
A LEGAL-HISTORICAL PERSPECTIVE ON AFFIRMATIVE ACTION IN SOUTH AFRICA (PART I)

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1 Introduction

South Africa's past reveals a history of colonialism, slavery, patriarchy and apartheid.¹ These led to racist and sexist practices and to laws resulting in systemic, structural discrimination and inequality for a black majority, other non-white minorities and women in the country.² Although discrimination on the grounds of sex in South Africa has not been as visible and widely condemned as discrimination on the basis of race, it has nevertheless resulted in patterns of significant disadvantage.³

This article looks into some 350 years of inequality from the age of colonialism (in the 1600s) to the advent of democracy and equality (in the 1990s). In particular, the history of inequality in the workplace and its demise forms the focal point of the article.

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1 See, generally, Gann & Duignan (eds) *Colonialism in Africa, 1870-1960* Vol 1, *The History and Politics of Colonialism, 1870-1914* (1969); Gann & Duignan (eds) *Colonialism in Africa, 1870-1960* Vol 2, *The History and Politics of Colonialism, 1914-1960* (1970); Jacobs *Environment, Power, and Injustice: A South African History* (2003); Perry *Apartheid: A History* (1992); Coleman (ed) *A Crime Against Humanity: Analysing the Repression of the Apartheid State* (1998); Thompson (ed) *A History of South Africa* (2001); Worden *The Making of Modern South Africa: Conquest, Segregation, and Apartheid* (2000).

2 Thompson "Legislating for affirmative action: Employment equity and lessons from the developed and developing countries" in Adams (ed) *Affirmative Action in a Democratic South Africa* (1993) 22; O'Regan "Addressing the legacy of the past: Equality in the South African Constitution" in Loenen & Rodrigues (eds) *Non-discrimination Law* (1999) 14; Andrews "Affirmative action in South Africa: Some theoretical and practical issues" in Liebenberg (ed) *The Constitution of South Africa from a Gender Perspective* (1995) 49; Cheadle, Davis & Haysom *South African Constitutional Law* (2002) 53-54; De Waal, Currie & Erasmus *The Bill of Rights Handbook* (2001) 199; Thompson (n 1) 265; *Explanatory Memorandum to the Employment Equity Bill* 6 (GG 1 December 1997 GN 1840 GG No 18481). The black/white colour lines have been drawn very clearly as a result of the small number of whites in relation to blacks (Glaser & Possony *Victims of Politics. The State of Human Rights* (1979) 205). Currently, blacks comprise 77,4 per cent, Indians/Asians 2,5 per cent, so-called "coloureds" 8,4 per cent and whites 11,7 per cent of the South African population (Bureau of Market Research: *A Projection of the South African Population, 2001 to 2021* Research report no 330 (2004) 17). Minorities include coloureds and Indians. The former resulted from the contact between Europeans, the indigenous people and slaves from various areas (Van Jaarsveld *Van Van Riebeeck tot Vorster 1652-1974* (1976) 14 18-38 396-406). The latter came to South Africa as labourers (see 2 1 below).

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

2 Early times

2.1 Colonialism and slavery

The Southern African region was originally inhabited by indigenous people: Khoikhoi (or Hottentots) and San (or Bushmen).⁴ When trade expanded between European and Asian countries in the seventeenth century, 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.⁵

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.⁶ The outpost at the Cape gradually developed into a permanent settlement.⁷

The first shipload of slaves was imported from Dahomey (on the west coast of Africa) and a number of Angolan slaves were captured from the Portuguese.⁸ By the early eighteenth century, most of the slaves came from Mozambique, Madagascar, Indonesia, India and Ceylon (now Sri Lanka). Subsequently, Chinese workers were imported to work on the mines.⁹ From 1860 Indians were imported as indentured labourers to work in the Natal sugar plantations.¹⁰

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 1806.¹¹ From then onwards, the Cape was a British colony. Further colonies were established later – the Transvaal, Orange Free State and Natal.¹²

4 Worden (n 1) 7-8; Thompson (n 1) 6-7; Van Jaarsveld (n 2) 14-17; Glaser & Possony (n 2) 205.

5 In 1652. O'Regan (n 2) 14; Thompson (n 1) xix 31-69; Worden (n 1) 9; Van Jaarsveld (n 2) 3 18 430; Ncholo "Equality and affirmative action in constitution-making: The Southern African case" in Hepple & Szyszczak (eds) *Discrimination: The Limits of the Law* (1992) 415.

6 Worden (n 1) 9-13; Thompson (n 1) 6.

7 Hahlo & Kahn *The Union of South Africa. The Development of its Laws and Constitution* (1960) 3.

8 Thompson (n 1) 36; Van Jaarsveld (n 2) 31. The indigenous Hottentots and San were also used as slaves; see Van Jaarsveld (n 2) 21 32-33 41.

9 Thompson (n 1) xxi.

10 Hahlo & Kahn (n 7) 8; Van Jaarsveld (n 2) 90 383-396.

11 Hahlo & Kahn (n 7) 4-5; Thompson (n 1) xix-xx 51-52; Van Jaarsveld (n 2) 11 77.

12 The Transvaal and Orange Free State were independent republics which were colonised after the Second Boer War. Natal had been colonised much earlier. See Worden (n 1) 12.

From 1679 to 1707 German settlers and the French Huguenots arrived at the Cape and British settlers followed in 1820.¹³ Eventually, because of the contact between the Europeans, the Hottentots and slaves from various areas, a group of so-called "coloured people" was formed.¹⁴

The process of dispossession of the indigenous peoples which started in the seventeenth century accelerated in the nineteenth century, with wars being fought in the Eastern Cape between the British and Dutch settlers on the one hand and the indigenous Xhosa people on the other, and, in Natal, between the British and the Zulu Kingdom.¹⁵

The British abolished slavery in 1807, but the practice was maintained until approximately 1834.¹⁶

2 2 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 1853.¹⁷ The *Colonial Laws Validity Act*¹⁸ was passed to provide for greater powers, but some restrictions remained.¹⁹ Representative and responsible government was granted in 1872.²⁰ At the beginning of the twentieth century, after the defeat of the two Boer Republics in the Transvaal and Free State,²¹ the British Empire granted parliamentary government to the four colonies, with the right to vote being given only to white people.²²

2 2 1 South Africa Act, 1909

In 1909, a written constitution (with no bill of rights), the *South Africa Act*, based on the British Westminster system, was promulgated and created a unitary

13 Thompson (n 1) xx 55; Worden (n 1) 12; Van Jaarsveld (n 2) 41 87 89; Commission of Enquiry into Labour Legislation *The Complete Wiehahn Report Parts 1-6 and the White Paper on each Part with Notes* (1982) xx (hereafter *Wiehahn Report*).

14 Van Jaarsveld (n 2) 14 18-38 396-406.

15 O'Regan (n 2) 14; Thompson (n 1) xx 70-109; Worden (n 1) 20-21 25-27; Van Jaarsveld (n 2) 54-56 98-114.

16 O'Regan (n 2) 14; Van Jaarsveld (n 2) 36 79.

17 Wiechers *Verloren van Themaat Staatsreg* (1967) 186-187.

18 Of 1865 (28 & 29 Vict, c 63).

19 Bekink *Principles of South African Constitutional Law (A Student Handbook)* (2003) 52; Wiechers (n 17) 186-187. It lay 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.

20 Wiechers (n 17) 186-187.

21 Called out in the early 1850s when Cape colonists – unhappy under British rule – moved north (the Great Trek) and settled in certain areas managing their own affairs independent of British rule (Van Jaarsveld (n 2) 141 150-152; Hahlo & Kahn (n 7) 6-7).

22 Thompson (n 1) xx-xxi 149-151; *Wiehahn Report* (n 13) xxi.

state with parliamentary sovereignty.²³ This differed from the system of constitutional supremacy which the country was to enjoy from 1993 onwards.²⁴

Under the *South Africa Act* the four colonies became the provinces of the Union of South Africa in 1910.²⁵ The black peoples of South Africa were, however, not included as citizens of the country.²⁶ Soon the *Natives Land Act*²⁷ was passed to limit African land ownership to "native reserves"²⁸ which became sources of cheap, unskilled labour for white farmers and industrialists. This meant, paradoxically, that thousands of black males worked in the Union of South Africa and were absent from the reserves.²⁹ In the late 1930s, in particular, large numbers of blacks from the reserves went to the mines where they worked in unskilled positions, the skilled jobs being reserved for whites.³⁰

A series of segregation laws were introduced.³¹ 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.³²

23 See Thompson (n 1) 150; Worden (n 1) 29; Van Jaarsveld (n 2) 247-269; Bekink (n 19) 51; Wiechers (n 17) 185-190; Ncholo (n 5) 415. The country, however, remained part of the British Empire with the British Parliament being able to legislate for it (Cockram *Constitutional Law in the Republic of South Africa* (1975) 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, South Africa became part of the British Commonwealth of Nations. This implied that all previous dominions were equal in status "though united by a common allegiance to the Crown" (Wiechers (n 17) 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 21).

24 With the subsequent independence of the Union from the Commonwealth, the *Republic of South Africa Constitution Act* 32 of 1961 was passed (Van Jaarsveld (n 2) 318-323). The Act provided that Parliament would be the sovereign legislative authority in and over the Republic (s 59(1)). In 1983 a new Constitution came into force under the *South Africa Constitution Act* 110 of 1983, confirming parliamentary sovereignty. Under the latter, three uniraical chambers were created for whites, coloureds and Indians, but blacks were still excluded (Thompson (n 1) 225-226).

25 Hahlo & Kahn (n 7) 7 118-127; Wiechers (n 17) 233-237; Thompson (n 1) 150; Van Jaarsveld (n 2) 13; Bekink (n 19) 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 (n 2) 318-323). 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 (n 17) 247-250).

26 Ncholo (n 5) 415.

27 of 1913.

28 Worden (n 1) 55. Totalling 7 per cent of the area of the (then) Union of South Africa. The *Native Trust and Land Act* 18 of 1936 increased this to 11,7 per cent (Thompson (n 1) xx 163).

29 Thompson (n 1) 164-168.

30 *Ibid.*

31 See n 40 *infra* for examples. See, too, Thompson (n 1) xx 154-186.

32 Van Jaarsveld (n 2) 36 413.

2 2 2 Early case law

In *Moller v Keimoes School Committee*³³ the interpretation of legislation providing for separate education of children of European descent gives some indication of the racial sentiments among the European population. The court held:³⁴

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.

The court thus gave weight to the fact that descendants of the European settlers limited themselves racially and culturally: they "defined out" black people from their idea of a nation.³⁵

In the case of *Minister of Posts and Telegraphs v Rasool*³⁶ the respondent (of Indian descent) questioned the instructions of the Postmaster-General to divide the (substantially equal) facilities in post offices into two parts: one for Europeans and the other for non-Europeans. Three of the four judges held that the instructions were valid.³⁷ 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 discrimination was not *per se* unreasonable. One dissenting judge, AJA Gardiner, condemned this type of differentiation and held it to be unreasonable.³⁸

Early case law thus perpetuated and enhanced the inequality between so-called "Europeans" and "non-Europeans".

33 1911 AD 635.

34 At 643.

35 Glaser & Possony (n 2) 376-377.

36 1934 AD 167.

37 At 175-178 181-183.

38 At 191-193.

3 Apartheid

Racist and sexist, and "separate-but-equal" practices and laws, were continued under the apartheid government which came into power in 1948.³⁹ Legislation provided for racially segregated societies for blacks, whites and coloureds. This was achieved by means of pass laws (controlling the free movement of blacks); 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.⁴⁰ In addition, separate "homelands" and separate citizenship were created for the black population of South Africa.⁴¹

In the workplace, discrimination was institutionalised by the apartheid government by means of laws such as the *Industrial Conciliation Act*⁴² and the *Mines and Works Act*.⁴³ The first mentioned excluded blacks from collective bargaining⁴⁴ and the latter provided for job reservation for whites.⁴⁵ Moreover, the *Wage Act*⁴⁶ allowed for differentiations in wage determinations based on race and sex. The *Group Areas Act*⁴⁷ restricted, in particular, the mobility of black, female work seekers, and the *Unemployment Insurance Act*⁴⁸ provided

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- 39 Van Jaarsveld (n 2) 296-326; *Wiehahn Report* (n 13) xxiii-xxv.
- 40 O'Regan (n 2) 14; De Waal, Currie & Erasmus (n 2) 199; Commission to Investigate the Development of a Complete Labour Market Policy *Restructuring the South African Labour Market: Report of the Presidential Commission to Investigate Labour Market Policy* (1996) 138-139 (hereafter *Labour Market Report*); Thompson (n 1) xxi; Worden (n 1) 83-85 106-136; Glaser & Possony (n 2) 376-377. 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; and 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.
- 41 Van Jaarsveld (n 2) 453-477. See the *Promotion of Bantustan Self-Government Act* 46 of 1959 which was subsequently replaced by the *National States Citizenship Act* 26 of 1970; the *Constitution of Bantu Homelands Act* 21 of 1971; the *Status of the Transkei Act* 100 of 1976; 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 (n 2) 357).
- 42 28 of 1956. Repealed by Act 94 of 1979, previously Act 11 of 1924 and Act 36 of 1937.
- 43 12 of 1911 and, later, 27 of 1956.
- 44 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.
- 45 The mining sector was the first to use the colour bar.
- 46 27 of 1925; later, 44 of 1937; and, still later, 5 of 1957.
- 47 41 of 1950; later, 77 of 1957 (see Thompson (n 2) 22).
- 48 53 of 1946; later, 30 of 1966.

for unequal benefits for men and women. In the public service, discrimination based on sex was allowed in terms of the *Public Service Act*.⁴⁹

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.⁵⁰

Inevitably inequality resulted from apartheid's workings.⁵¹

4 Equality gains support

4.1 Wiehahn Commission

The establishment of the Wiehahn Commission⁵² ushered in the first major changes in the South African workplace in the process of attaining 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".⁵³ It took as points of departure 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,⁵⁴ and the fact that changes in labour laws would have a ripple effect on other spheres of society.⁵⁵ It viewed change over a broader front in society as "essential".

The Commission recommended amendments to the *Industrial Conciliation Act*.⁵⁶ Under this Act, black employees were excluded from the definition of "employee" and unions with black members were not able to register. This meant that they were 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.⁵⁷ In 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 an Industrial Court (then yet to be established) by

49 54 of 1957; later, 111 of 1984.

50 *Labour Market Report* (n 40) 139.

51 *Labour Market Report* (n 40) ix.

52 Appointed by the Government on 8 July 1977 with Professor NE Wiehahn as Chairperson. See n 13 above.

53 *Wiehahn Report* (n 13) xxxii.

54 As was found in other countries.

55 *Wiehahn Report* (n 13) Notes par 3 9 9.

56 28 of 1956.

57 *Wiehahn Report* (n 13) Part 5 par 4 127 11.

employing the concept of "unfair labour practice" as criterion. There were two particular reasons for this recommendation. First, the Constitution⁵⁸ of the Republic (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.⁵⁹ 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 an Industrial Court, being based on fairness and equity,⁶⁰ would, in due course, provide an invaluable source for such a code.⁶¹

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.⁶² Removal of discrimination, it stated, also involved "the arduous evolution of different attitudes within the society".⁶³ The Commission stated that evidence showed that much more "deliberate and assertive action" against discrimination was called for in South Africa, a country with heterogeneous work forces. It held 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 would have to be outlawed and criminalised. This had to be done because it was estimated that less than twenty per cent of the labour force in the South African economy at the end of the twentieth century would consist of whites, coloureds and Asians, since the vast majority would be black.⁶⁴

However, it was emphasised that the timing was not right for the introduction of complete, prohibitory measures on discrimination in legislation and it was suggested that further studies be conducted in this regard.⁶⁵ The Commission deracialised the *Industrial Conciliation Act*, and recommended that⁶⁶

58 32 of 1961 (and, later, 110 of 1983).

59 *Wiehahn Report* (n 13) Part 5 par 4 127 11.

60 *Wiehahn Report* (n 13) Part 1 par 4 25 14; Part 5 par 4 127 17.

61 *Wiehahn Report* (n 13) Part 5 par 4 127 12.

62 *Ibid.*

63 *Ibid.*

64 *Wiehahn Report* (n 13) Part 5 par 4 127 14. The outlawing of discrimination would, therefore, not only be a valid source for the short-term in order to overcome the disadvantages to which blacks were being subjected, but was also needed to forestall the likely development of discrimination against minorities.

65 *Wiehahn Report* (n 13) Part 5 par 4 127 15.

66 *Wiehahn Report* (n 13) Part 5 pars 4 128 1 & 4 129 1. In the context of what constitutes fairness, the Commission wisely held as follows: "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."

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".⁶⁷ The definition was general and wide in scope. It included any labour practice which, in the opinion of the Industrial Court,⁶⁸ was an unfair labour practice.⁶⁹ It could therefore include unfair discrimination. In 1980, this definition was superseded by an amendment⁷⁰ which changed the name of the Act to the *Labour Relations Act*. The amendment defined the term in more detail, but still did not include a prohibition on discrimination in so many words. This definition, as further amended in 1982,⁷¹ was used by the Industrial Court to bring about fundamental changes to everyday employment practices.⁷² 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 -
 - (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;

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

68 Established in terms of the *Industrial Conciliation Amendment Act* 94 of 1979 s 8.

69 Since the Wiehahn reforms, statutory forms of discrimination and work reservation have been abolished. Eg, 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" 1988 (10) *Labour Law Briefs* 72).

70 S 1(c) of the *Industrial Conciliation Amendment Act* 95 of 1980.

71 S 1 of the *Labour Relations Amendment Act* 51 of 1982.

72 Le Roux & Van Niekerk *The South African Law of Unfair Dismissal* (1994) 19. The Court's approach was based mainly on policy considerations.

- (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.⁷³

During 1988 the definition was amended again to include a non-exhaustive list with fifteen detailed provisions which would constitute an unfair labour practice.⁷⁴ For the first time, the definition explicitly provided that "the *unfair discrimination* by any employer against any employee solely on the grounds of race, sex or creed" (own emphasis)⁷⁵ 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.⁷⁶

During this era, the Industrial Court interpreted the unfair labour practice definition mainly to prevent industrial unrest and promote the resolution of labour disputes.⁷⁷ It sought to curtail some of the primary causes of industrial conflict, such as arbitrary and discriminatory practices in the workplace which threatened the job security of employees, and conduct which was adverse to employers' business interests.⁷⁸

73 Dupper & Garbers "Employment discrimination" in Thompson & Benjamin (eds) *South African Labour Law* (looseleaf) (2002) CC 1-7; Dupper *Disparate Impact and Substantive Justice: The Lessons of Comparative Discrimination Law for South Africa* (unpublished doctoral thesis Harvard University 1999) 13; *SACWU v Sentrarchem Ltd* (1988) 9 ILJ 410 (IC); *J v M Ltd* (1989) 10 ILJ 755 (IC); *Chamber of Mines v Mineworkers Union* (1989) 10 ILJ 133 (IC).

74 *Labour Relations Amendment Act* 83 of 1988.

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

76 In addition, it made provision for trade unions to prevent future racial, sexual or religious discrimination in hiring if such discrimination prejudicially affected their current members' employment and detrimentally affected the employment relationship (s 1(o)).

77 Rycroft & Jordaan *A Guide to South African Labour Law* (1994) 128.

78 Rycroft & Jordaan (n 77) 128.

This definition was, however, repealed in 1991 and replaced with a definition similar to the pre-1988 definition, which was general and all-encompassing.⁷⁹

4.2 South African Law Commission

As a result of sustained national and international criticism⁸⁰ of apartheid policies, the South African government instructed the South African Law Commission⁸¹ to investigate the definition and protection of group rights and the possible extension of the (then) existing protection of individual rights.⁸² The South African Law Commission proposed that all rights should be protected in a bill of rights.⁸³ Such a bill of rights should, *inter alia*, and very simply, contain "[t]he right to equality before the law (non-discrimination)".⁸⁴

Subsequently, the government announced that it had in principle accepted the protection of individual rights in the form of a bill of rights.⁸⁵ The South African 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 during 1993.⁸⁶

In the South African Law Commission's *Interim Report*⁸⁷ a draft bill of rights was included. A clause on non-discrimination and affirmative action was recommended, thus endorsing the notions of both formal and substantive equality. It provided for everyone to have the right to equality before the law.⁸⁸

79 *Labour Relations Amendment Act* 9 of 1991.

80 See, eg, International Labour Conference 73rd Session 1987 Special Report of the Director-General on the *Application of the Declaration concerning Action against Apartheid in South Africa* (1987) 157-180; International Labour Conference 77th Session 1990 Special Report of the Director-General on the *Application of the Declaration concerning Action against Apartheid in South Africa and Namibia* (1990) 127-151; International Labour Conference 79th Session 1992 Special Report of the Director-General on the *Application of the Declaration concerning Action against Apartheid in South Africa* (1992) 94-111; Thompson (n 1) 221-240; Van Jaarsveld (n 2) 428.

81 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 investigate all such branches of the law in order to make recommendations for the development, improvement, modernisation or reform thereof. In terms of the *Judicial Matters Amendment Act* 55 of 2002 it is now called the South African Law Reform Commission.

82 South African Law Commission *Group and Human Rights: Working Paper* 25 Project 58 (1989) 1 (hereafter *Working Paper*). The interim Constitution, which was based on these recommendations, was adopted in 1993.

83 *Working Paper* (n 82) 409.

84 *Ibid.*

85 South African Law Commission *Group and Human Rights: Interim Report* (1991) 2 (hereafter *Interim Report*).

86 Du Plessis & Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 39-40.

87 *Interim Report* (n 85) 13.

88 This 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

It made provision for affirmative action in that⁸⁹

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 South African Law Commission's *Final Report* reiterated that a bill of rights should contain an equality clause⁹⁰ with a section on non-discrimination⁹¹ and a section on affirmative action as follows:⁹²

[The] section [on non-discrimination] 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 and that it should benefit blacks and women in particular.⁹³

Part one of this article has traced South Africa's discriminatory history from the age of colonialism until the end of the apartheid era. Its resultant effects of inequality are discussed. The unraveling of racist and sexist laws since the late 1970s in the workplace, in particular, has been looked into. In this regard, the actions resulting from the recommendations of the Wiehahn Commission and

or other natural characteristics (*Interim Report* (n 85) 686).

89 *Ibid.*

90 To the effect that every person will have the right to equality before the law and to equal protection of the law (South African Law Commission: *Final Report on Group and Human Rights* (1994) 13 (hereafter *Final Report*).

91 *Final Report* (n 90) 16.

92 *Idem* 137.

93 *Idem* 132 135. The question arose as to whether provision for affirmative action in a bill of rights should not be regulated so as to refer expressly to certain factors on the basis of which discrimination could take place. 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 always exclude certain categories of people. 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 socio-economic 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. Though 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, it was argued, could lead to the exclusion of other groups who had also been disadvantaged. It could also lead to the racial factor being further strengthened by express reference thereto.

the South African Law Commission to attain equality, have been covered.

The second part of the article will investigate further steps taken in an endeavour to achieve equality. The need for provisions on non-discrimination as well as affirmative action – substantive equality – mooted by the Labour Market Commission, has been acknowledged by the new democratic order and is reflected in the Constitution and the *Employment Equity Act*.

(to be continued)