AN HISTORICAL OVERVIEW OF AFFIRMATIVE ACTION IN THE UNITED STATES OF AMERICA

Tameshnie Deane*

1 Introduction

In both the United States of America and South Africa, issues of segregation and discrimination are not new. In these matters, both countries have a similar history as both experienced government-sanctioned racial discrimination and segregation. Both the United States of America, during the slavery era to 1865 and that of Reconstruction after 1876 following the Civil War, and South Africa, during the *apartheid* era, passed laws requiring or permitting the segregation of races in daily life. The *de jure* segregation in both countries came with "miscegenation laws" (prohibitions against inter-racial marriages) and laws against hiring people of a particular race in any but menial positions. Such segregation in hiring practices contributed to an economic imbalance between races.[1]

Segregation may involve the spatial separation of races and the mandatory use of different facilities such as schools and hospitals by people of different races.[2] However, segregation often also permitted close contact in hierarchical situations, such as allowing a person of one race to work as a servant for a member of another race.

Subsequently both countries have taken the opportunity of addressing their past policies and are in the process of eradicating years of racism, segregation, and unfair discrimination through a process of affirmative action.[3]

This article will examine the evolution of public policies designed to eradicate and overcome the effects of economic discrimination. I hope to show that anti-discrimination legislation alone was not sufficient to overcome systemic discrimination. The aim is twofold. Firstly, the article seeks to describe the history and origins of affirmative action in the United States of America. And secondly, it will attempt to show that even though the United States has implemented anti-discrimination legislation that was insufficient to overcome

* Senior Lecturer, Department of Criminal and Procedural Law, University of South Africa. (BProc LLB (Natal) LLD (Unisa)).

1 Abdelrahman "Affirmative action in the United States and South Africa – Why South Africa should not follow in our footsteps" 1999 *New York Law School Journal of International and Comparative Law* 195-214.

2 Dobratz *The White Separatist Movement in the USA* (2001) 384.

3 Rubio *History of Affirmative Action, 1619-2000* (2001) 13.

the effect of years of general discrimination. Something more than the mere promulgation of anti-discrimination legislation was required; something that required positive action and that came in the form of affirmative-action programmes. Thus, it has been stated that

> [f]rom the beginning, law has played a central role in demarcating who was white and who was not. Although we have come to see these categories as natural, race is actually a product of numerous legal rules that prescribe certain behaviors, create certain privileges and disabilities, and distribute them to various members of the population.[4]

To eliminate racial segregation altogether, one has to take account of race. This article will then further explain that also for South Africa, which is still at the early stages of addressing the injustices of the past, it is the implementation of affirmative-action programmes that will assist in achieving equality.

In exploring the history of legislation that condoned discrimination against certain persons in the United States of America, the article will provide a background to the reasons for anti-discrimination legislation in that country. This will further highlight why, in the South African context, voluntary action alone will not suffice to eliminate discrimination. As discriminatory and segregationist policies were mandated by the government, it was vital in America that the government became actively involved in eliminating discrimination. In South Africa, discrimination was brought about by a system of *apartheid*. The many decades of *apartheid* excluded blacks not only from political power, but also from economic participation. A reliance on labour-market voluntarism to rectify this imbalance will not suffice. Hopefully an investigation of the historical process in another comparable jurisdiction will equip South African lawyers better to understand, manage and implement this country's own affirmative-action provisions and programmes so as to achieve the ultimate goal of equality.

2 The origins of affirmative action in the United States of America

The current scope of affirmative-action programmes in the United States of America is best understood as an outgrowth and continuation of a national effort to remedy the subjugation of racial and ethnic minorities and of women. Some efforts at affirmative action began before the promulgation of many civil-rights statutes in the 1950s and 1960s. However, these efforts did not have any

4 *http://www.aapf.org/focus/episodes/nov6a.php* (10 Jan 2007).

real effect until it became clear that anti-discrimination statutes alone were not enough to break longstanding patterns of discrimination.

Economic discrimination has been an inherent feature of race relations in America since the first blacks arrived in the Northern American colonies in 1619.[5] The study of America's civil-rights law should be analysed against the background of its history, "since no other national history holds such tremendous lessons, for the American people themselves, and for the rest of mankind".[6] A study of this history raises many questions, but chief amongst them is whether or not a nation can rise above the injustices of its origins and, by its moral purpose and performance, atone for them.[7]

2 1 The beginnings of segregationist thinking

Segregationist thinking began with the implementation of slavery. It has been argued that legal racist practices were shaped by slavery and that enslavement powerfully reinforced prejudices.[8] Under slavery, blacks were generally confined to agricultural and domestic work.[9] However, by the late 1700's an anti-slavery movement had sprung up in the American colonies and this led to the enactment of the Northwest Ordinance in 1787.[10] This measure prohibited the introduction of slavery into territories north of the Ohio River. Consequently, there commenced a period of turmoil that divided the American colonies geographically into slaveholding and non-slaveholding regions. By 1787, slavery had already been abolished in some northern states and populations of black freedmen, as they were called, began establishing themselves in that region. There was a great temptation for black slaves to run away from their southern masters and to seek refuge in the free northern states. The clash between slavery in the South and anti-slavery sentiment in the North resulted in great internal tensions in the American colonies. A culture of separate and seemingly equal treatment came to be condoned in the South and became known as Jim Crowism.[11]

Jim Crow was the name of a racial caste system which was used to describe the segregation laws, rules and customs that operated between 1877 and

5 Turner *The Past and Future of Affirmative Action: A Guide and Analysis for Human Resource Professionals and Corporate Counsel* (1990) 20.
6 West *Race Matters* (1993) 4.
7 Johnson *A History of the American People* (1997) 22.
8 Smelser, Wilson & Mitchell (eds) *America Becoming: Racial Trends and their Consequences* (2000) 40.
9 Hill *Black Labour and the American Legal System* (1977) 376.
10 The Germantown Protest of 1688 against slavery was the first known public objection to slaveholding and the slave trade in the British mainland colonies of North America: see, in general, Nicholas *A Documentary History of Slavery in North America* (1976) 5-65.
11 *http://www.jimcrowhistory.org/history/history.htm* (11 Nov 2008).

continued until the mid 1960s. Jim Crow was more than a series of anti-Black laws, but became a custom or way of life. Under Jim Crow, African Americans were relegated to the status of second class citizens.[12] Jim Crow legitimised anti-Black racism.[13]

Jim Crow laws were enacted as statutes by Southern states and municipalities from the 1880s onwards, in effect legalising segregation between blacks and whites.[14] The Jim Crow system allowed for the progression of blacks only in a workforce that would lead to, at best, a semi-skilled or higher-level unskilled occupation. The lines of progression for whites, however, often led to white-collar work.[15] Other discriminatory practices included segregated departments and separate bargaining units, including separate union locals, for African-American workers.[16]

In 1856 the first Supreme Court case on the issue of slavery was decided. Abolitionists saw the decision in *Dred Scott v Sandford*[17] as a disaster. The Court held that in terms of the Constitution, a slave was property and not an American citizen.[18] The decision reaffirmed the view of the legal status of black slaves: they were less than fully human and were mere property.[19] In a sense the decision could be seen to have fuelled the American Civil War that followed.[20] In the 1860s, a Republican president, Abraham Lincoln, led the Northern states into a civil war that ultimately overturned the *Dred Scott* decision and freed all slaves. After the South collapsed and the Civil War came to an end in 1865, the Congress of the United States proposed a number of anti-slavery amendments to the Constitution. It framed and recommended to the states three constitutional amendments: to end slavery; to extend rights of citizenship to freed slaves; and to guarantee their voting rights.

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12 For example, railways and streetcars, public waiting rooms, restaurants, boarding houses, theatres and public parks were segregated; and separate schools, hospitals and other public institutions, generally of inferior quality, were designated for blacks. See Woodward *The Strange Career of Jim Crow* (1996) 54.

13 Kennedy *Jim Crow Guide: The Way it Was* (1990) 117.

14 *http://www.jimcrowhistory.org/history/history.htm* (n 11). See also *University of California Regents v Bakke* 438 US 265 (1978).

15 Blumrosen *Black Employment and the Law* (1971) 167.

16 *http://www.jimcrowhistory.org/history/history.htm* (n 11).

17 *Dred Scott v Sandford* 60 US 393 (1856).

18 Fehrenbacher *The Dred Scott Case* (1978) 250. In this case, Scott, a black slave in Missouri, claimed that as a citizen of the USA, he had become entitled to his freedom when his master took him on a journey to non-slave territories and to the free state of Illinois. The Supreme Court decided that Scott was a mere chattel who was being taken by his master to a place where slavery was prohibited and that that therefore gave him no just claim to manumission.

19 Fisher "Ideology and imagery in the law of slavery" in Finkelman (ed) *Slavery and the Law* (1997) 43-85.

20 *http://www.slaveryinamerica.org/* (26 Nov 2008).

Three amendments to the Constitution of the Unites States were adopted after the Civil War. This group of amendments is sometimes referred to as the "Civil War Amendments" or the "Three Reconstruction Era Amendments".[21] They were intended to restructure the United States from a country that was racially divided to one in which the constitutionally guaranteed "blessings of liberty" would be extended to the entire male populace, including the former slaves and their descendants. The Thirteenth Amendment, both proposed and ratified in 1865, abolished slavery, so effectively ending the main political issue in the country up to that time. The Fourteenth Amendment, proposed in 1866 and ratified in 1868, included the Privileges or Immunities Clause, and Due Process and Equal Protection Clauses. The Fifteenth Amendment, proposed in 1869 and ratified in 1870, granted voting rights regardless of "race, color, or previous condition of servitude".[22] This amendment conferred on pre-war slaves the right to vote and declared that states should not proscribe a person's right to vote based on that person's race. This was particularly important at the time as the United States was a nation that reserved voting rights for property-owning white males. The Fifteenth Amendment was further important as it granted to blacks the right to representation in Congress.

The Fourteenth Amendment specifically provided a broad definition of citizenship, overruling the decision in *Dred Scott v Sandford* which had excluded slaves, and their descendants, from possessing and exercising constitutional rights.

Despite the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution, the successful transition of blacks from a status of slavery to a status of equality in the enjoyment of political, economic, educational and social rights proved to be difficult as the discriminatory practices of the past had left blacks uneducated, poor and politically powerless. The amendments laid the framework for establishing legal equality in the United States, but the achievement of that equality remained out of reach.

The next major judicial development occurred in 1896 with the decision in *Plessy v Ferguson.*[23] In this case the Supreme Court permitted the separation of facilities for whites and blacks and it served as constitutional encouragement for the passing of discriminatory laws that wiped out gains made during the Reconstruction. The Supreme Court upheld a statute that required railroad

21 S 1 of the Fourteenth Amendment formally defines citizenship and protects people's civil and political rights from being abridged or denied by any state.
22 Carr *Federal Protection of Civil Rights: Quest for a Sword* (1947) 45.
23 63 US 537 (1896).

companies to provide two sets of passenger cars: one for blacks and the other for whites. It attributed the following meaning to the Equal Protection Clause of the Fourteenth Amendment[24]

> [W]e cannot say that a law which authorises or even requires the separation of the two races in public conveyances is unreasonable .... This means that laws could be enacted that separated citizens by race in schools, transportation, public accommodation etc., as long as the services provided for one race were equal to those provided for the other.

Not surprisingly, this decision constituted a major obstacle on the road to the achievement of equality. Despite earlier gains, in the last decade of the nineteenth century, numerous racially discriminatory laws were passed[25] and racial violence aimed at African Americans sporadically flared up in the United States.

Then there was the Great Migration.[26] The main reason for migration was the racial climate and widespread violence of lynching in the American South. African Americans fled to escape the discrimination and racial segregation imposed by late nineteenth century Jim Crow laws. Apart from the Great Migration, which involved the relocation of millions of blacks to the North, the final element responsible for the re-channelling of the African-American political activity was the Depression itself.[27] The very extent of the black unemployment made it inevitable that blacks would receive at least some benefit from the New Deal programmes, even if this was not a major objective of the Roosevelt administration.[28] The New Deal programmes were a series of measures implemented during the 1930s under then President Franklin Roosevelt aimed at the improvement, recovery and transformation of the United States economy after the Great Depression.

It was as part of these programmes that the first federal "affirmative-action" programme (the phrase was never used, though) for African Americans was developed in conjunction with the Public Works Administration. The Public Works Administration was created in June 1933 by the National Industrial

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24 *Idem* 545 at par 3. In short, a majority of the members of the US Supreme Court did not regard *de jure* segregation either to be illegal or unconscionable. See also Little "Affirmative action: Legal basis and risks in the United States and South Africa" 1994 *Stellenbosch LR* 275.

25 One example is an amendment to the Mississippi Constitution of 1890 that denied blacks the right to vote: see Ransom & Sutch *One Kind of Freedom: The Economic Consequences of Emancipation* (1977) 4-7.

26 The Great Migration was the movement of 1,3 million African Americans to the North, Midwest and West from 1915 to 1930.

27 Unemployment among urban blacks exceeded 50 per cent.

28 See, in general, Leuchtenberg *Franklin D Roosevelt and the New Deal* (1963) 23-57.

Recovery Act.[29] It budgeted several billion dollars to be spent on the construction of public works as a means of providing employment, stabilising purchasing power, improving public welfare, and contributing to a revival of the American industry. The programmes were designed specifically for the sectors of the economy in which African-American labour was already concentrated; however, job training and the upgrading of skills were not part of the "affirmative-action" programme and it was therefore not very successful.[30]

It is important to observe at this point that the legislative and judicial history of affirmative action and discrimination is directly linked to the Civil Rights Movement. This Movement in the United States encompasses events and reform actions from around 1954 to 1968 that were targeted at abolishing public and private acts of racial discrimination and racism against African Americans and restoring universal suffarge in the Southern states. The period in question is sometimes referred to as the Second Reconstruction era.

2 2 The Civil Rights Movement

The Civil Rights Movement in the United States was a political, legal, and social struggle by black Americans to gain full citizenship rights and to achieve racial equality. It was first and foremost a challenge to segregation. During the Movement, individuals and organisations challenged segregation and discrimination with a variety of activities, including protest marches, boycotts, and a refusal to abide by segregation laws.

Acts of non-violent protest and civil disobedience produced crisis situations between activists and government authorities. Federal, state and local governments, businesses, educational institutions and communities often had to respond immediately to events that highlighted the inequities faced by African Americans. A number of events contributed significantly to bringing about change. Some may briefly be mentioned here.

On 17 May 1954, the Supreme Court ruled in the landmark case of *Brown v Board of Education,*[31] unanimously deciding that segregation in public schools was unconstitutional. This ruling set the stage for desegregation in schools.[32] Another important event related to Rosa Parks.

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29 It was created by Title II of the National Industrial Recovery Act of 1933, officially known as the Act of June 16, 1933 (Ch 90, 48 Stat 195, formerly codified at 15 USC s 703).

30 See Rubio (n 3) 96.

31 347 US 483 (1954).

32 See Intercultural Development Research Association *Racism: History of Affirmative Action* (1996) 25.

On 1 December 1955, National Association for the Advancement of Colored People[33] member Rosa Parks was arrested for refusing to give up her seat at the front of the bus to a white passenger, defying a Southern custom of the time. In response to her arrest, the Montgomery black community launched a bus boycott, which continued until the bus system was eventually desegregated.[34] As newly elected president of the Montgomery Improvement Association, the reverend Martin Luther King Junior, was instrumental in leading the boycott.[35]

On 1 February 1960, in Greensboro, North Carolina, four black students from the North Carolina Agricultural and Technical College began a sit-in at a segregated lunch counter. Although they were refused service, they were allowed to stay at the counter. The event gave rise to many similar non-violent protests throughout the South.[36]

On 4 May 1961, the Congress of Racial Equality began sending student volunteers on bus trips to test the implementation of new laws prohibiting segregation in interstate travel facilities. One of the first two groups of "freedom riders", as they were called, encountered its first problem two weeks later, when a mob in Alabama set the riders' bus on fire. The action continued, and by the end of that summer 1000 volunteers, black and white, had participated.[37]

On 28 August 1963, approximately 250 000 people joined in the March on Washington for Jobs and Freedom. Congregating at the Lincoln Memorial, participants listened as Martin Luther King delivered his famous "I Have a Dream" speech.[38]

These and other successes of the Civil Rights Movement eventually forced the United States government to accept and promulgate affirmative-action measures. Further, the emphasis on civil rights throughout the 1960 presidential election campaign reflected the growing public acknowledgement of the gravity of the issue of race in the United States. This ultimately led to the passing of the civil rights legislation.[39] Thus, on 2 July 1964, President Johnson

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33 The National Association for the Advancement of Colored People is one of the oldest and most influential civil-rights organisations in the United States.
34 See further Parks *Rosa: My Story* (1992) 40.
35 See Esmond *The American Dream: From Reconstruction to Reagan* (1996) 13.
36 See further Patterson *The Negro in Tennessee 1780-1865* (1922) for more information.
37 See generally Williams *Eyes on the Prize: America's Civil Rights Years 1954-1965* (1988).
38 Lucas & Medhurst *"I Have a Dream" Speech Leads Top 100 Speeches of the Century* (1999). "I Have a Dream" is the popular name given to the public speech by King when he spoke of his desire for a future where people of all races would coexist harmoniously as equals. King's delivery of the speech was a defining moment of the American Civil Rights Movement.
39 See Rubio (n 3) 5.

signed the Civil Rights Act of 1964[40] which abolished segregation in public places.

2 3 Civil Rights legislation and affirmative action

The actual term "affirmative action" emerged first in the context of labour law in the National Labour Relations Act (the Wagner Act) of 1935,[41] but it did not become firmly associated with Civil Rights legislation until 1961 in President Kennedy's Executive Order 10952.[42] In March 1961, this Executive Order created the Equal Employment Opportunity Commission,[43] which required federal contractors to take affirmative action to ensure that race, creed, colour, or national origin did not play a part in their treatment of job applicants or employees.[44] Departing from previous presidential directives, this Order granted the Commission authority to impose sanctions for any violation of it. Kennedy regarded this enforcement authority as a new "determination to end job discrimination once and for all".[45]

The concept of affirmative action was not formally defined in the Executive Order, which stated that affirmative action was the obligation of the employer, and not a power delegated to the courts.[46] Also, the Order failed to state specific affirmative-action requirements of employers. However, if there was no clarity on what affirmative action was, it was clear what *was not*. In 1961, affirmative action did not refer to hiring goals or targets and it was evident that quotas were wrong and that no one in government had ever proposed them.[47] Due to white-initiated violence in the South, Kennedy proposed civil rights legislation. This was opposed by Congress and the Civil Rights Act was only passed after Kennedy's assassination.[48]

2 3 1 The Civil Rights Act

The most important civil rights legislation since Reconstruction and similar to the executive order that preceded it was the Civil Rights Act of 1964. In

40 42 USC 2000e.
41 29 USC §§ 151-169.
42 23 Federal Register (FR) 639 (1961).
43 The Equal Opportunity Commission mandated that projects which were financed with federal funds, "take affirmative action" to ensure that hiring and employment practices are free of racial bias.
44 Executive Order 10952 (n 42). See also Lehman & Phelps (eds) *Mala Prohibita West's Encyclopedia of American Law* Vol 2 (2005) and available online at *http://www.enotes.com/wests-law-encyclopedia/mala-prohibita* (20 Jan 2009).
45 Freidel *The Presidents of the United States of America* (2001) 19.
46 Jones *The Origins of Affirmative Action* (1988) 18.
47 *Idem* at 2.
48 The Civil Rights Bill was brought before Congress in 1963. However, the Bill was still being debated by Congress when Kennedy was assassinated in Nov 1963: see further Loevy *A Brief History of the Civil Rights Act of 1964* (2001) 411-419.

addition to its employment provisions, the Act prohibited discrimination in, for example, public accommodations, public conveyances, theatres and restaurants and it authorised the government to withhold federal funds from schools that had not yet desegregated.[49] Projects involving federal funds could also be cut off from such funding if there were evidence of discrimination based on colour, race or national origin. The Civil Rights Act also attempted to deal with the problem of African Americans being denied the vote in the South. It provided that uniform standards had to prevail for establishing the right to vote. Further, schooling to sixth grade constituted legal proof of literacy and the Attorney General was empowered to initiate legal action in any area where a pattern of resistance to the law was evident.

Title VI and Title VII are the most important parts of the Act when it comes to the enforcement of civil rights and measures of affirmative action. The Act explicitly prohibited an employer from discriminating against any person on the basis of race, colour, religion, sex, or the national origin of an individual. Title VII also prohibits most employers with twenty five or more employees from discriminating on the basis of race or colour when hiring or discharging employees. It clearly states that nothing in the law requires "preferential treatment" on the basis of race or colour, but it also allows for "affirmative action" when an employer has intentionally engaged in unlawful employment practices.[50] Title VI covers discrimination in federally assisted programmes and Title VII covers employment discrimination.

Title VII, in combination with related executive orders and key administrative and court decisions, set the stage for stronger affirmative action measures by requiring businesses doing business with federal government to compile statistical data about the race and sex of their employees and job applicants in order to demonstrate their compliance with the law.[51]

Executive Order 11246[52] was introduced in a speech on 24 September 1965 delivered by President Johnson as a method of redressing discrimination that had persisted in spite of civil rights laws and constitutional guarantees. This speech is important, not only because it outlined the intentions behind the shift from the weak affirmative action to more proactive policies, but also because

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49 See also *Brown v Board of Education* (n 31) 495.

50 The Civil Rights Act in art 703 states that "(a) It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, colour, religion, sex, or national origin".

51 Drake & Holsworth *Affirmative Action and the Stalled Quest for Black Progress* (1996) 54.

52 30 FR 12319, 3 Code of Federal Regulations (CFR) 265 (1956).

the justifications it offered continues to be utilised in today's debates over affirmative action.

Executive Order 11246 was issued to give effect to Title VII of the Civil Rights Act. The Order, as amended,[53] barred discrimination on the basis of race, colour, sex or national origin by certain federal government contractors. This Order and its implementing regulations required federal government agencies to include in contracts with businesses an equal opportunity clause, which committed those firms to treat job applicants and employees without regard to their status or qualification in any of the aforementioned categories.[54] In addition, the Order required government contractors to take affirmative action to ensure that the non-discrimination goal was met. The reach and coverage of the Order was broad. Apart from governments and educational institutions, one-half of all employees were employed by businesses which filed annual statements with the Equal Employment Opportunity Commission that set forth the sex, race and ethnic distribution in the occupational classifications of their work forces. Approximately 75 per cent of employees described in those reports were employed by federal contractors.[55]

Insisting that affirmative-action programmes served to achieve "not just equality as a right and a theory but equality as a fact and equality as a result", President Johnson in his speech already emphasised the need to see social reality as a means of measuring whether opportunity was real rather than simply theoretical.[56] To promote fair employment within the government itself, the Order further required the heads of all federal agencies to establish an equal employment opportunity effort within their agencies, to be supervised by the Civil Service Commission.[57]

Executive Order 11246 was more specific regarding the requirements for contractors and the penalties for non-compliance than was Kennedy's earlier Order. Unfortunately, like the previous one, the new Order failed to define "affirmative action" or to provide precise criteria against which to evaluate compliance. However, the Order did specify that affirmative action be extended to "employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation;

53 Executive Order 11246 was amended by Executive Order 11375 (32 FR 14303 CFR 3 (1967) and Executive Order 12086 (43 FR 46501 CFR 3 (1978)).

54 See generally Human Resources Management Programmes *Guidebook to Fair Employment Practices* (1989) 27.

55 See Welch (ed) *Affirmative Action and Discrimination* (1989) 67.

56 See The American Presidency Project *Public Papers of the President Lyndon B Johnson* (1966) 787, available at *http://www.presidency.ucsb.edu/ws/* (10 Jan 2008).

57 See Executive Order 11246 at 339.

and selection for training, including apprenticeship".[58] Again, though, it neglected to indicate how affirmative action was to be applied in these areas. The failure to define affirmative action created severe difficulties of enforcement for the Office of the Federal Contract Compliance as well as for the affected contractors and unions. Finally, in prohibiting discrimination on the basis of "race, creed, color, or national origin", the Order omitted any reference to "sex" – unlike Title VII – a deficiency that was not rectified until a subsequent Executive Order was issued in 1967.[59]

In summary, then, the Johnson years witnessed a major transformation in the Civil Rights Movement in general and in the struggle for economic opportunity in particular. Civil-rights activists had won many of their immediate objectives, including the passage of major civil rights legislation, increased voting rights, and the abolition of the most blatant forms of social segregation. These developments, coupled with the assassinations of such grass-roots leaders as Martin Luther King and Malcolm X, redirected the movement away from large-scale public protests and toward legal and governmental channels. At the same time, both civil-rights groups and governmental agencies began to embrace a more expansive view of the types of measures needed to overcome the effects of decades of discrimination.

Apart from the Civil Rights Act, other equal-protection laws that were promulgated to make discrimination illegal included the Voting Rights Act of 1965, adopted after Congress had found that racial discrimination in voting was an "insidious and pervasive evil".[60]

Discussed below are some important judicial decisions that changed the course of history. It should be observed that even though some of them did not directly relate to affirmative action, they are important as they had a bearing on affirmative-action programmes in general.

2 3 2 Important judicial decisions implementing the Civil Rights Act

The first Supreme Court case on affirmative action, *Griggs v Duke Power Company*,[61] prohibited employers from practices that discriminated against blacks and restricted the use of test scores and educational requirements that could be shown to be irrelevant to job performance. In *Albermarle Paper Co v*

58 See Executive Order 11246 at 341.
59 Executive Order 11246, s 101.
60 See Sykes *The Origins of Affirmative Action* (1995) 14.
61 401 US 424 (1971).

Moody[62], the job relatedness of Albermarle's testing programme had not been demonstrated. The Supreme Court decided that non-discriminatory alternatives to testing could be employed by employers in an effort to bring blacks into their workforce.[63] Contrarily, the Supreme Court ruled in *Washington v Davis*[64] that a valid test could be used to predict training performance, regardless of its ability to predict later job performance. A valid test was considered sufficiently job related even if more blacks than whites failed the test.

A quota system was declared illegal in the Supreme Court decision in *Regents of the University of California v Bakke*.[65] The Court also decided that colleges and universities could consider an applicant's race as a factor in determining admission in order to achieve a diverse student body. Private employers were permitted though to use racial preferences in hiring and promotions (voluntary affirmative-action plans) as a means to correct past discrimination.[66] In *Fullilove v Klutznick,*[67] the Supreme Court ruled that minority set-asides or the limited use of quotas was appropriate for remedying past discrimination. Under the Reagan administration, employers were no longer required to maintain affirmative-action programmes or to hire according to racial quotas. The Supreme Court decision in *State of Connecticut v Teal*[68] stated that a bottom-line demonstration of no disparate impact did not shield an organisation from an investigation of the disparate impact of each of the components of the selection system. Basically, this meant that disparate impact was not the same as disparate treatment, which involves intent. Adverse impact may occur in facially neutral processes without specific intent and may be determined from any individual component or element of a selection process. In this case the bottom-line demonstration was rejected and it opened scrutiny to individual test components.

In *Wygant v Jackson Michigan Board of Education,*[69] racial preferences were ruled permissible in the context of hiring, as long as there was a history of discrimination. Also, the termination of senior white teachers' contracts to protect the jobs of newly hired black teachers was deemed unconstitutional. The ruling in *Johnson v Transportation Agency of Santa Clara County*[70] upheld

62 422 US 405 (1975) 431.
63 See further Chemerinsky *Race and Supreme Court Trial* (1995) 86-88.
64 426 US 229 (1976).
65 438 US 265 (1978). In this case the Supreme Court ruled that racial quotas in hiring and promotions were constitutional.
66 See *Kaiser Aluminium Company and United Steelworkers of America v Weber* 443 US 193 (1979).
67 448 US 448 (1976).
68 457 US 404 (1982) 445-456.
69 476 US 267 (1986).
70 480 US 616 (1987).

the favouring of women and minorities over better-qualified men and whites as a way to improve the balance in a workplace. And in *City of Richmond v JA Croson,*[71] the Supreme Court struck down the city's minority-contracting programme as unconstitutional, requiring that a state or local affirmative-action programme be supported by a "compelling interest" and be narrowly tailored to ensure that the programme furthers that interest.

The difference between strict scrutiny and intermediate scrutiny was made salient in the Supreme Court decision in *Metro Broadcasting Incorporated v Federal Communications Commission*.[72] Strict scrutiny is the standard under the Equal Protection Clause that federal courts use to assess the constitutionality of governmental classifications based on race as well as those that impinge on fundamental constitutional rights. To pass muster, a challenged governmental action must be "closely" related to a "compelling" governmental interest. Strict scrutiny is therefore the most rigorous of the three levels of scrutiny that courts have formulated. Ordinary (minimum) scrutiny applies to most bases on which government classifies people and their activities, for example, economic and social considerations such as wealth (or the lack of it). This test merely requires government to show that the classificatory scheme "reasonably" relates to a "legitimate" governmental interest. An intermediate level, called "intermediate scrutiny," applies to classifications based on gender and illegitimacy. Here, the governmental action must be "substantially" related to an "important" governmental interest. In contrast to ordinary scrutiny, where courts presume that the legislation or challenged governmental activity is constitutional and the plaintiff has the burden of showing a constitutional violation, strict scrutiny assumes that it is unconstitutional and the government has the burden of demonstrating its compelling interest. Here, courts must focus on the government's purpose rather than merely on the effect of governmental action to determine the validity of a challenged law or regulation.

The *Metro Broadcasting Incorporated* case approved a preference for minority-owned businesses in broadcasting licensing. This decision in effect provided new protections for minorities and women and led to the signing of the Civil Rights Act of 1991[73] by President Bush.[74] This new Civil Rights Act provided that work forces do not have to match the statistical population make-up of a community. Strict scrutiny in achieving a compelling government purpose

71 488 US 469 (1989).
72 480 US 616 (1987).
73 42 USC 1981.
74 Lemann *Taking Affirmative Action Apart* (1995) 36.

became the criterion in *Adarand Constructors Incorporated v Pena*.[75] In this case, the court made applicable to federal affirmative action programmes the same standard of review, strict scrutiny, that *City of Richmond*, applied to state and local affirmative action measures. Although *Adarand* itself involved contracting, its holding is not confined to that context; rather, it is clear that strict scrutiny will now be applied by the courts in reviewing the federal government's use of race-based criteria in health, education, hiring, and other programmes as well.

Looking at the various decisions, it is clear that the whole concept of legal rights has been developed in the United States of America with reference to individual rights, and if the Equal Protection Clause is relied on to provide justice for the groups by creating a quota or reservation, the right of discriminated-against-individuals of the excluded groups is said to be violated.

In the absence in the United States of constitutional language used to defend group claims[76] the deprivations of individual rights on the basis of group characteristics, race, religion, and national origin is nevertheless treated in law as a problem of protecting the rights of an individual. It would seem that not only does constitutional and legal language in the United States advocate a colour-blind society and individual equality as opposed to group equality, but the various decisions of the United States Supreme Court, too, defend the right to equality in terms of equality for individuals.[77]

Looking at the American experience, focusing on individual rights when assessing the constitutionality of race-based affirmative-action programmes can be disastrous to the implementation of such programmes.[78] The Supreme Court's emphasis on individual guarantees of equal protection has proven to be a failure to many race-based affirmative-action programmes.[79] The Court's pronouncement on race-based affirmative-action programmes in *Adarand Constructors Incorporated v Pena*[80] also emphasised that the Equal Protection Clause protects persons, not groups.[81]

The endorsement of affirmative action in South Africa is supported by a Bill of Rights with specific emphasis on the protection of group rights as well as

75 515 US 200 (1995).
76 As is employed in South Africa in Ch III of the Employment Equity Act 55 of 1998.
77 See, eg, the decision in *Regents of University of California v Bakke* (n 65) 265.
78 *Idem* 307.
79 *Idem* 320; see also *Adarand Constructors Incorporated v Pena* (n 75) 210.
80 *Adarand Constructors Incorporated v Pena* (n 75) 200.
81 *Idem* 210.

individual rights.[82] However, it is submitted that affirmative action is meant to benefit groups as a whole and not specific individuals from within such groups. Therefore, it is further submitted that when looking at the specific situation in this country, only where a class or group *as a whole* has advanced to such a level as to be able to compete on an equal footing with the rest of the non-designated classes, castes or groups, can it be said that equality of status has been achieved. The problem still remains, of course, of how this is to be determined.

3 Conclusion

This discussion highlighted the fact that although there were many victories in America for civil rights in general, those judicial and legislative victories were not enough to overcome long entrenched patterns of discrimination. Something more than judicial pronouncements was required. Various reasons may be attributed for this state of affairs. Among others, these civil-rights measures frequently focussed only on issues of formal rights, such as the right to vote, and were particularly susceptible to judicial watering down. Further, proving that one has been discriminated against involved direct evidence and often the presentation of evidence that proved overt bias and bigotry. This approach did not take into account situations where discriminatory practices were more subtle and yet just as effective in achieving its goals of racial or other forms of discrimination.

So, even though there were gains in the civil-rights movement, private and public institutions were often not open to change and a reliance on voluntary efforts alone to eliminate discrimination could not be depended upon to achieve equality. In the United States, more than just a reliance on people's good nature was required to ensure the elimination of unfair discrimination and the achievement of employment equity. Looking at the history of slavery and discrimination highlights how racism developed into a social policy. Nothing less than a mandatory set of laws would be required to eliminate all forms of discrimination. Modern affirmative action was resorted to as policymakers sought a way to address continuing problems of discrimination. Simply put, affirmative action was established as part of a society's efforts to address continuing problems of discrimination.

Despite all the legal changes of the past half-century, the United States of America remains a segregated society, with housing patterns, school

82 Abdelrahman (n 1) 7.

enrollment, church membership, employment opportunities, and even college admissions all reflecting significant *de facto* segregation. Supporters of affirmative action argue that the persistence of such disparities reflects either racial discrimination or the persistence of its effects. Affirmative action is part of a strategy aimed at ending racial domination that would otherwise continue unchallenged. Affirmative action, therefore, represents a response to, and is not the cause of, the racial disparities that emerge from a norm of privileged whiteness.[83] Affirmative action nevertheless has a number of disadvantages and is not considered to be the overall or short-term solution for a country that was riddled by years of racism. But it is a start to ensuring that all citizens are placed on an equal footing in the long run. Affirmative action is an attempt to level the playing fields and it can work only if all citizens are committed. It can be argued with certainty that affirmative action is a necessary remedy against persistent discrimination and the continuing limited opportunities open to the many who have been discriminated against. At the same time, it is a policy that provides benefits for everyone in society.

Finally, looking at how affirmative action has been and continues to be implemented in other jurisdictions is a useful exercise. The United States Supreme Court has been reluctant to look beyond its own legal system and this inflexible approach has stifled much of the affirmative-action initiatives in that country.[84] It may be suggested that South African courts have been and will contuinue to be enriched if they look beyond our own borders for assistance, guidance and possible solutions.

83 See *http://www.aapf.org/focus/episodes/nov6a.php* (17 Oct 2008).
84 See *Singh Affirmative Action Programme – A Comparative Study of India and the United States* (2003) 2.