</sup> of the Constitution. The Bill of Rights likewise affirms the trilogy of ‘democratic values’, namely ‘human dignity, equality and freedom’.<sup>140</sup> This is in accordance with international conventions which emphasise the principles of dignity and equality, and which primarily protect individual integrity and dignity.<sup>141</sup>

This trilogy of values is repeated in the limitations clause of the Constitution, which states that all rights may be limited only in terms of law of general application to a law of the extent that the limitation is reasonable and justifiable in an open and democratic society,<sup>142</sup> based on the three values of ‘human dignity, equality and freedom’.<sup>143</sup> It has been cautioned that a court should be extremely cautious before finding a limitation of one

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fact that all ‘reasonable people’ relate to one another as possessing inherent *equal moral status*, and not from the perspective of people’s own interests: “Dignity” makes clear, as “equality and freedom” on their own do not, that any limitation of a constitutionally protected right must respect our inherent moral status or the fact that we are *ends in ourselves*’ (own emphasis) (Meyerson *Rights Limited* 13-4).

137 Equality is also the first right in the Bill of Rights in terms of s 9 (see par 3.5.1.3 below for the wording of the right).

138 Freedom is also a right in terms of s 11, the third right in the Bill of Rights: ‘Everyone has the right to freedom and security of the person ...’.

139 See Kentridge ‘Equality’ 14-55; De Vos ‘Equality for All’ 63; De Waal, Currie & Erasmus *Bill of Rights Handbook* 230.

140 Section 7(1)(a) of the Constitution.

141 See chapter 2 pars 2.1.2.2; 2.1.2.3; 2.1.2.4 above.

142 An ‘open and democratic society’, it has been held, requires that, where governmental action has to be justified, this must be done not by reference to political power, but by way of reasons. ‘Openness’ requires that public policies should be rationally justified in public, that is, that the workings of politics must be made transparent to all people. The actual reasons which guide public policy should also be made public. Since justifications are easy to contrive, the judiciary must scrutinise the reasons offered by the state in order to ensure that these do not merely disguise the exercise of raw power (Meyerson *Rights Limited* 3).

143 Section 36 of the Constitution (see par 3.5.1.3(c) below). When balancing rights under the limitations clause, it must be asked how the central value of dignity is affected (De Waal, Currie & Erasmus *Bill of Right Handbook* 232). Similarly, the question that needs to be asked is how the values of equality and freedom are affected. The focus of the limitations clause is on the purposes, actions and reasons of government, and not on the rights holder, as with the unfairness inquiry under s 9 (Kentridge ‘Equality’ 14-43) (see pars 3.5.1.3(a)(i); 3.5.1.3(c) below).

of the three foundational values of the Constitution – dignity, equality and freedom – to be justified.<sup>144</sup> Moreover, the interpretation clause of the Bill of Rights<sup>145</sup> holds that, when a court, tribunal or forum interprets the *Bill of Rights*, it must promote the values that underlie an open and democratic society, based on the three values of ‘human dignity, equality and freedom’.<sup>146</sup> Similarly, when interpreting *any legislation*, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights,<sup>147</sup> among which, as seen above, is the affirmation of the values of human dignity, equality and freedom.

(b) Equality and dignity

(i) Dignity

Dignity as a value is considered to be what gives a person his or her intrinsic value or worth.<sup>148</sup> Kant argued that human beings’ capacity for rational choice makes them uniquely valuable and thus confers on them ‘dignity’.<sup>149</sup> This capacity then gives rise to a special moral status that separates human beings from all other creatures: humans are owed a special kind of respect. They must be treated as ends in themselves, and not as

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144 Kentridge ‘Equality’ 14-66. See *Lotus River, Ottery, Grassy Park Residents Association v South Peninsula Municipality* 1999 (2) SA 817 (CC) at 831A-C; 833B-C where the court was (nevertheless) satisfied that the respondent had discharged the onus of justification by advancing a plausible explanation for a rates increase, by showing that alternatives from a limited range of options had been considered, by giving careful consideration to the matter, and by adopting the least restrictive means to achieve its purpose (at 833A-B). For another example, see *National Coalition for Gay and Lesbian Equality No 1* 1999 (3) SA 173 (CC) at 186I-187A (at pars 37-8) where it was held that the inquiry whether a limitation of the right to equality is constitutionally justified must pay due regard to the foundational nature of the constitutional value of equality. The court decided that the moral views of certain sections of the population, however generally held, and however deep and sincere, could not justify the unfair discrimination against gay males constituted by the criminal prohibition of sodomy (at pars 37-8).

145 Section 39(1)(a) of the Constitution.

146 In both the limitations and interpretation clauses of the Constitution, freedom and equality enjoy the same status. Equality does not necessarily trump freedom.

147 Section 39(2) of the Constitution. See Meyerson *Rights Limited* xxv.

148 De Waal, Currie & Erasmus *Bill of Rights Handbook* 231; Henkin ‘Human Dignity’ 210-1; Dworkin 1 198-9; Parent ‘Constitutional Values’ 71 (see also the discussion of dignity in the international context in chapter 2 pars 2.1.2.2; 2.1.2.3; 3.3.2 above).

149 Kant *Moral Law* 96; Melden ‘Dignity and Worth’ 29-35; Meyerson *Rights Limited* 12.

a mere means to someone else's, or society's, ends. Consequentially, dignity is 'above all price and so admits of no equivalent'.<sup>150</sup> Since dignity is included in the humanity of all people, no one can be excluded from its reach.<sup>151</sup> Dignity therefore appears to be an inclusive and integrative concept. Dignity, then, is viewed as the 'source of a person's innate rights to freedom and to physical integrity, from which other rights flow'.<sup>152</sup>

#### A Equality flows from dignity

Equality – the point of departure and broad theme of this study – 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>153</sup> Put differently, the right to equality is premised on the idea that every person possesses equal human dignity.<sup>154</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>155</sup> Whereas the apartheid dispensation was based on inequality, equality as a value is now central to the task of transformation or remodelling in South Africa, or the integration of South African society.<sup>156</sup>

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150 Kant *Moral Law* 96.

151 Fredman 1 155.

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

153 *Ibid.*

154 *Op cit* 232 (see par 3.4.1 fn 86 above for the arguments in respect of affirmative action and dignity in the Law Commission's Final Report on Group and Human Rights).

155 De Waal, Currie & Erasmus *Bill of Rights Handbook* 232 (see also par 3.5.1.2(b)(ii) below where this was confirmed in *S v Makwanyane (Makwanyane)* 1995 (3) SA 391 (CC)).

156 Albery & Goldblatt 'Jurisprudence of Equality' 249; Cowen 'Equality Jurisprudence' 35. Over and above forming the foundation for civil rights, the right to dignity also forms the basis for (a) political rights related to governing a democracy; and (b) the protection of personal freedom. With regard to the first, it relates to making individual political choices (De Waal, Currie & Erasmus *Bill of Rights Handbook* 231). The relationship between dignity and democracy was explained in *August v Electoral Commission* 1999 (3) SA 1 (CC) at par 17 to mean that '[t]he vote of each and every citizen is a badge of *dignity and of personhood*. Quite literally, it says that everybody counts' (own emphasis). With regard to the second, it has been held that, without the proper protection of personal freedom, 'human dignity' is substantially diminished (*Ferreira v Levin NO* 1996 (1) SA 984 (CC) at par 49). 'Human dignity cannot be fully valued or respected unless individuals are able to develop their *humanity, their "humaneness"* to the full extent of its potential. Each human being is

(ii) Dignity as ‘cornerstone’ and one of the most important rights

‘Dignity’ has been interpreted to be the ‘cornerstone’ of the Constitution.<sup>157</sup> Although generally conceded by the Constitutional Court that ‘dignity’ is a ‘notoriously elusive concept’ and that it needs precision and elaboration,<sup>158</sup> it has been made clear that, at its least, the following interpretation should be given to dignity:<sup>159</sup>

‘At its least, it is clear that the constitutional protection of dignity requires us to acknowledge the *value and worth of all individuals as members of our society*’ (own emphasis).

The Constitutional Court has described dignity as one of the ‘most important’ human rights:<sup>160</sup>

‘Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the *foundation* of many of the other rights that are specifically entrenched in ... [the Bill of Rights] ... [H]uman dignity is important to all democracies. In an aphorism coined by *Ronald Dworkin*, *because we honour dignity, we demand democracy*.

The rights to life and *dignity* are the *most important of all human rights*, and the *source of all other personal rights* in the Bill of Rights. By committing ourselves to a society founded on the recognition of human rights we are required to value these two rights above all others’ (own emphasis).

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uniquely talented. Part of the dignity of every human being is the *fact and awareness* of this uniqueness. An individual’s human dignity cannot be fully respected or valued unless the individual is permitted to develop his or her unique talents optimally. *Human dignity has little value without freedom; for without freedom ... human dignity is little more than an abstraction. Freedom and dignity are inseparably linked. To deny people freedom is to deny them their dignity*’ (own emphasis).

157 See, for example, *Makwanyane* 1995 (3) SA 391 (CC) at pars 328-330; *Hugo* 1997 (4) SA 1 (CC) at pars 41-3; *Prinsloo* 1997 (3) SA 1012 (CC) at pars 31-3; *National Coalition for Gay and Lesbian Equality v Minister of Justice & others (National Coalition for Gay and Lesbian Equality No 2)* (1999 (1) SA 6 (CC) at par 28.

158 *National Coalition for Gay and Lesbian Equality No 2* 1999 (1) SA 6 (CC) at par 28, quoting from the Canadian case, *Egan v Canada* (1995) 29 CRR (2d) 79 at 106.

159 *National Coalition for Gay and Lesbian Equality No 2* 1999 (1) SA 6 (CC) at par 28.

160 *Makwanyane* 1995 (3) SA 391 (CC) at pars 328-330.



(iii) Dignity in the South African apartheid context

It has been held specifically that dignity is the ‘touchstone’ of the new South African political order in an endeavour to heal the apartheid past:<sup>161</sup>

‘Respect for the *dignity* of all human beings is *particularly important* in South Africa. *For apartheid was a denial of a common humanity*. Black people were *refused respect and dignity* and thereby the *dignity of all South Africans was diminished*. The new Constitution rejects this past and affirms the *equal worth* of all South Africans. Thus *recognition and protection of human dignity is the touchstone* of the new political order and is fundamental to the new Constitution’ (own emphasis).

(iv) Dignity as motif which links equality

The Constitutional Court has linked dignity and equality as follows:<sup>162</sup>

‘[D]ignity is the *motif which links and unites equality ...* and which, indeed, *runs right through the protections* offered by the Bill of Rights’ (own emphasis).

Or, put differently:<sup>163</sup>

‘The prohibition of *unfair discrimination* in the Constitution provides a bulwark against invasions which impair *human dignity* or which affect people adversely in a *comparably serious manner*’ (own emphasis).

The rights of equality and dignity have been interpreted to be closely related in particular circumstances.<sup>164</sup> In *National Coalition for Gay and Lesbian Equality No 2*, the

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161 At par 329.

162 At pars 120; 124.

163 *Hugo* 1997 (4) SA 1 (CC) at par 41.

164 *National Coalition for Gay and Lesbian Equality No 2* 1999 (1) 1 SA 6 (CC) at par 31; *National Coalition for Gay and Lesbian Equality v Minister No 1* 1999 (3) SA 173 (CC) at par 30.

possible unfairness of the discrimination of criminalising sodomy was argued as follows:<sup>165</sup>

‘(a) ... Gay men are a *permanent minority* in society and have suffered in the past from patterns of disadvantage. The *impact* is severe, affecting the *dignity*, personhood and identity of gay men at a deep level. It occurs at many levels and in many ways and is often difficult to eradicate.

(b) The nature of the power and its purpose is to criminalise private conduct of consenting adults which causes no harm to any one else. It has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society.

(c) The discrimination has ... gravely affected the *rights and interests* of gay men and deeply impaired their *fundamental dignity*.

The above analysis confirms that the discrimination is unfair. There is nothing that can be placed in the other balance of the scale ...’ (own emphasis).

Kentridge agrees with this. She holds that section 8(2) of the interim Constitution (which comments are also valid in respect of section 9 of the final Constitution), prohibiting discrimination on a non-exhaustive list of grounds, read in the context of the section, the chapter and the Constitution as a whole, upholds the principle of ‘fundamental human dignity’.<sup>166</sup> She argues that<sup>167</sup>

‘[section 8(2)] seeks to destroy entrenched *patterns of inequality* – patterns which typically, but not exclusively, take shape around the listed characteristics. For as surely as the Constitution is a bridge from a culture of authority to a *culture of justification*, it is a bridge from a society of *oppression and degradation to a community of equals*, in which “*all human beings will be accorded equal dignity and respect regardless of their membership of particular groups*” (own emphasis).

(v) Dignity used to interpret equality

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165 1999 (1) SA 6 (CC) at pars 26; 27. See also par 28 where it was held that the constitutional protection of dignity requires the court to acknowledge the value and worth of ‘all individuals as members of our society’ and that sodomy laws degrade and devalue gay men in the broader society.

166 Kentridge ‘Equality’ 14-34.

167 *Ibid* referring in the last lines of the quotation to *Hugo* 1997 (4) SA 1 (CC) at par 41.

In an attempt to 're-establish' respect for human dignity, the large-scale unfair discrimination under apartheid is currently being addressed in the country. In this process, the Constitutional Court has used the concept 'dignity' to determine the meaning of the concept 'equality'.<sup>168</sup> In one of the first discrimination cases to reach the Constitutional Court, *Prinsloo*,<sup>169</sup> it was held that

[u]nfair discrimination ... principally means treating persons differently in a way which impairs their *fundamental human dignity as human beings, who are inherently equal in dignity* (own emphasis).

This emphasis on dignity as the underlying consideration in interpreting discrimination matters was confirmed in *Hugo*,<sup>170</sup> *Harksen*,<sup>171</sup> *City Council of Pretoria v Walker*<sup>172</sup> (*Walker*), *National Coalition for Gay and Lesbian Equality v Minister No 2*,<sup>173</sup> and *National Coalition for Gay and Lesbian Equality No 1*.<sup>174</sup>

The suitability of 'dignity' as a value underlying, and for interpreting, equality has been widely debated.<sup>175</sup> While Cowen<sup>176</sup> argues that dignity is well placed to serve the transformative purpose underlying the Constitution, Albertyn and Goldblatt<sup>177</sup> are critical of the Constitutional Court's interpretation of 'equality' on the basis of 'dignity'. Basically, they argue that the right to substantive equality should be given a meaning 'independent

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168 This approach would accord with equality 'as empty in content', a concept developed by Westen 'Empty Idea of Equality' 547-8; 577-8; 592-596 (see chapter 2 par 2.2.3 above).

169 1997 (3) SA 1012 (CC) at par 31.

170 1997 (4) SA 1 (CC) at pars 41; 43.

171 1998 (1) SA 300 (CC) where the court endorsed the views expressed in *Hugo* 1997 (4) SA 1 (CC) at par 51. The court referred to a passage from a Canadian judgment, *Egan v Canada* (1995) 29 CRR (2d) 79 at 104-5, which held that 'equality ... cannot tolerate legislative distinctions that treat certain people as second-class citizens, that demean them, that treat them as less capable of for no good reason, or that otherwise offend fundamental human dignity'.

172 1998 (3) BCLR 257 (CC) at par 37 (the court quoted from *Hugo* 1997 (4) SA 1 (CC)).

173 1999 (1) SA 6 (CC) at pars 15 to 26.

174 1999 (3) SA 173 (CC) at pars 41-47.

175 See, generally, Albertyn & Goldblatt 'Jurisprudence of Equality'; Cowen 'Equality Jurisprudence'; Davis 1; Chaskalson 'Human Dignity'; Fagan 'Dignity and Unfair Discrimination'.

176 Cowen 'Equality Jurisprudence' 58.

177 Albertyn & Goldblatt 'Jurisprudence of Equality' 254.

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of the value of “dignity”, being informed primarily by the value of ‘equality itself’ (the last mentioned admittedly being an elusive concept itself). Albertyn and Goldblatt rely on feminist theories which played a key role in developing the *group*-based notion of substantive equality, as opposed to liberal legalism, which focuses on the *individual* – where equality, freedom and dignity are inextricably bound up with one another, as an entitlement of the individual and protecting his or her autonomy.<sup>178</sup> They argue that such overlapping meanings make it difficult to extract the essence of each of the rights and values, as each relies on the other for its meaning.<sup>179</sup> According to them, the main problem with dignity at the centre of the equality debate is that this approach centres the right on *individual* feelings of affront rather than placing the complainant within the context of a general, materially disadvantaged group. This, then, shifts the emphasis away from the *transformative use* of the right. They state that the emphasis of equality should be on the ‘group’. They state that the value of equality<sup>180</sup>

*‘promotes and protects the ability of each human being to develop to his or her full human potential and to forge mutually supportive relationships in the home, the community, the workplace and society as a whole. The laws, policies and practices of the state and society should promote relationships between persons and groups which facilitate each person’s ability to be full social citizens of our new democracy. This entails the removal of systemic discrimination and deeply entrenched patterns of structural disadvantage and the development of opportunities and resources for meaningful participation in society (own emphasis).*

Yet another author, Davis, holds that equality is ‘too central a concept to be relegated to a secondary meaning’.<sup>181</sup> He criticises the use of dignity in Constitutional Court jurisprudence<sup>182</sup> and argues that the fundamental value of ‘equality’ has been

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178 *Ibid.*

179 *Ibid.*

180 *Ibid.*

181 Davis 1 413. Also a judge of the High Court of South Africa.

182 *Hugo* 1997 (4) SA 1 (CC); *Harksen* 1998 (1) 300 (CC); *Prinsloo* 1997 (3) SA 1012 (CC).

rendered meaningless. Simultaneously, 'dignity' has been given both a content and scope that<sup>183</sup>

'make for a piece of jurisprudential Legoland – to be used in whatever form and shape is required by the demands of the judicial designer'.

The author urges the courts to view equality as a *value* which seeks to promote a democratic society that recognises and promotes difference, and individual as well as group diversity, and thereby show a commitment to ensuring that all within society enjoy the means and conditions to participate significantly as citizens.<sup>184</sup> He accordingly challenges the Constitutional Court to have the courage to begin its search for an equality jurisprudence 'afresh'.<sup>185</sup>

Cowen scrutinises all the above opinions and argues convincingly that the power of 'dignity' as a value should not to be rejected because it raises complex and contested questions, or because it has multifaceted meanings that require judicial deconstruction.<sup>186</sup> In essence, the author holds that dignity's meaning, and its power and ability to point to a way out of the past into a future to which all South Africans commonly aspire, must be openly explored by the judiciary. 'Equal worth', she argues, is not a neutral value to be used to mask inequalities. Although 'dignity' may be a contested value, it is not a meaningless value, or an indeterminate value.<sup>187</sup> Rather, she holds, 'it is a value that can serve to define what is important as South Africa transforms itself'.

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183 Davis 1 413-4.

184 *Op cit* 414.

185 *Ibid.* The author holds that the Constitutional Court's present position can be justified only by 'deleting equality from the text'.

186 Cowen 'Equality Jurisprudence' 58.

187 *Ibid.*

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*Evaluation of equality as a value*

It is submitted that the repetition of the values of equality and dignity in the South African Constitution must be seen against the background of the history of the country, a history that speaks of the extreme denial of both values under colonialism, slavery, apartheid and patriarchy. In this regard, apartheid has been described as ‘a crime against humanity’.<sup>188</sup> In similar vein, it has been said that the history of systematic discrimination in South Africa was premised on gross violations of human dignity.<sup>189</sup> It is submitted that the new democratic order makes it clear, by repetition of the values for a new era, of what needs to be achieved. In other words, it gives the pointers for a transformed or remodelled country to guide itself by. Some indication was given above as to the meaning of the values, and the relationship between them. Equality, like the values of dignity and freedom, is a value that informs the interpretation of (probably) all other fundamental rights and is of significant importance in the limitations enquiry, as well as in the interpretation of other legislation.<sup>190</sup> In addition, the Constitutional Court has strongly relied on the concept ‘dignity’ in order to interpret equality. Although this approach can be criticised, it is submitted that dignity is a suitable concept for interpreting equality, though care will have to be taken not to lose sight of the group-based notion of equality which, as shown above, has been adopted in South Africa for very particular reasons.<sup>191</sup>

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188 *Makwanyane* 1995 (3) SA 391 (CC) at par 329.

189 Du Plessis & Corder *Transitional Bill of Rights* 149.

190 See pars 3.5.1.2(a) above; 3.5.1.3(c) below.

191 See pars 3.4.1; 3.4.2; 3.4.3; 3.4.4; 3.4.5 above; 3.5.2 below.

### 3.5.1.3 *Equality as a right*

#### (a) Non-discrimination

The Constitution also embraces equality as a *right*. In this regard it holds:<sup>192</sup>

‘(1) Everyone is equal before the law<sup>193</sup> and has the right to equal protection<sup>194</sup> and benefit<sup>195</sup> of the law.

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192 Section 9 of the Constitution. Equality as a right legally entitles groups and individuals to claim the promise of the value and provides the means to achieve substantive equality (Albertyn & Goldblatt ‘Jurisprudence of Equality’ 249).

193 ‘Equality before the law’ has been interpreted *not* to mean that all must be treated identically and that all distinctions must be suppressed, but to mean ‘being concerned more particularly with entitling “everybody at the very least, to equal treatment by our courts of law”’ (Davis et al *Fundamental Rights* 61 commenting on the interim Constitution, which is similar enough to the final Constitution for the comments to apply to both). In addition, the phrase has been held to entail equality of ‘process’, which requires that people be equally represented on legislative bodies and that each person be granted equal concern and respect when the law is formulated or applied (Dlamini ‘Equality or Justice’ 16).

194 ‘Equal protection’ has been interpreted not to really add anything to the principle of equal treatment (Davis et al *Fundamental Rights* 55). But, another has held that equal protection ‘encompasses laws which give benefits and prohibit people being subordinated by or disadvantaged through the law’, thus entailing legislative and other steps to realise equality (Dlamini ‘Equality or Justice’ 16).

195 The term ‘equal benefit’ was taken from Canadian law with the intention of broadening the equality review into areas of substance of the law and not merely to the manner in which it is administered. ‘Equal benefit’ will arguably encourage the court to read a richer, more substantive concept of equality into the words of s 9(1) (see chapter 6 par 3.6.2 below) (Davis et al *Fundamental Rights* 61). Each aspect of section 9(1) and (2) (or section 8(1) and (2) of the interim Constitution) has a role to play in the protection of equality (Kentridge ‘Equality’ 14-7). A complainant may therefore be able to frame his or her claim under more than one of these rights. In some instances, one will be more suitable than the other and every instance of unfair discrimination is a denial of either (or sometimes both) equality before the law or equal protection of the law. Not every denial of equality before the law or equal protection of the law is necessarily an instance of unfair discrimination under section 9(2).

(2) Equality includes the full and equal enjoyment of all rights and freedoms.<sup>196</sup> To promote the achievement of equality, legislative and other measures,<sup>197</sup> designed<sup>198</sup> to protect or advance persons or categories of persons, disadvantaged<sup>199</sup> by unfair discrimination, may<sup>200</sup> be taken.<sup>201</sup>

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- 196 The phrase 'equality includes the full and equal enjoyment of all rights and freedoms' has been interpreted to mean: to enjoin the courts to view equality as permeating through all the rights and freedoms in the Bill of Rights; to represent an injunction for the promotion of the substantive constitutional commitments to ensure that everyone is entitled to equality under the Constitution, namely equality of 'conditions' which ensure that bearers of rights can enforce those rights set out in the Bill of Rights (Davis et al *Fundamental Rights* 61). Chapter 2 of the Bill of Rights (as a whole) has been interpreted to promise to each citizen the ability to exercise and enjoy all constitutionally entrenched rights in conditions of equality with his or her fellow citizens (*ibid*).
- 197 See fn 249 below for an interpretation of the word 'measures'.
- 198 See fn 250 below for an interpretation of the word 'designed'.
- 199 No definition is provided for the concept 'disadvantage' in the Constitution. See par 3.5.1.4(a) below for an interpretation of 'disadvantage'.
- 200 The measures are thus not mandatory.
- 201 The wording of s 8(3) of the interim Constitution and s 9(2) of the final Constitution relating to affirmative action, though not exactly the same, is quite similar. Both mention 'persons' or 'categories of persons' who have been disadvantaged by unfair discrimination. It is submitted that this implies that individuals and groups may benefit. The omission of the word 'group' from the final Constitution appears merely to have removed a redundancy and does not affect the scope of the provision (Kentridge 'Equality' 14-60). However, while the interim Constitution provided for measures designed to achieve the 'adequate protection and advancement' of people, s 9(2) of the final Constitution omits the word 'adequate'. In *Stoman v Minister of Safety & Security & others (Stoman)* (2002) 23 ILJ 1020 (T) at 1032 A-B it was held to be understandable that the wording in the final Constitution did not include the 'adequate' protection and advancement of people. The court held that it was virtually impossible to determine when 'protection and advancement' were indeed 'adequate', especially in a society where people and groups had suffered systemic discrimination and oppression over centuries (at 1032A-B). Would any protection or advancement, it asked, ever be declared to be 'adequate'? Also, it held that it was hardly conceivable that anyone would be able to prove the necessary causal connection, namely that certain measures were indeed likely to achieve such adequate protection and advancement within the foreseeable future (at 1032B). The wording of the final Constitution was thus more realistic and conceptually sound (at 1023B-C). (Kentridge 'Equality' 14-60, on the other hand, holds that the omission of the word 'adequate' arguably removes a constraint on affirmative action measures under the interim Constitution, but that, given the indeterminacy of the word 'adequate', the omission is not material.) Also, the structure of the final Constitution differed from that of the interim Constitution, in that the former started with the opening statement that equality included the full and equal enjoyment of all rights and freedoms. Then, it stated that, to promote the achievement of equality, measures designed to protect or advance people may be taken. The court held that this was more sound in that recognition was first given to the fact that equality included the full and equal enjoyment of all rights and freedoms, whereafter it was recognised that the achievement of equality may be 'promoted' by measures designed to protect or advance persons or categories of persons disadvantaged by unfair discrimination (at 1032B-C). The promotion of the achievement of equality thus seemed to be stated as an overarching ideal. Measures designed to protect or advance previously disadvantaged people may be taken as part of an 'attempt' to achieve this ideal. Although rationality and planning were required by the use of the word 'designed', the aim of affirmative action measures was stated in somewhat vaguer terms than the emphatic 'achievement' of 'adequate protection and advancement' of the interim Constitution (at 1032D-E).



(3) The state may not unfairly discriminate<sup>202</sup> directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

(4) No person may unfairly discriminate<sup>203</sup> directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.'

The golden thread of substantive equality, which was woven into the Law Commission's reports from the start, is therefore also found in the text of the final Constitution. The right to equality confirms both a formal<sup>204</sup> (elimination of unfair discrimination) and substantive<sup>205</sup> (affirmative action measures) notion of equality.

(i) Listed and unlisted/analogous grounds of non-discrimination

As the Constitution prohibits direct and indirect discrimination by way of a non-exhaustive list<sup>206</sup> of grounds, this implies that, besides the 17 'listed'<sup>207</sup> grounds, other

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202 It is not necessary to prove an intention to discriminate (*Walker* 1998 (2) SA 363 (CC) at 383-384). Requiring intention was thought to be too onerous on an applicant, especially in cases of indirect discrimination. Similarly, the intention or motive of the employer is not relevant to a finding of discrimination (*Association of Professional Teachers v Minister of Education* (1995) 16 ILJ 1048 (IC) at 1083A-B and 1089H; *Masondo v Crossway* (1998) 19 ILJ 171 (CCMA) at 179I-J; *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) 19 ILJ 285 (LC) at 293A; *Ntai* (2001) 22 214 ILJ (LC) at 219I; *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) at 194-5).

203 The comment in fn 202 above is applicable here as well.

204 Section 9(3); 9(4) of the Constitution. See the discussion in chapter 2 par 3.1 above as to the various notions of equality.

205 Section 9(2) of the Constitution. See the discussion in chapter 2 par 2.2 above as to the various notions of equality. See *Walker* 1998 (3) BCLR 257 (CC); *Larbi-Odam v MEC for Education (North-West Province) (Larbi-Odam)* 1998 (1) SA 745 (CC); *National Coalition for Gay & Lesbian Equality No 2* 1999 (1) SA 6 (CC); *Minister of Finance & another v Van Heerden (Van Heerden)* 2004 (6) SA 121 (CC); *Stoman* (2002) 23 ILJ 1020 (T) where the Constitutional Court elaborated on, and confirmed, the goal of substantive equality.

206 See also *Brink* 1996 (4) SA 197 at par 41 where this was explained as follows:

'Although our history is one in which the most visible and most vicious pattern of discrimination has been racial, other systematic motifs of discrimination were and are inscribed on our social fabric. In drafting s 8 [of the interim Constitution], the drafters

‘analogous’ or ‘unlisted’ grounds may exist.

Discrimination based on a listed ground is presumed to be unfair.<sup>208</sup> If discrimination is based on an unlisted ground, no unfairness is presumed and the applicant has to prove the unfairness.

As far as proof of a claim of unfair discrimination based on an unlisted ground is concerned, the Constitutional Court has followed the same basic line of reasoning as set out in international law.<sup>209</sup> In *Harksen*,<sup>210</sup> a distinction was made between differentiation and discrimination. In terms of this approach, differentiation (in the sense of treating people differently), which may or may not be rationally connected to the purpose it seeks to achieve, does not necessarily constitute discrimination.<sup>211</sup> As to what would constitute illegitimate grounds (thus elevating differentiation into the realm of discrimination), there are two possibilities: the ‘listed’ grounds, and the ‘unlisted’ grounds. An objective test must be applied to ascertain whether differentiation is based on a listed or an unlisted ground.<sup>212</sup>

As regards the listed grounds, these are clearly described in the Constitution. Further, as pointed out above, a presumption of unfairness has been established by the Constitution.<sup>213</sup> As regards the unlisted grounds, the court has held that there is discrimination on an unlisted ground if it is<sup>214</sup>

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recognised that systematic patterns of discrimination on grounds other than race have caused, and many continue to cause, considerable harm. For this reason, s 8(2) lists a wide, and non-exhaustive, list of prohibited grounds for discrimination.’

207 These are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth. The EEA follows a similar approach (see par 3.5.2.3(b) below).

208 Section 9(5) of the Constitution.

209 See chapter 2 pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B above.

210 1998 (1) SA 300 (CC) at 320-321 in which the equality clause of the interim Constitution was interpreted.

211 At 320D-321J.

212 At 322C-D.

213 Section 9(5) of the Constitution.

214 At 322A-C.

'[b]ased on *attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or if it affects them adversely in a comparably serious manner*' (own emphasis).

Although it was unnecessary for the Constitutional Court in *Harksen* to set out comprehensively what the phrase 'based on attributes or characteristics' connotes,<sup>215</sup> the court did caution against adopting a narrow approach:<sup>216</sup>

'What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to *categorize, marginalise and often oppress* persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to *demean* persons in their *inherent humanity and dignity*. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. Section 8(2) [of the interim Constitution] seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history' (own emphasis).

#### A Citizenship as an unlisted/analogous ground of discrimination: *Larbi-Odam* case

Citizenship is not a listed ground of discrimination in the Constitution. However, the possibility exists that it may be regarded as an 'unlisted' ground. As it will be argued that citizenship may be used as a criterion to benefit (although not absolutely) from affirmative action,<sup>217</sup> the basis for this possibility will now be investigated.

In *Larbi-Odam*,<sup>218</sup> the constitutionality of a government regulation prohibiting the applicants (permanent residents employed on contract as teachers) from being

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215 At 324E-F. And, likewise, in *Prinsloo* 1997 (3) SA 1012 (CC) at 1027C.

216 At 322H-323B.

217 See chapter 4 par 2.3 below.

218 1998 (1) SA 745 (CC), decided under the interim Constitution.

permanently employed in state schools was held to be unfairly discriminatory. The court acknowledged that citizenship was not a listed ground of prohibited discrimination, but held that there was 'no doubt'<sup>219</sup> that the differentiation between citizens and non-citizens in terms of the regulation constituted discrimination. Denying permanent residents job security when they had been selected for residence, when they had made a conscious commitment to South Africa, when they had been allowed to live and work in South Africa indefinitely, and when they were entitled to citizenship within a few years, was held to be unfair discrimination.<sup>220</sup> Non-citizens in South Africa were found to be a 'vulnerable group' and a minority with 'little political muscle'.<sup>221</sup> Citizenship was found to be a personal attribute which was difficult to change.<sup>222</sup>

"The characteristic of citizenship is one typically not within the control of the individual and, in this sense, is immutable. Citizenship is, at least temporarily, a characteristic of personhood not alterable by conscious action and in some cases not alterable except on the basis of unacceptable costs."<sup>223</sup> ... This general lack of control over one's citizenship has particular resonance in the South African context, where individuals were deprived of rights or benefits, *ostensibly on the basis of citizenship, but in reality in circumstances where citizenship was governed by race* ... Many became *statutory foreigners* in their own country under the Bantustan policy, and the Legislature even managed to create remarkable beings called "foreign natives". Such people were treated as instruments of cheap labour to be discarded at will, with scant regard for their rights, or the rights of their families' (own emphasis).

The court concluded that discrimination on the basis of citizenship had the potential to impair the human dignity of permanent residents.<sup>224</sup> It reiterated that the discrimination was unfair because permanent residents were excluded from employment opportunities,

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219 At 756 H-I.

220 At 758H-759F.

221 At 756I; 757A-B; 757G.

222 At 757C-E.

223 This part is quoted from the Canadian case, *Andrews v Law Society of British Columbia* (1989) 56 DLR (4<sup>th</sup>) 1 at 32 (see chapter 6 pars 3.6.3.1(a); 3.6.3.1(b)(i)A below).

224 At 757H.

even though they might have been permitted to enter the country permanently.<sup>225</sup> This thus detracted from government's commitment to permanent residents by permitting them to enter, and then discriminating against them in this manner.<sup>226</sup>

In its subsequent application of the limitations clause, the court rejected the argument by government that the limitation of the right to equality was justified because employment for South African citizens enjoyed priority.<sup>227</sup> The court held that the application of the limitations clause<sup>228</sup>

' ... involves the weighing up of competing values, and ultimately an assessment based on proportionality ... In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question'.

After applying these factors, it held that, while the aim of reducing unemployment among citizens was legitimate, the primary aim of the statute in question was to provide quality education to children.<sup>229</sup> This was held to be more important than the secondary aim of reducing unemployment.<sup>230</sup> Permanent residents were therefore to be treated the same as citizens in this instance.<sup>231</sup> The court did not specifically address the position of temporary residents. The regulation was however invalidated so that the benefit could be extended to temporary residents as well.<sup>232</sup> This case will be distinguished from citizenship

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225 At 759D-E.

226 At 759F.

227 At 760H.

228 At 759, quoting from *Makwanyane* 1995 (3) SA (CC) at par 104.

229 At 760G-H.

230 *Ibid.*

231 At 760H-I.

232 At 764G-765C.

in the context of affirmative action below.<sup>233</sup>

## B Political sensitivity

The issue of political sensitivity may require citizenship for particular posts. In *Larbi-Odam*,<sup>234</sup> the court accepted that ‘political sensitivity’ was a possible justification for discrimination between citizens and non-citizens in the area of employment opportunity. In this regard, it referred to Members of Parliament, Judges of the Constitutional Court, the Public Protector, and members of the Human Rights Commission and the Commission on Gender Equality, all of whom must be South African citizens in terms of the Constitution.<sup>235</sup> Klaaren comments that it is not clear for what reasons, other than ‘political sensitivity’, posts might require citizenship, although they seem to derive from the particular ‘nature’ of the job.<sup>236</sup> Carpenter also comments that any measure which reserves employment opportunities for citizens (and arguably for permanent residents as well) should state with sufficient clarity the justification for excluding non-citizens, whether for reasons of political sensitivity or for practical reasons.<sup>237</sup>

### (b) Establishing unfairness of discrimination

Once discrimination on an unlisted ground has been established, the unfairness of the discrimination must be determined. Once again, *Harksen* sets out the relevant factors to be considered in this regard:<sup>238</sup>

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233 See chapter 4 pars 2.3.4; *Evaluation of citizenship as unfairly discriminatory against non-citizens* below.

234 1998 (1) SA 745 (CC) at 761A.

235 At 761 fn 37.

236 Klaaren ‘Non-citizens and Constitutional Equality’ 290.

237 Carpenter ‘Equality and Non-discrimination’ 39.

238 1998 (1) SA 300 (CC) at 323H-324E. Originally set out in *Hugo* 1997 (4 SA 1 (CC) (at pars 41-49) as (a) the group which is disadvantaged by the measure; (b) the nature of the power in terms of which the discrimination is effected; (c) the nature of the interests affected by the discrimination; and, (d) the severity of the effect of the discrimination upon such interests. Kentridge ‘Equality’ 14-44 argues that the court in any event went beyond these factors it had itself laid down for the enquiry into the unfairness of the discrimination, and took into account other factors which belong more properly to the limitations enquiry in *Hugo*. *Harksen* was followed in *Van Heerden* 2004 (6)

*'(a) the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;*

*(b) the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants ... but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question ...*

*(c) with due regard to (a) and (b) above, and any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature'* (own emphasis).

Assessed objectively, the court held that these factors would 'assist in giving precision and elaboration to the constitutional test of unfairness'.<sup>239</sup> These factors, however, do not constitute a closed list – others factors may emerge as the equality jurisprudence develops.<sup>240</sup>

It thus appears that the focus of the enquiry into the unfairness of the discrimination is on the holder of the right, on the position of that person in society and on the kind of harm suffered by that person.<sup>241</sup> This enquiry deals with questions of fairness and rationality in relation to the values underlying the right to equality itself.<sup>242</sup>

(c) Justifying discrimination

As was seen above, once it is established that the discrimination is unfair, it can still

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SA 121 (CC) at par 27.

239 At 324E.

240 At 324F.

241 This enquiry should be contrasted to the limitations enquiry under s 36 (see par 3.5.1.3(c) below).

242 Kentridge 'Equality' 14-43.

be justified in terms of section 36 of the Constitution. This section requires that such a limitation must be justified only in terms of law of general application, to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Certain factors should be considered in order to establish such reasonableness and justifiability. These include the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose.<sup>243</sup> This enquiry thus focuses on the purposes, actions and reasons of government, in contrast to the enquiry into the unfairness of the discrimination discussed above, which is on the holder of the right.<sup>244</sup>

It revolves around the issue of balancing the right to equality against other rights and against other aspects of public policy, such as distribution of limited resources.<sup>245</sup> It considers whether incursions into treatment as an equal or freedom from discrimination are permissible because they serve a legitimate social purpose in a way which is proportionate to the end they seek to achieve.<sup>246</sup>

### *Evaluation of equality as a right*

It appears then that the underlying consideration in determining the reasons or grounds for making differentiation and, consequently, discrimination illegitimate is that a measure must have the potential to impair the 'dignity' of a person or to result in some comparable disadvantage. In this regard, the courts have made it clear that citizenship is an unlisted ground, as it may impact on a person's dignity. Case law referred to above will however be distinguished from the context of affirmative action.<sup>247</sup>

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243 Section 36(a)-(e) of the Constitution.

244 See par 3.5.1.3(b) above.

245 Kentridge 'Equality' 14-43.

246 *Ibid.*

247 See chapter 5 pars 2.3.4; *Evaluation of citizenship as unfairly discriminatory against non-citizens* below.



### 3.5.1.4 Affirmative action

Having dealt with the meaning of equality as a value and a right, this study's focus now shifts to affirmative action. The wording of the Constitution regarding affirmative action is repeated for ease of reference:<sup>248</sup>

'(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures,<sup>249</sup> designed<sup>250</sup> to protect or advance

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248 Section 9(2) of the Constitution. The wording has been cited in par 3.5.1.3 above.

249 'Measures' are *mechanisms* for redressing systemic, structural discrimination, strategies for reaching the goal of a non-sexist society, or *methods* to remedy inequality (see *Van Heerden* 2004 (6) SA 121 (CC) at pars 38; 41; 44; 52). The concept is supported as an acceptable 'tool' in the struggle to eliminate discrimination and as a redistributive and remedial measure to ensure that equality can be reached (Hodges Aeberhard 'Affirmative Action' 443; Kentridge 'Equality' 14-14; 14-35). The reason for any measure is a specified goal. Measures imply action. Once the goal is achieved by the action taken, the rationale for the measure falls away. In the South African context, the reason for affirmative action measures is the achievement of substantive equality. This is a long-term goal to be achieved through measures and programmes aimed at reducing inequality (Dupper 1 292). The measures to attain the goal are distinguished from the goal itself (see *Dudley v City of Cape Town (Dudley)* (2004) 25 ILJ 305 (LC)). This implies that, when South African society has been transformed and normalised, affirmative action in an equal society would constitute discrimination on grounds of race and gender. Effective measures thus imply that disadvantage will over time be erased so that disadvantaged people will accordingly no longer be entitled to benefit under the affirmative action clause (Davis et al *Fundamental Rights* 60). In other words, the object of the measures is limited to 'full and equal enjoyment of all rights and freedoms', and nothing more (*ibid*) (see also chapter 7 par 5 below). See also *Harmse v City of Cape Town* (2003) 24 ILJ 1130 (LC) for a contrasting opinion. This judgment has, however, been widely criticised (see, for example, Garbers 'Right to Affirmative Action?'; McGregor 3).

250 The word 'designed' implies that measures must be rational in relation to the ends pursued (De Waal, Currie & Erasmus *Bill of Rights Handbook* 224; Kentridge 'Equality' 14-59). For case law in this regard see, for example, *Van Heerden* 2004 (6) SA 121 (CC) at pars 38-44, where it was held that the measures must be directed at an 'envisaged future outcome' ... 'reasonably capable of attaining the desired outcome'; *Public Servants Association of South Africa & another v Minister of Justice & others (Public Servants Association)* (1997) 18 ILJ 241 (T) at 306-308, where a special dispensation (with no overall plan) to promote representivity was found not to constitute designed measures and to give the employer an unfettered discretion to earmark posts for blacks and women; *MWU v ESKOM* (1999) 9 BLLR 1089 (IMSSA) where ESKOM's lack of detailed and individualised plans for each of its operating systems was found not to be in line with an affirmative action policy in terms of item 2(2)(b) of schedule 7 to the 1995 LRA; *Public Servants Association v Minister of Correctional Services & others* (LC 25 July 1997 case no J174/97) (unreported) where it was found that the employer's affirmative action programme was lawful, since it was the product of consultations and had been structured to achieve a 'certain equality by a certain date'. For a more relaxed approach, see *NEHAWU obo Thomas v Department of Justice (Thomas)* (2001) 22 ILJ 306 (BCA) at 313A-F where the appointment of an Indian female to the Employment Equity Directorate of the Department of Labour (when the Directorate's equity plan had not been finalised)

persons or categories of persons, disadvantaged by unfair discrimination, may be taken.'

Although not spelt out in so many words, it is submitted that it can be inferred from the wording of the interim and final Constitutions that affirmative action focuses on the protection and advancement of both individual people (both use the word 'persons') and categories or groups of people (the wording 'groups or categories of persons' and 'categories of persons' are used respectively) disadvantaged by unfair discrimination.

(a) Disadvantage

Both the interim and the final Constitutions' texts create categories for beneficiaries of affirmative action, namely people who have been 'disadvantaged' by past discrimination.<sup>251</sup> But no specific factors are used to connote 'disadvantage'. It is not stated that disadvantage is assumed in favour of members of the designated groups, or whether evidence of actual disadvantage as such is required. The term 'disadvantaged'

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was found not to be haphazard or ad hoc, as the Directorate had relied on departmental policy and the public service staff code; *Gordon v Department of Health Kwazulu-Natal* (2004) 25 ILJ 1431 (LC) at 1437B-C where the court held that an affirmative action plan is not a prerequisite for making an affirmative action appointment. See also *Swanepoel v Western Region District Council & another* (1998) 19 ILJ 1418 (SE); *IMAWU v Greater Louis Trichardt Transitional Local Council (IMAWU)* (2000) 21 ILJ 1119 (LC); *Germishuys v Upington Municipality* (2000) 21 ILJ 2439 (LC); *Walters v Transitional Local Council of Port Elizabeth & another (Walters)* (2000) 21 ILJ 2723 (LC); *Crotz v Worcester Transitional Local Council* (2000) 22 ILJ 750 (CCMA); *Department of Justice v CCMA & others* (2001) 22 ILJ 2439 (LC); *Stoman* (2002) 23 ILJ 1020 (T); *Coetzer & others v Minister of Safety & Security & another (Coetzer)* (2003) 23 ILJ 163 (LC), all of which held that the lack of 'specific' programmes prevented the employers from implementing any measures under the banner of affirmative action. Similarly, in *IMATU obo Gounden & eThekweni Municipality: Metro Electricity (Gounden)* (2003) 12 SALGBC 6.9.8 case no EMD 050314 (unreported), the arbitrator held that the summary ruling out of Indian males based on a 'private design' (over and above a clear affirmative action policy) to correct their excessive representation was wrong and an act of unfair discrimination. The arbitrator held that the proper place to take the over-representivity of Indian males into account was after sifting and perhaps even shortlisting, during the interview process and where it emerged that candidates were tied or perhaps ranked very closely. Being a member of a group that is under-represented in the specific department or sub-department might then be an additional factor that could, arguably, legitimately be used to decide who gets the job. See also *Communications Workers Union and Langa & others & South African Post Office* (2004) (13 CCMA 6.9.4 case no GA 26669-03 (unreported)) where it was held that an employment equity plan must be rational and justifiable with the purpose of addressing past inequalities. Such a plan must not merely be meant to 'make up numbers at the expense of competency'.

251 See s 8(3)(a) of the interim Constitution and s 9(2) of the final Constitution.

is in fact not defined at all. Moreover, neither of the texts make special provision for multiple disadvantage, such as for black women or disabled women. Nor do the texts provide for degrees of disadvantage. In view of this, it can be argued that the word 'disadvantage' should then be given meaning in the light of the constitutional purpose.

Kentridge<sup>252</sup> does exactly this and offers an exposition on the concept 'disadvantage' against the constitutional background. She states that the constitutional wording 'disadvantaged by unfair discrimination' implies people who are, or have been, disadvantaged by measures which impair their fundamental dignity or adversely affect them in a comparably serious way. The author however points out that the possibility exists that the words 'disadvantaged by unfair discrimination' could be very restrictively interpreted:

'For example, they could be taken to mean that the beneficiaries of an affirmative action policy must *themselves* have been subject to discrimination *on the part of the body whose affirmative action policy is under scrutiny*. If this is the case, a *body defending* its affirmative action policy will have to show that *it* has in the past perpetrated unfair discrimination, whether direct or indirect, against the individuals or groups who are now the beneficiaries of the policy.

Hence respondents needing to justify an affirmative action policy would be required to lead evidence of their *own* past "sins of discrimination". Apart from being counterproductive, such an interpretation is *inconsistent with the substantive conception of equality* embraced by the Constitution. It is born of a perception that inequality is an aberration which results from isolated instances of discrimination. On this approach, if there is no evidence that some person or institution has "perpetrated" discrimination, then there is no discrimination. This view ... is fundamentally at odds with the conception of equality espoused by the Constitution. There is no room in the perpetrator perspective for the acknowledgement that discrimination may be unintentional, indirect or systemic' (own emphasis).

The author points out that the interim Constitution however appreciated the systemic and self-perpetuating nature of discrimination and the need to redress discrimination

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252 'Equality' 14-38-14-39. Although she discusses s 8(3) of the interim Constitution, the interpretation holds true for s 9(2) of the final Constitution, as the sections are similar enough in this respect for comments on one to apply to the other.

through positive measures. She argues that the words ‘disadvantaged by unfair discrimination’ clarify that it is not necessary to show present unfair discrimination against the beneficiaries of an affirmative action policy. Past unfair discrimination, the effects of which are felt in the present, is sufficient.<sup>253</sup> She cautions that even this requirement should not be construed unduly narrowly, since affirmative action measures are not merely compensatory in their object. It is not necessary that each individual benefited by such measures is shown to have been personally disadvantaged by unfair discrimination and therefore entitled to compensation. The words ‘persons or groups or categories of persons’ (in the interim Constitution) indicated that the measures may be designed to protect and advance groups as well as individuals. The goal of the measures was to give their beneficiaries access to ‘full and equal enjoyment of all rights and freedoms’. She concludes that section 8(3)(a) of the interim Constitution was therefore forward-looking and not simply backward-looking. This, she emphasises, is consistent with the rationale underlying affirmative action, as identified by the Canadian Supreme Court,<sup>254</sup> namely that an employment equity programme must be designed to break a ‘continuing cycle of systemic discrimination’.

*‘The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, although some such individuals may be beneficiaries of an employment equity scheme. Rather, an employment equity programme is an attempt to ensure that future applicants and workers from the affected group will not face the same insidious barriers that blocked their forebears’* (own emphasis).

Finally, the author holds that the limitations on the scope of affirmative action policies should be interpreted in a way which is sensitive to the social, economic and political context of disadvantage and which is true to the constitutional commitment to

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253 *Op cit* 14-39. The author does not specifically address the issue of whether the disadvantaged person should have been present in the territory of South Africa, or whether a person who fled the country under apartheid will also be allowed to benefit from affirmative action (see chapter 4 par 2.1.2 below for an opinion in this regard).

254 *Action Travail des Femmes v Canadian National Railway Company (Canadian National Railway)* [1987] 1 SCR 1114, 40 DLR (4<sup>th</sup>) 193 at 213 (see chapter 6 par 3.5.4.2(b)(i) below) (see also chapter 4 par 2.1.3.2(b) below where this wording is used).

substantive equality.<sup>255</sup> It is submitted that this interpretation is correct in the light of the notion of substantive equality as being a group-based notion. Reference will be made below to the interpretation of the courts of the concept ‘disadvantage’ in the contexts of the EEA.<sup>256</sup>

### **3.5.2 Employment Equity Act 55 of 1998**

#### *3.5.2.1 Green Paper on Employment and Occupational Equity*

Shortly after the Constitution came into operation, the Minister of Labour launched a Green Paper on Employment and Occupational Equity<sup>257</sup> (hereafter the ‘Green Paper’) with a view to introducing a comprehensive statutory regulation of equality rights in employment. It stated that government was committed to ‘positive measures’ to overcome the legacy of discrimination and disadvantage inherited from the previous apartheid state and society.<sup>258</sup> As with the Labour Market Commission,<sup>259</sup> it extended employment equity to both a ban on unfair discrimination and to broad measures to encourage employers<sup>260</sup>

‘to undertake *organizational transformation to remove unjustified barriers to employment for all South Africans*, and to accelerate training and promotion for individuals from historically disadvantaged groups’ (own emphasis).

The Green Paper noted that income distribution and occupational status in South Africa were amongst the most unequal in the world, and that these went hand in hand with

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255 Kentridge ‘Equality’ 14-39.

256 See chapter 4 pars 2.1.2; 2.1.3 below.

257 Green Paper on Employment and Occupational Equity. The launch of the paper was preceded by extensive consultations between business, labour and government.

258 Green Paper chapter 1 par 1.1.3.

259 See par 3.4.4 above.

260 Green Paper chapter 1 par 1.1.5.2.

race and gender.<sup>261</sup> It relied in this regard on the figures of the ILO Country Review<sup>262</sup> which underscored the need to define inequalities in terms of how race and gender 'work together'.<sup>263</sup> It emphasised that, historically, discrimination had occurred *within* the labour market as a result of discrimination in hiring, training, promotion and retrenchment, and owing to unnecessary hindrances perpetuated by the ways in which work and training were organised.<sup>264</sup> In addition, it stated, many laws, regulations and policies *outside* the labour market ensured the disadvantage of the majority of South Africans.<sup>265</sup> In this regard, critical factors reinforcing inequality included the history of unequal education<sup>266</sup> and training,

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261 *Op cit* Summary pars 2.1; 2.1.3; chapter 2 pars 2.1.1; 2.2.1; 2.5.1. The Green Paper pointed out that, amongst the employed, one-third of blacks earned less than R500 per month, compared with under 5 percent of whites. A white male South African was 5 000 times more likely than an African woman to be in a top management position. These distortions within the occupational and professional structures of the labour force were further illustrated by a survey of some 107 organisations by the Breakwater Monitor Study in 1996. It indicated that, in the top managerial ranks of companies (Paterson F Grade), Africans constituted only 2,99 percent, coloureds only 0,43 percent, and Asians only 0,21 percent, with whites at 96,38 percent. The same study found that, for the lowest grades (Paterson A), whites constituted 1,05 percent, Africans 89,01 percent, coloureds 7,94 percent and Asians 1,20 percent. No correlation existed between the composition of the workforce at technical, professional and managerial levels and the overall demographics of the country. It was pointed out that the situation would not redress itself automatically. An FSA Contact survey on affirmative action (September 1997) found that, in the three-year period to 1997, the number of black senior managers increased by only 2,3 percent, and by only 1,6 percent among middle managers. The ILO Country Review (1996) supported these findings on the basis that the 1994 October Household Survey indicated that more than two out of every five employed blacks were in labouring jobs, whilst about one out of every five whites were in such jobs. The ILO Country Review pointed to the fact that, for top positions, not only had Africans and other non-whites been chronically under-represented in managerial positions, but whites had been artificially eased into management without the prerequisite qualifications, in both the private and the public sectors. Also, the public service displayed great discrepancies with regard to male-female ratios. With regard to people with disabilities, only 236 such employees out of 1,18 million were employed in the public service by 1997. Serious problems existed with regard to occupational segregation in general. In 1989, only 6 percent of artisans and 14 percent of apprentices were African, and most of these were in the construction industry. Of the indentured apprentices in 1990, 74 percent were white, 10,5 percent were African, 9,6 percent were coloured and 5,8 percent were Asian. Those Africans who had entered the system were found mostly at the lower levels. In addition, Africans were found mostly in the mining and construction sectors and seldom in the financial and services sectors.

262 See par 3.4.4 above.

263 Green Paper chapter 2 par 2.2.1. It first endeavoured to define the nature of inequalities faced by different groups, and the extent to which inequalities arose within the labour market, before it went on to establish measures to successfully combat these.

264 *Op cit* chapter 3 par 3.1.1.2.

265 *Op cit* chapter 3 par 3.2.1.

266 Separate education under apartheid, with little money, inferior qualifications, little secondary education, under-resourced teaching conditions and language requirements (*op cit* chapter 3 pars

disparities in the ownership of assets,<sup>267</sup> the unequal division of household labour and child care<sup>268</sup> (especially in communities with poor infrastructure), how close living areas were to work, and regional backlogs.<sup>269</sup>

The strategy to secure social and economic equality must, the Green Paper held, therefore reach ‘far beyond’ employment equity. Broad non-discrimination measures applying to all employers, employees and applicants for employment were mooted.<sup>270</sup> With regard to affirmative action measures, it was proposed that employers conduct an organisational audit and develop an employment equity plan for historically disadvantaged groups, namely<sup>271</sup>

‘black people, women and people with disabilities’,

with black women considered to form an especially neglected group.<sup>272</sup> The rationale for including these particular groups was, it appears, based on the figures of the ILO Country Review referred to above.<sup>273</sup> The basis was thus laid for the different categories of beneficiaries of affirmative action – and this by a government-appointed commission (a majority government at that stage), based on the figures of the ILO Country Review (which

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3.2.3 to 3.2.7) (see also chapter 4 par 2.2.1 below).

267 Apartheid prevented Africans from owning land and limited their access to loans, markets and infrastructure (Green Paper chapter 3 pars 3.2.8; 3.2.9).

268 Women typically faced the burden of unpaid household labour in addition to income-generating work. On the one hand, for many women, household responsibilities left them no time for paid employment. On the other hand, a rigid work organisation had prevented women from performing well, as time-off had to be taken for child and other family responsibilities. The Green Paper pointed out that, in many countries, remedying gender imbalances meant restructuring work organisation to give greater flexibility in balancing paid work against caring responsibilities (*op cit* chapter 3 par 3.2.11).

269 *Op cit* chapter 3 pars 3.1.1; 3.2.2.

270 *Op cit* chapter 4 par 4.2.2.

271 *Op cit* chapter 4 pars 4.2.3; 4.6; 4.7.

272 *Op cit* chapter 2 pars 2.1; 2.2.4; 2.2.7; chapter 3 pars 3.2.10; 3.2.12; 3.2.13.1; 3.3.4.

273 See par 3.4.4 above.

have never been contested), for a majority of blacks and women.<sup>274</sup> Reference to these groups has subsequently been repeated in proposed laws on affirmative action. Although the Green Paper held that the process of consultation would define how much to differentiate within these groups in order to meet their specific needs, and how to ensure accelerated measures for designated groups without reintroducing an oppressive classification system, it seems that nothing came of this.<sup>275</sup> After comments on the Green Paper were considered, a draft Employment Equity Bill was prepared.

### 3.5.2.2 *Employment Equity Bill*

The Employment Equity Bill expressed the goal of substantive equality as follows:<sup>276</sup>

‘Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are *reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups*, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport. These disparities can *not* be remedied *simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed*’ (own emphasis).

The Bill stated that the legislation had been drafted with a view to advancing those groups who had been disadvantaged as a result of discrimination caused by ‘laws and social practices’.<sup>277</sup> Like the Green Paper, it argued that black people, women and people with disabilities faced significant disadvantages in employment. These included occupational segregation, inequalities in pay, lack of access to training and development opportunities, and high levels of unemployment.<sup>278</sup> It further stated that, under apartheid,

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274 A situation different from that in the US where a majority has determined the groups for minorities and where, in fact, such determination was initially made, and was later extended, by bureaucrats (see chapter 5 par 3.8 below).

275 Green Paper chapter 4 pars 4.2.1; 4.2.2.

276 Explanatory Memorandum to the Employment Equity Bill 5.

277 *Op cit* 5.

278 *Op cit* 6.



black people in particular had suffered particular and pernicious disadvantage as a result of job reservation and a lack of access to skills and education.<sup>279</sup> It repeated and emphasised that South Africa had the most unequal distribution of income in the world.<sup>280</sup> The Employment Equity Bill was debated extensively at the National Economic, Development and Labour Council (hereafter NEDLAC), with agreement on many issues, but a consensus view could not be reached on all aspects.

### 3.5.2.3 *Employment Equity Act 55 of 1998*

#### (a) Introduction

Subsequently, the EEA was passed. It gives effect to section 9 of the Constitution and follows the constitutional model of both formal<sup>281</sup> and substantive<sup>282</sup> equality. The EEA's purpose is twofold: first, to achieve equity in the workplace by promoting equal opportunities and fair treatment in employment through the elimination of unfair discrimination,<sup>283</sup> and, secondly, by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels in the workforce.<sup>284</sup> In doing so, it provides the touchstone for affirmative action in employment law.

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279 *Ibid.* It was noted, however, that, whilst the Employment Equity Bill sought to address inequalities within the sphere of employment, other inequalities outside the labour market should not be lost sight of, such as disparities in the ownership of productive assets, the unequal division of household labour and child care, and the geographic distribution of population groups under apartheid, all of which had contributed to these inequalities.

280 *Op cit* 6-8, referring to the ILO Country Review (see pars 3.5.2.1; 3.4.4 above for the figures).

281 Section 2(a) of the EEA.

282 Section 2(b) of the EEA.

283 See s 2(a); chapter II of the EEA, the latter of which came into operation on 9 August 1999.

284 Section 2(b) and chapter III, which came into force on 1 December 1999. It should be noted at this stage that the focus of the EEA appears to differ from that of the Constitution – 'equitable representation', which emphasises that people from designated groups should be equitably represented (ss 15(2)(c); 15(2)(d); 20(2)(c); 42(a) of the EEA).



(b) Non-discrimination

With regard to the first purpose, the EEA prohibits direct and indirect unfair discrimination on the same grounds listed in the Constitution.<sup>285</sup> To these, the Act adds family responsibility, HIV status and political opinion.<sup>286</sup> As with the Constitution, the list is non-exhaustive and implies that other ‘unlisted’ grounds may exist.<sup>287</sup> Like the Constitution, it does not include citizenship. The EEA, as with the Constitution, provides for a presumption of unfairness if discrimination is based on a listed ground, and for the unfairness to be proven by the applicant if discrimination is based on an unlisted ground.<sup>288</sup>

(c) Affirmative action

(i) Nature

With regard to the second purpose, the Act provides that it is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act.<sup>289</sup>

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285 These include race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, and birth (s 9(3) of the Constitution) (see par 3.5.1.3(a) above).

286 Section 6(1) of the EEA.

287 Section 6(1) uses the word ‘including’. See McGregor 1 167-71 for a discussion of listed and unlisted grounds.

288 Section 11 of the EEA.

289 Section 6(2)(a) of the EEA. Affirmative action has been described as a ‘transformative device’, (Adam ‘Affirmative Action’ 240) and as ‘a *socio-political priority*’ that may be said to assume ‘something of the nature of a latter-day value’, but not a ‘universal value’. It has been stressed that affirmative action is strictly ‘a procedure, a strategy, a means to an end or as termed in our interim Constitution, a “measure” to achieve a goal ... affirmative action is a *means to an end* and not an end in itself ... affirmative action is not a value as such but an interim measure. Being a measure and not a universal value it will be temporary in nature’ (George (1996) 17 ILJ 571 (IC) 571 at 592D-E). In contrast, *non-discrimination* has been held to be ‘a value and a *constitutional right* ...’ (own emphasis) (George (1996) 17 ILJ 571 (IC) 571 at 593E-F). See also Smith 2 88; Dupper 1 292; Du Plessis & Corder *Transitional Bill of Rights* 145. For the sake of completeness, note that the EEA provides that unfair discrimination may also be justified on a second ground, namely the inherent requirements of the job (s 6(2)(b)).

Put differently, affirmative action is a defence to a claim of unfair discrimination.<sup>290</sup> This means that an applicant for employment or promotion cannot rely on affirmative action to compel an employer to appoint or promote.<sup>291</sup>

The EEA indicates the nature of affirmative action measures as follows:<sup>292</sup>

‘... measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.’

It has been held that the EEA requires affirmative action as a ‘mandatory strategy’ or a ‘strategic mechanism’ for designated employers to achieve the outcome of an equitable workplace.<sup>293</sup> In other words, affirmative action in the context of the EEA refers to a ‘planning process to be put in place’,<sup>294</sup> it is no more than an attempt to force larger employers to approach affirmative action on a consistent and rational basis<sup>295</sup> and does

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290 Affirmative action measures can be defended only by showing that the measures promote the achievement of equality. This justification falls within the realm of political morality (Kentridge ‘Equality’ 14-36). The justification is concerned with issues of fairness and rationality and not with prudential considerations (*ibid*). In other words, affirmative action must be justified in relation to the purposes underlying the value of equality itself and are not considered to be a diminution of equality which must be justified with reference to other competing considerations (*op cit* 14-35 - 14-37; 14-55; Bacchi *Affirmative Action* 20; 22). This is borne out by case law. For example, *Abbot v Bargaining Council for the Motor Industry (Western Cape) (Abbot)* (1999) 20 ILJ 330 (LC); *Walters* (2000) 21 ILJ 2723 (LC) pointed out that reliance on affirmative action might be a good defence to a claim of a breach of the principle of equality; *Ntai* (2001) 22 ILJ 214 (LC) held that ‘[a]ffirmative action in terms of the applicable provisions of the LRA ... remains but a shield or defence in the hands of an employer that wishes to legitimately and lawfully apply such “reverse discrimination” on the basis of, for instance, race...’. It is important to note that only affirmative action measures consistent with the purpose of the EEA – to ensure the equitable representation of designated groups in all occupational categories and levels in the workforce (s 2(b)) – justifies discrimination. From this it also follows that affirmative action programmes entered into outside the scope of the EEA may well be used as a justification, as long as they are consistent with the purpose of the EEA.

291 Dupper & Garbers *Employment Discrimination* CC1-59.

292 Section 15(1) of the EEA.

293 Bhoola ‘Commentary’ CC1-B-4; B-6.

294 *Op cit* CC1-B-3. Although the concept ‘employment equity’ refers to *both* a planning process and the outcome of the Act.

295 Dupper 1 278.

not give rise to a right in this regard.<sup>296</sup>

(ii) Content and process

Every designated employer must implement affirmative action measures for people from designated groups.<sup>297</sup> To do this, an employer must consult with its employees,<sup>298</sup> must conduct an analysis,<sup>299</sup> and must prepare an employment equity plan.<sup>300</sup> In addition, a duty<sup>301</sup> to report on progress made in implementing its plan is placed on every designated employer. Failure to comply with these requirements may lead to fines and to state contracts being refused or cancelled.<sup>302</sup>

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296 *Dudley* (2004) 25 ILJ 305 (LC) at 331F-G; 332A (see fn 249 above).

297 Section 13(1) of the EEA.

298 Section 13(2)(a) of the EEA. Sections 16; 17; 18 indicate the nature of consultation, who the employer must consult with, the matters for consultation, and provide for disclosure of information.

299 Section 13(2)(b) of the EEA. A designated employer must collect information and must conduct an analysis of its employment policies, practices, procedures and the working environment in order to identify employment barriers that adversely affect people from designated groups (s 19(1)). The analysis must include a profile of the designated employer's workforce within each occupational category and level to determine the degree of under-representation of people from designated groups in various occupational categories and levels in that workforce (s 19(2)).

300 Section 13(2)(c) of the EEA. A designated employer must prepare and implement a plan which will achieve reasonable progress towards employment equity in the particular workforce. Such a plan must include certain items, such as the objectives to be achieved for each year of the plan (s 20(2)(a)); the affirmative action measures to be implemented as required by s 15(2) (s 20(2)(b)); where under-representation of people from designated groups has been identified, the numerical goals, strategies and timetables intended to achieve these goals (s 20(2)(c)); the timetable for each year of the plan (s 20(2)(d)); the duration of the plan, which may not be shorter than one year or longer than five years (s 20(2)(e)); the procedures that will be used to monitor and evaluate the implementation of the plan and whether reasonable progress is being made (s 20(2)(f)); the internal procedures to resolve any dispute about the interpretation or implementation of the plan (20(2)(g)); and the people in the workforce, including senior managers, responsible for monitoring and implementing the plan (s 20(2)(h)). The Regulations to the EEA provide information on demographic data, occupational levels and categories to which employers may refer when they establish their numerical goals.

301 Sections 13(2)(d) of the EEA. The first reports by employers with less than 150 employees were due in December 2000 and, thereafter, once every two years. Employers with more than 150 employees were required to report in June 2000 and, thereafter, once a year (s 21(1) and (2)). Reports are made to the Director-General of the Department of Labour. In the case of a public company, a summary of such report must be published in the annual report of the designated employer (s 22(1)). In the case where the designated employer is an organ of state, the relevant minister must table such report in Parliament (s 22(2)).

302 Section 53; schedule 1 to the EEA.

Section 15(2) lays down which issues must be included in affirmative action measures implemented by a designated employer. In short, the section requires measures to identify and eliminate employment barriers which adversely affect people from designated groups;<sup>303</sup> measures to further diversity in the workplace, based on equal dignity and respect for all people;<sup>304</sup> measures for reasonably accommodating people from designated groups;<sup>305</sup> measures to ensure equitable representation of ‘suitably qualified’ people from designated groups;<sup>306</sup> measures to retain and develop people from designated groups; and measures to implement appropriate training measures (including skills development).<sup>307</sup> The last two measures include preferential treatment and numerical goals, but exclude quotas.<sup>308</sup> It is further stipulated that a designated employer is not required to take any decision concerning an employment policy or practice that would establish an absolute barrier to the prospective or continued employment or advancement of people who are not from designated groups.<sup>309</sup>

While the non-discrimination provisions of the EEA apply to all employers and

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303 Section 15(2)(a) of the EEA.

304 Section 15(2)(b) of the EEA.

305 Section 15(2)(c) of the EEA.

306 Section 15(2)(d)(i) of the EEA.

307 Section 15(2)(d)(ii). For measuring compliance with the Act, s 42 sets out certain factors. It states that, with regard to the extent to which suitably qualified people are equitably represented, regard must be had to the demographic profile of the national and regional economically active population; to the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees; to present and anticipated economic and financial factors relevant to the sector; to the employer’s present and planned vacancies in the various categories and levels; and to the employer’s turnover of labour (s 42(a)). Regard must also be had to the employer’s progress in implementing employment equity in comparison with others in comparable circumstances and in the same sector (s 42 (b)); to reasonable efforts made by the employer to implement its plan (s 42(c)); and to the extent to which an employer has made progress in eliminating employment barriers that adversely affect people from designated groups (s 42(d)). The Skills Development Act 97 of 1998 aims to assist with training and development of people and to create a bigger pool of people from which employers can recruit and hire.

308 Section 15(3) of the EEA.

309 Section 15(4) of the EEA. This implies some measure of fairness and proportionality towards people of non-designated groups (Pretorius ‘Affirmative Action’ 20). See also *Public Servants Association* (1997) 18 ILJ 241 (T). Case law also points out that affirmative action cannot constitute a fair basis for dismissal, as opposed to appointment of an employee. See, in this regard, *Van Zyl v Department of Labour* (1998) 7 CCMA 5.3.1(unreported), decided under items 2(2)(a) and (b) of schedule 7 to the 1995 LRA; *McInnes v Technikon Natal* (2000) 21 ILJ 1138 (LC), also decided under items 2(2)(a) and (b) of schedule 7 to the 1995 LRA.

employees,<sup>310</sup> the affirmative action measures apply only to 'designated employers' and to people from 'designated groups'.<sup>311</sup> The term 'designated employers'<sup>312</sup> is defined to include, essentially, larger enterprises (in terms of the number of employees and turnover),<sup>313</sup> municipalities,<sup>314</sup> organs of state,<sup>315</sup> and employers appointed as such in terms of a collective agreement.<sup>316</sup> Employers who are not designated may comply voluntarily with the affirmative action requirements of the EEA.<sup>317</sup> Affirmative action is thus limited to 'designated employers' and 'designated groups'.

(iii) Beneficiaries

As pointed out above, the figures and evidence contained in the ILO Country Review have determined the beneficiaries of affirmative action.<sup>318</sup> No further debate took place on the identify of beneficiaries. It may thus be said that South Africa's apartheid history dictated mainly who the beneficiaries of affirmative action should be. The reference to beneficiaries in the EEA is made only with regard to groups.<sup>319</sup> The EEA uses the term 'designated groups' and defines it to connote<sup>320</sup>

'black people, women, and people with disabilities'.

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310 Section 4(1) of the EEA. In the public and private sectors.

311 See ss 4(2); 12 of the EEA. It also includes temporary employment services (s 57). The scope of this obligation is narrower than that of the Constitution.

312 Section 1 of the EEA.

313 Employers who employ 50 or more employees, and employers who employ fewer than 50 employees, but who have an annual turnover that is equal to, or is above, the applicable turnover for a small business in terms of schedule 4 to the EEA.

314 As referred to in chapter 7 of the Constitution.

315 As defined in s 239 of the Constitution, but excluding local spheres of government, the National Defence Force, the National Intelligence Agency and the South African Secret Service (see also s 58 of the EEA).

316 In terms of s 23 or s 31 of the 1995 LRA, to the extent provided for in the agreement.

317 Section 14 of the EEA.

318 See pars 3.4.4; 3.5.2.1 above.

319 While s 9(2) of the Constitution refers to 'persons' and 'categories of persons'.

320 Section 1 of the EEA.

'Black people' is<sup>321</sup>

'a generic term for Africans, Coloureds, and Indians,

whereas 'people with disabilities' connotes<sup>322</sup>

'people with a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into, or advancement in, employment'.

#### A Identifying beneficiaries

The Department of Labour<sup>323</sup> has given some guidance regarding the classification of employees. Form EEA1 calls for self-classification by employees, but this remains a voluntary action. The information on Form EEA1 is confidential. However, should an employee be unwilling to complete the form, the employer may use existing records to determine the status of the employee, but must ensure that such information is always available for employee review.<sup>324</sup> Employers are encouraged to urge particularly employees with disabilities to disclose their disabilities,<sup>325</sup> and employees are encouraged not to be fearful of this process of self-identification. Further, it is recommended that an employee with black and white parents be given the benefit of a declaration as a 'designated' employee.<sup>326</sup>

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321 *Ibid.*

322 *Ibid.*

323 <http://www.labour.gov.za/docs/legislation/eea/faq.html> 1.

324 *Ibid.*

325 *Ibid.* Undercounting with regard to people with mental disabilities may be likely in South Africa.

326 *Ibid.*



(d) Interpretation of EEA

The EEA must be interpreted in compliance with the Constitution so as to give effect to the latter's purpose.<sup>327</sup> Regard should be had to any relevant code of good practice issued in terms of the EEA, or any other employment law.<sup>328</sup> The EEA must also be interpreted in compliance with the international obligations of South Africa, in particular those contained in ILO Convention 111,<sup>329</sup> which South Africa has ratified.<sup>330</sup>

#### 4 CONCLUSIONS

In this chapter, an overview of South Africa's history of colonisation, slavery, patriarchy and apartheid was given and it was indicated that, early on, equality was interpreted in a restrictive and formal way. The discussion then focused on important steps taken since the late 1970s, which led to the transformation of the apartheid practices and laws of the country into a democratic order.<sup>331</sup> In this regard, the Wiehahn Commission initiated major changes with regard to the labour regulation system, and, slowly, the system started to be remodelled so as to integrate labour relations in South Africa. Moreover, both the Law Commission and the Labour Market Commission played important roles in facilitating both constitutional and national legislative changes. It was shown that, as from 1993, with the adoption of the interim Constitution, South Africa embraced the concept of substantive equality, with provision being made for the elimination of unfair discrimination and, in addition, for affirmative action measures. This was done in an endeavour to achieve

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327 Sections 3(a); 3(b) of the EEA.

328 Section 3(c) of the EEA. In this regard, a Code of Good Practice: Preparation, Implementation and Monitoring of Employment Equity Plans (hereafter 'Code of Good Practice: Preparation and Implementation of Employment Equity Plans') has been published. It contains practical guidelines regarding procedure and substance. It does not impose any legal obligations over and above those in the EEA. The guidelines in the Code must be applied when employers develop employment equity plans, but the specific circumstances of an organisation may be taken into account (s 3(2) of the Code).

329 Section 3(d) of the EEA.

330 See chapter 2 par 2.1.2.4 above.

331 See pars 3.3; 3.4; 3.5 above.

true equality in the historically oppressed South African society and to comply with ILO Convention 111.<sup>332</sup> Subsequently, the final Constitution and the EEA confirmed these principles.<sup>333</sup>

An overview was also given of the use of the concepts of dignity and equality in the Constitution.<sup>334</sup> Dignity has been interpreted to be the cornerstone and one of the most important rights in South Africa. Furthermore, it is considered as particularly important against the background of apartheid, as the motif linking equality and as an integrating and remodelling tool for interpreting equality.<sup>335</sup> The law of discrimination according to the Constitution (and the EEA which follows it closely) was also set out. It was seen that both the Constitution and the EEA prohibit direct and indirect discrimination by way of non-exhaustive lists of grounds, and that this implies that, besides the 'listed' grounds, other 'analogous' or 'unlisted' grounds may exist.<sup>336</sup> Discrimination based on a listed ground is presumed to be unfair. If discrimination is based on an unlisted ground, no unfairness is presumed and the applicant has to prove the unfairness. Once it is established that the discrimination is unfair, it can still be justified in terms of a law of general application in certain circumstances. The factors given by the Constitutional Court – following the same basic line of reasoning as set out in international law – to determine the unfairness of the

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332 See chapter 2 par 2.1.3.4 above; par 3.5.2.3(d) above.

333 In addition to the EEA, the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2002 (PEPUDA) was passed to promote equality and prevent unfair discrimination in all spheres of society. It was enacted to comply with section 9(4) of the Constitution and the Convention on the Elimination of All Forms of Discrimination against Women as well as the Convention on the Elimination of All Forms of Racial Discrimination (Preamble of PEPUDA). It does not apply to any person to whom, and to the extent to which, the EEA applies (s 5). This does not mean that it will not apply at all to the workplace. People excluded from the EEA, like members of the National Defence Force, the National Intelligence Agency and the South African Secret Service (s 1 of the EEA), as well as independent contractors, may, for example, rely on the PEPUDA. Employees of smaller or non-designated employers may also fall under this Act (Cooper 'Application of PEPUDA' 1535). It should be noted that the PEPUDA specifically includes, in its illustrative list, unfair practices in certain sectors, labour and employment (schedule to the Act referring to s 29). This Act is mentioned for the sake of completeness. As with the Constitution and the EEA, it prohibits discrimination generally (s 6) and specifically on the basis of race (s 7), gender (s 8) and disability (s 9). It also provides for affirmative action (ss 14; 15; 26; 27; 28). This Act will not be discussed further, but will merely be referred to in one or two instances (see chapter 4 fn 240 below).

334 See par 3.5.1.2(b) above.

335 See par 3.5.1.2(b)(iv) above.

336 See pars 3.5.1.3(a)(i); 3.5.1.3(a)(i)A above.

discrimination were discussed. The seminal case of *Harksen*<sup>337</sup> makes it clear that the enquiry into the unfairness of the discrimination essentially focuses on the holder of the right, the position of that person in society and on the kind of harm suffered by that person. It was submitted that this enquiry should be contrasted with the limitations enquiry under section 36 of the Constitution, which focuses on the purposes, actions and reasons of government, and not on the rights holder.<sup>338</sup>

It was furthermore seen that citizenship is not a *listed* ground of discrimination in either the Constitution or the EEA. However, an investigation revealed that citizenship as an *unlisted* ground is possible. In this regard, the case of *Larbi-Odam*<sup>339</sup> held that non-citizens in South Africa are a 'vulnerable group' and a minority with 'little political muscle', and that citizenship is a personal attribute which is difficult to change.<sup>340</sup> This case will be distinguished from citizenship in the context of a requirement for affirmative action.<sup>341</sup> It was also pointed out that the issue of political sensitivity may require citizenship for particular posts.<sup>342</sup>

It was seen that, despite the explicit provision in the Constitution for affirmative action for 'disadvantaged' people, the concept is not defined in exact terms.<sup>343</sup> While the Constitution refers to 'persons' (individuals) and 'categories of people', it does not state clearly whether actual past disadvantage or membership of a disadvantaged group will suffice. However, 'disadvantage' was interpreted to mean people who are, or have been, disadvantaged by measures which impair their fundamental dignity or adversely affect them in a comparably serious way.<sup>344</sup> It was cautioned that a too restrictive interpretation should not be followed, as this would be inconsistent with the substantive notion of equality

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337 1998 (1) SA 300 (CC) at 320-1.

338 See par 3.5.1.3(b) above.

339 1998 (1) SA 745 (CC).

340 See par 3.5.1.3(a)(i)A above.

341 See chapter 4 pars 2.3.4.2; *Evaluation of citizenship as unfairly discriminatory against non-citizens* below.

342 See par 3.5.1.3(a)(i)B above.

343 See par 3.5.1.4(a) above.

344 *Ibid.*

embraced by the Constitution. It was clarified that it is not necessary to show present unfair discrimination against the beneficiaries of affirmative action. Past unfair discrimination, the effects of which are felt in the present, is sufficient.<sup>345</sup>

It was seen that the EEA, in giving effect to section 9 of the Constitution, provides in more detail for the beneficiaries of affirmative action. It uses the method of categorisation and provides for 'designated groups' to constitute the beneficiaries. These are defined as black people, women and people with disabilities.<sup>346</sup> It was also noted that the EEA, in contrast to the Constitution, only refers to 'groups'. Owing to the fact that the EEA does not state clearly whether past personal disadvantage is required, the same debate as found in the constitutional context, continues in the context of employment law. This will be discussed in chapter 4.

Further, the issue of degrees of disadvantage, which is not addressed in either the Constitution or the EEA, the requirement of 'suitably qualified' as per the EEA and citizenship as a requirement to benefit from affirmative action, as introduced by case law, will be discussed in chapter 4.

It is to these issues that attention will now turn, with the focus on the EEA as interpreted by the courts.

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345 *Ibid.*

346 See par 3.5.2.3(c)(iii) above.