

# *Affirmative action: Theory and practise*

A thesis on the question whether the affirmative action policy in the employment sector of South Africa is legitimate and effective.  
Is the current policy the way to level the playing field?

## Masterthesis Master International & European Law Human Rights Track



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“The special measures that we envisage to overcome the legacy of past discrimination are not intended to ensure the advancement of unqualified persons, but to see to it that those who have been denied access to qualifications in the past can become qualified now, and that those who have been qualified all along, but overlooked because of past discrimination, are at last given their due.”

- *Nelson Mandela (1991) (Ex President: South Africa)*

## **Preface**

Before you lies the thesis “Affirmative action: Theory and practise” which has been written to graduate from the master International and European Law: Human Rights Track at Tilburg Law School. It will mark the end of eight years of studying in Tilburg and more in particular of the master in international and European Law. Eight years ago I started as a student in Law and Management, but after only a few months I knew I was going to transfer towards international and European law as this field of law seemed much more interesting to me. It turned out to be the right choice.

As this thesis is partly based on a questionnaire that I conducted among some South Africans, I would like to thank them very much for their responses. I would ofcourse also like to thank mr. dr. Meijknecht for her comments and critical feedback, this has helped me throughout the process. It kept me confident although I was not always sure about my work.

During the past eight years I have been able to learn and experience a lot, both inside and outside my studies. I would like to thank everyone who was part of that!

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## 1. Introduction

Discrimination has played a very important role in the history of South Africa. It started when the Dutch East Indian Company entered the country in 1652 and used slavery and rose to a peak in 1948 when the apartheid government came into power and continued sexist and racist practices and laws. Separate societies were created for whites, blacks and coloured people by legislation. Within the workplace the apartheid government institutionalized discrimination by introducing laws such as the Wage Act<sup>1</sup> and Mines and Works<sup>2</sup> act. Whereas the former allowed differentiation between whites and blacks regarding wage, the latter simply reserved jobs for individuals with a white ethnicity. These are just two of the many examples of laws created by the government that provided for the unequal treatment of blacks and coloured people in relation to white people.<sup>3</sup> This regime finally came to an end in 1993 when a new interim Constitution was adopted in which discrimination and equality became important topics.<sup>4</sup>

The concept of discrimination and the principle of equality are important principles within international law. These principles ensure that all people are treated equally and prohibit discrimination. However, in certain circumstances these principles might not be enough to establish true equality due to effects of past discrimination. Although the actual discrimination might have come to an end, the effects might remain visible and be long term. This is true for South Africa. The regime change that happened during the nineties did not mean the end of equality problems. Especially not regarding equality within the workplace.

To eradicate the long term effects of past wrongdoings, an affirmative action policy was proposed. Affirmative action is used in several countries to counter discrimination. South Africa is one of these countries and, due to its history, is an interesting one to consider. Due to several years of discrimination against women, black and coloured groups, other groups in society had (and maybe still have) a privileged position within society. Therefore, South Africa decided to use affirmative action in several parts of society such as education and employment sector in order to end the inequalities.

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<sup>1</sup> Wage act 1957.

<sup>2</sup> Mines and Works Act of 1911.

<sup>3</sup> McGregor, Marie. "A Legal-Historical Perspective on Affirmative Action in South Africa (Part 1)." *Fundamina* 12.2 (2006): 87-99 Web. p. 90.

<sup>4</sup> Budeli, M. (2014). Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994. *New York Law School* p 2-3.

During a trip to South Africa I experienced that the country is still divided, as this is visible in all parts of society. I met several locals and we discussed the history of discrimination in South Africa and the problems that the country is still facing today. They briefly explained the affirmative action policy that was implemented in South Africa over 20 years ago and from what I understood, they were not very satisfied with this policy and this triggered my interest. I started reading about the principle of equality in the country and the affirmative action policy and I could identify whether this policy was achieving a more equal society or actually doing the opposite. This triggered my interest even more.

### **1.1. Research question**

As can be deduced from the above, the topic of this thesis is the affirmative action policy within South Africa, more specifically in the employment sector of South Africa. It has been over 20 years since democracy was introduced in South Africa, shortly after which affirmative action was implemented. After 20 years it is interesting to see how this policy has got a place within the legislation and case law in the country. It also raises question such as: Is the policy achieving what it was supposed to achieve? Is it considered to be effective and necessary? In other words, is it still necessary for the government to level the playing field? The aim of this thesis is to explore the place of affirmative action within the employment sector in both the international and South African legal system. Moreover, this study will attempt to answer the question whether or not the policy can be considered as both legal and effective. Although affirmative action is applicable to race, gender and disability, the focus of this thesis will be mostly on race since this is causing the most issues.

Based on the issues outlined above, the main research question will be:

*Affirmative action in the employment sector: a legitimate and effective way to achieve true equality in South Africa?*

### **1.2. Subquestions**

In order to answer the main research question, the following sub questions have to be answered:

1. *What is the general concept of affirmative action and its place within international law?*
2. *What is the place of affirmative action within the legislative framework of South Africa?*
3. *What are the main problems with the current policy in South Africa?*



#### *4. Affirmative action measures in other countries: Lessons to learn for South Africa?*

### **1.3. Structure of the thesis**

In order to answer these questions relevant legislation and case law will be discussed. As it is a controversial topic in several countries, there have been many publications and court cases on the topic. Relevant publications from both proponents and opponents will be discussed. In order to answer the question regarding the effectiveness of the policy, we have to look beyond publications and court cases. It is important to capture the opinion of the South African citizens.

Therefore, I have created a questionnaire that was sent to South Africans, mainly between the age of 22-27 of different race groups. I was particularly interested in the opinion of this group as it comprises respondents of a new generation. They are too young to have experienced apartheid, but are exposed to its future consequences. The questionnaire consisted of 10 questions and I received 20 responses. This might not be many responses but it has helped to look beyond the literature and to map the problems that are experienced in practise. Unfortunately I do have to remark that almost all of the respondents were white. They had a very clear opinion about the policy. The answers and problems that were derived from these responses have been used throughout this thesis, but especially in chapter 3.

As said, the objective of this thesis is to analyse the affirmative action policy within the employment sector of South Africa. In order to do this, each chapter will discuss one of the sub-questions mentioned above. The second chapter will shortly look into the general concept of affirmative action and it will discuss whether or not affirmative action is in accordance with the principles of international law. More specifically with the principles of equality and non-discrimination. The third chapter will intend to answer sub-question 2. It will discuss the specifics of the South African policy and the place within the South African legal system. The next chapter is derived from the responses of the questionnaire and will look into the main problems of the current affirmative action policy in South Africa. In order to find solutions to these problems, the fifth chapter will look into the affirmative action policy of three other countries and see if there are any lessons to learn for South Africa.

## **2. What is the concept of affirmative action and what is its place within international law?**

### **2.1 Introduction**

The first part of this chapter will introduce affirmative action measures and explain what they are and how they were developed. The second part will cover the international view on the concept of affirmative action and equality. It is necessary to understand this concept from an international perspective in order to get the complete picture and to really understand the laws in South Africa. Since South Africa has ratified several international documents that are concerned with the right to equality, the prohibition of discrimination and the possibility of introducing affirmative action measures, it is important to consider affirmative action within the international legal system. Due to these ratifications South Africa will have to comply with these international rules and South African courts have to consider them when making a decision. Since this thesis looks at affirmative action measures in relation to employment equity this will be the main focus of this chapter.

### **2.2 The general concept of affirmative action**

#### 2.2.1. The origin, definition and purpose of affirmative action

The first person to use the term 'affirmative action' was President John F. Kennedy of the United States in 1961 when he issued Executive Order 10925. This order contained a prohibition on discrimination by federal government contractors based on, amongst others, race, colour or national origin. In 1965, President Lyndon B. Johnson introduced an executive order that required that an affirmative action policy was implemented by all government employers. This was to ensure that these employers would hire employees without regard to religion, national origin or race. Five year later, in 1970, the same administration introduced the Equal Employment Opportunity Commission whose main focus was on growing the representation of the minorities in the federal employment and contracting.<sup>5</sup> This is seen as the beginning of the international concept of affirmative action.<sup>6</sup>

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<sup>5</sup> Laher, I. (2007). *A critical analyses of employment equity measures in South Africa* (Master dissertation). Retrieved from [www.myscience.com](http://www.myscience.com) p. 6-7 & Mhambi, M. H. (2014). *Employment equity: the implementation and application of affirmative action in the workplace* (Master dissertation, University of Pretoria) p.3.

<sup>6</sup> Mhambi, M. H. (2014). *Employment equity: the implementation and application of affirmative action in the workplace* (Master dissertation, University of Pretoria) p.4.

### *Definition and purpose*

Although the concept of affirmative action is used in both national and international law, there is no official legal definition. A working definition was created by Mr. Marc Bossuyt, Special Rapporteur of the United Nations, and is used by both the United Nations Economic and Social Council and the International Labour Organisation.<sup>7</sup>

*“Affirmative action is a coherent packet of measures, of a temporary character, aimed specifically at correcting the position of members of a target group in one or more aspects of their social life, in order to obtain effective equality.”<sup>8</sup>*

Affirmative action can be described as the implementation of measures, for a certain period of time, that have the purpose of achieving and ensuring substantive equality.<sup>9</sup> These measures or policies can be implemented by several actors of the public sector, for example local governments, the federal government and even the State. They can also be carried out by actors of the private sector such as education institutions or employers.<sup>10</sup> They are policies that consider factors such as race, sex or national origin to make sure that underrepresented groups will benefit in areas such as education, business or employment.<sup>11</sup> There are countries that use other terms for these policies, e.g. employment equity, positive action, preferential policies or reservations but they all fall within the scope of affirmative action.<sup>12</sup> In order to explain the purpose of affirmative action and the times at which it can be implemented, it is easiest to describe a practical example that was used by Lyndon B Johnson in one of his speeches:

*“Two swimmers are on the starting block preparing to dive into the pool to swim a two hundred and fifty metre sprint. The gun fires and the first swimmer in lane 1 dives in while swimmer two in lane two is held*

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<sup>7</sup> Mhambi, M. H. (2014). *Employment equity: the implementation and application of affirmative action in the workplace* (Master dissertation, University of Pretoria) p.3.

<sup>8</sup> Economic and Social Council. (2002). *Prevention of Discrimination: The concept and practice of affirmative action* (E/CN.4/Sub.2/2002/21). United Nations Commission on Human rights. p. 3.

<sup>9</sup> The concept ‘substantive equality’ will be explained in chapter 2 & Laher p. 6.

<sup>10</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.3.

<sup>11</sup> Economic and Social Council. (2002). *Prevention of Discrimination: The concept and practice of affirmative action* (E/CN.4/Sub.2/2002/21). United Nations Commission on Human rights. p. 2-3.

<sup>12</sup> Mhambi, M. H. (2014). *Employment equity: the implementation and application of affirmative action in the workplace* (Master dissertation, University of Pretoria) p.3.

*back by her opponent's coach. After going fifty metres into the lead, swimmer two is released by the coach and allowed to compete against swimmer one."*<sup>13</sup>

How can this situation be resolved? Both swimmers can either restart or the first swimmer can wait so the second swimmer can catch up. The first solution is not a realistic option since society cannot be restarted. Therefore, disadvantaged groups must be given the opportunity to catch up with the groups that did not have restrictions on them in the past.<sup>14</sup> Affirmative action measures are developed to give them this possibility.

The measures thus have the purpose of addressing individual and structural discrimination, while at the same time recognizing the space for differences in multicultural societies.<sup>15</sup> Within the field of employment the measures want to ensure equal employment opportunities and equitable representation of suitably qualified persons from designated groups in all occupational categories and levels of the workforce.<sup>16</sup> Thus, the goal of affirmative action measures is to ensure equal opportunity by promoting opportunities for certain groups in a disadvantaged position.<sup>17</sup> Therefore, affirmative actions are always addressed at a certain group consisting of persons that have the same characteristics and their membership to the group is based on those characteristics. In general, these characteristics are innate, for example race, gender, nationality or ethnic minority. That is why affirmative action measures have mainly targeted black people, women, indigenous people or other racial groups.<sup>18</sup>

### 2.2.2. Formal and substantive equality

To understand the different affirmative action measures and what they are trying to achieve it is important to know the difference between the two types of equality.

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<sup>13</sup> Laher, I. (2007). *A critical analyses of employment equity measures in South Africa* (Master dissertation). Retrieved from [www.myscience.com](http://www.myscience.com) p. 7.

<sup>14</sup> Laher, I. (2007). *A critical analyses of employment equity measures in South Africa* (Master dissertation). Retrieved from [www.myscience.com](http://www.myscience.com) p. 7-8.

<sup>15</sup> Romany, C., & Chu, J. B. (2004). Affirmative action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions. *Connecticut Law Review*, 36. p.833.

<sup>16</sup> Laher, I. (2007). *A critical analyses of employment equity measures in South Africa* (Master dissertation). Retrieved from [www.myscience.com](http://www.myscience.com) p.7 & Mhambi, M. H. (2014). *Employment equity: the implementation and application of affirmative action in the workplace* (Master dissertation, University of Pretoria) p.3.

<sup>17</sup> Mhambi, M. H. (2014). *Employment equity: the implementation and application of affirmative action in the workplace* (Master dissertation, University of Pretoria) p.3.

<sup>18</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.3.

### *Substantive equality*

Substantive equality recognises that the opportunities of a certain individual depend upon that persons' historical and social status, which includes gender and race. It also acknowledges that acts of discrimination are part of a pattern of behaviour relating to a group, for example black people. These patterns of discrimination result in disadvantage for these groups relating to economic, educational or political nature. For this type of equality, the prohibition of unfair discrimination is not sufficient to achieve true equality for these groups, supplementing measures are necessary.<sup>19</sup>

An example of affirmative action measures that want to achieve substantive equality are measures of affirmative preference. These measures give preference to the person coming from a designated group when two people, who are equally qualified, apply for a job or promotion.<sup>20</sup> A more radical measure can be the prohibition for people coming from non-designated groups to apply for certain opportunities or applying lower standards to them. There is a lot of resistance against these kinds of measures because the entitlement of benefits is purely based on group membership. Opponents are of the opinion that these measures are of a discriminatory nature since they do not look at one's individual merits. The costs of affirmative action are placed on certain specific individuals. In other words, these measures mean 'hurting' members of group 'A' in order to promote the welfare of group 'B'.<sup>21</sup> Certain people are given opportunities solely based upon their gender or race.<sup>22</sup>

### *Formal equality*

Formal equality can be found in measures that are called affirmative mobilization or affirmative fairness. It is based on the idea that people who are in similar circumstances should be treated in a way that is similar. For this form of equality, a persons' characteristics, such as social and economic status, are not relevant. It strikes down any form of gender or racially oppressive laws and a person who has been

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<sup>19</sup> The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality. (2007). Retrieved from <http://www.equalrightstrust.org/>.

<sup>20</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.17-18.

<sup>21</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.18.

<sup>22</sup> Laher, I. (2007). *A critical analyses of employment equity measures in South Africa* (Master dissertation). Retrieved from [www.myscience.com](http://www.myscience.com) p.9 & Bills Committee on Race Discrimination Bill. (2007). *Affirmative action* (LC Paper No. CB(2)1152/06-07(01)). Human Rights Unit, Legal Policy Division p.3.

disadvantaged in the past does not get a special position. It does give them access to certain privileges. With this type of affirmative action, it is all about the ability of an individual to compete in society and a person's characteristics are not important.<sup>23</sup> Examples are job-training programmes and special examinations. The idea behind these measures is that equality will not be achieved if the effects of the discrimination in the past have deprived these people from the opportunity to acquire the skills that are needed to compete in an effective way with people from non-targeted groups.<sup>24</sup> Affirmative action measures that use formal equality do not entail discrimination against people who are not part of a targeted group within the measure itself, the measures are colour-blind. However, the motivation behind the measures is race-conscious and the costs of these measures are placed upon society.<sup>25</sup>

A combination of both is necessary in order to accomplish true equality in South Africa.<sup>26</sup>

### **2.3. Justifications for affirmative action measures**

When a state decides to implement an affirmative action policy there is usually a lot of protest. The State will justify the policy toward its citizens by using certain grounds as justification. These grounds can differ per State since they depend on a specific social context.<sup>27</sup> One of the main justifications used is to redress or remedy injustices that have taken place in the past but still have consequences today. Due to systematic discrimination, certain target groups have acquired an underprivileged position in society. This justification is used in several countries such as Australia and the United States, but as we will see, also in South Africa.<sup>28</sup> An argument that was used in the U.S.A. is that ethnic and racial diversity in the workplace is necessary to speak of a just society. Also, an affirmative action policy can serve several goals. For example, members in important positions can become role models and motivate other

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<sup>23</sup> Laher, I. (2007). *A critical analyses of employment equity measures in South Africa* (Master dissertation). Retrieved from [www.myscience.com](http://www.myscience.com) p.8-9.

<sup>24</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.17 & Bills Committee on Race Discrimination Bill. (2007). *Affirmative action* (LC Paper No. CB(2)1152/06-07(01)). Human Rights Unit, Legal Policy Division p.3.

<sup>25</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.17.

<sup>26</sup> The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality. (2007). Retrieved from <http://www.equalrightstrust.org/> & Budeli, M. (2014). *Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994*. *New York Law School* p. 6.

<sup>27</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.4.

<sup>28</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.5.

members of the designated groups. However, it is important to notice that appointing less-qualified persons, based solely on group membership, could lead to the reinforcement of stereotyping and may actually stimulate racial thinking. By promoting the interests of disadvantaged people and balancing the equality, affirmative action programmes are also used to prevent social unrest. By taking action against the inequality, the State hopes to prevent demonstrations and riots by the disadvantaged people.<sup>29</sup>

#### **2.4. Affirmative action, equality and non-discrimination within international law**

In order to see which place affirmative action has within the international legal system, certain international documents will be discussed. The first important international documents are the UN Charter and the Universal Declaration of Human Rights (hereinafter: UDHR) that was created by the UN United Nations (hereinafter: UN). The UN has been established after World War II in 1945 and had to guide the world into an era of peace, well-being and security and within the UN Charter the most important principles of international relations are codified.<sup>30</sup> The UN wants to solve international problems of social, cultural, economic or humanitarian character and at the same time promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.”<sup>31</sup> This means that the UN provides for formal equality. This is done with a prohibition of discrimination on four specific grounds. Besides the four specific grounds of non-discrimination that are mentioned within the Charter, other grounds were added by a non-exhaustive list. Important to note is that, at the time, no provision for affirmative action was made.<sup>32</sup>

An important step in the field of human rights was the adaptation of the UDHR. Within this Declaration equality is framed in both positive and negative terms. It contains several provisions that relate to anti-discrimination, but also provisions that require positive state action in different areas such as employment or education.<sup>33</sup> The principles of non-discrimination and equality are embedded in both the UN Charter and the UDHR. Although the Declaration is not legally binding, it is considered to be the

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<sup>29</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.5-6.

<sup>30</sup> McGregor, M. (2006). Affirmative action and non-discrimination: South African law evaluated against international law. *CILSA*. p. 386.

<sup>31</sup> Article 1 paragraph 3 Charter of the United Nations.

<sup>32</sup> McGregor, M. (2006). Affirmative action and non-discrimination: South African law evaluated against international law. *CILSA*. p. 386.

<sup>33</sup> Romany, C., & Chu, J. B. (2004). Affirmative action in International Human Rights Law: A Critical Perspective of Its Normative Assumptions. *Connecticut Law Review*, 36. p.835.

foundation of established legal norms of international behaviour and an important basis for other international documents and treaties relating to human rights.<sup>34</sup>

Two of those other fundamental international human rights treaties that were specifically adopted with regard to discrimination and in which the principles of non-discrimination and equality can be found are; the Convention on the Elimination of All Forms of Discrimination against Women and the International Convention on the Elimination on All Forms of Racial Discrimination. Affirmative action has a place in both of these conventions and serves as a remedy against the effects of discrimination. Besides this, non-discrimination and equality are also founding values in two covenants that were created based on the ideals of the UDHR; the international Covenant on Economic, Social and Cultural Rights (ICESCR) and international Covenant on Civil and Political Rights (ICCPR).<sup>35</sup> The most important facts and parts of these Conventions and Covenants will be discussed below.

#### 2.4.1. The International Covenant on Economic, Social and Cultural Rights

Within international law, affirmative action is generally referred to as 'special measures'. The Government of India was the first one to mention these special measures during the drafting of an international document. This happened during the drafting of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Here, it was suggested that article 2 should be elaborated by an explanatory paragraph, which would specify that measures created in order to advance educational and social parts of society that were disadvantaged would not be seen as distinctions in light of article 2.<sup>36</sup> The representative wanted to point out that the non-discrimination principle did not only have positive effects, but could also raise problems regarding certain backward groups still present in many underdeveloped countries. He explained that, in India, both the Constitution and other laws provide the opportunity for special measures, which in turn, could advance the social and cultural status of these groups. This was essential to achieve true equality, especially in societies that are very heterogeneous. Therefore, India argued it was necessary to emphasise these type of special measures would not be

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<sup>34</sup> McGregor, M. (2006). Affirmative action and non-discrimination: South African law evaluated against international law. *CILSA*. p. 387-388.

<sup>35</sup> Cohn, M. "Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations." *Virginia Journal of International Law* 43.249 (2002) p. 250.

<sup>36</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.9 & Cohn, M. "Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations." *Virginia Journal of International Law* 43.249 (2002) p. 256.



considered as discriminatory. His proposal was supported by other representatives, but despite his efforts, it was withdrawn. Instead of adding the explanatory paragraph the commission included an interpretative statement in the records of the Committee that stated the meaning of the words of the Indian representative.<sup>37</sup>

Within the document of the Economic and Social Council it is mentioned that the objective of the ICESCR is not to achieve equality of *result* but, rather equality of *opportunity*. It wants to divide social resources in such a way that they provide basic rights to all members of society. The first step to realise this, is to use positive state action in order to secure that the disadvantaged groups of society get the opportunity to fully realise their rights.<sup>38</sup> This idea is translated into several articles of the Covenant. For example, article 7 stipulates that only seniority and competence are legitimate considerations in order to achieve equality of opportunity.<sup>39</sup> This means that states must eliminate all other possible barriers to promotion. In order to achieve this, positive measures may be necessary. This has been made possible by article 10.2 and 10.3,<sup>40</sup> in combination with General Comment No. 13 in which is laid down that temporary measures that have the intention of establishing equality for both men and women and for groups that have been disadvantaged, are allowed and not considered to be discrimination. The measures do have to end when the objectives have been achieved.<sup>41</sup>

Although this covenant entered into force on January 3<sup>rd</sup> 1976 it was not ratified by South Africa until 12 January 2015.<sup>42</sup>

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<sup>37</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.9 – 10 & Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 2.

<sup>38</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.10.

<sup>39</sup> Article 7 ii (c) International Covenant on Economic, Social and Cultural Rights, entry into force 3 January 1976, in accordance with article 27.

<sup>40</sup> Article 10 par. 2 & 3 International Covenant on Economic, Social and Cultural Rights, entry into force 3 January 1976, in accordance with article 27.

<sup>41</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.11 & Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 3.

<sup>42</sup> United Nations Treaty Collection, [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg\\_no=iv-3&src=treaty](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&lang=en&mtdsg_no=iv-3&src=treaty).

#### 2.4.2. The International Covenant on Civil and Political Rights <sup>43</sup>

This international covenant entered into force on 23 March 1976 and was ratified by South Africa on 10 December 1998.<sup>44</sup> During the discussion of the General Assembly about the ICCPR the representative from India raised the same issue. This time regarding article 2.1 of the ICCPR. He was still of the opinion that certain people needed more protection and greater privileges for a certain period of time in order to achieve true equality. The Committee agreed with the statement and decided that it should get a special mentioning in the report. This was also valid for article 26 ICCPR which is the general non-discrimination clause.<sup>45</sup> Notable is that the ICCPR does not advocate specifically that affirmative action measures need to be taken in order to achieve equality.<sup>46</sup> However, the Human Rights Committee did make a very clear statement on affirmative action when they said that the equality principle in certain cases requires State parties to take affirmative action in order to diminish or eliminate situations that can continue discrimination that is prohibited by the Covenant. These actions may include granting a part of the population, for a certain period of time, preferential treatment in specific matters. When these actions are necessary to correct discrimination, this is a legitimate differentiation under the Covenant according to the Committee.<sup>47</sup>

This view was confirmed in the case *Stella Costa v. Uruguay*. The case was about the reinstatement of people to the public service who had been dismissed based on political, ideological or union grounds. The author in this case complained that the preferential treatment of these people diminished his own chances of getting a job in public service. The Committee found that the affirmative action measures in this case did not constitute discrimination. They argued that the Act allowed this preferential treatment as a 'remedy' for people who were disadvantaged by violations of article 26 in the past.<sup>48</sup>

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<sup>43</sup> International Covenant on Civil and Political Rights, enforced on 23 March 1976.

<sup>44</sup> United Nations Treaty Collection, [https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg\\_no=iv-4&lang=en](https://treaties.un.org/pages/viewdetails.aspx?chapter=4&src=treaty&mtdsg_no=iv-4&lang=en).

<sup>45</sup> Bossuyt, M. (2002). Prevention of Discrimination – The Concept and Practice of Affirmative Action. Commission on Human Rights, United Nations p.11 & Bossuyt, M. (2000). Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 4.

<sup>46</sup> Cohn, M. "Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations." *Virginia Journal of International Law* 43.249 (2002) p. 257.

<sup>47</sup> Human Rights Committee, General Comment No. 18, para. 10, in HRI/GEN/1/Rev.4(2000).

<sup>48</sup> *Stella Coste v. Uruguay*, UN Doc CCPR/C/30/D/198/1985 (1987) & Bossuyt, M. (2002). Prevention of Discrimination – The Concept and Practice of Affirmative Action. Commission on Human Rights, United Nations p.11-12.

Another important case is *Ballantyne, Davidson and McIntyre v. Canada*. In this case the Committee was of the opinion that the prohibition of commercial advertising in English was not allowed in order to protect the francophone group. The affirmative action measures went too far and were disproportionate.<sup>49</sup> This shows that there has to be a clear and relevant goal in mind and that there are limitations to affirmative action measures. These limitations will be discussed later on.

Based on this information we can draw several conclusions regarding affirmative action and the two Covenants. First of all, it is generally accepted that positive measures, with the objective of achieving equality for disadvantaged groups, are not considered to be a breach of the prohibition of discrimination and distinction. The prohibition is only meant for measures of distinction that do not have a reasonable or objective goal.<sup>50</sup> It is also accepted that equality does not necessarily mean that all people have to be treated equally as in some cases it is justified by law to make distinctions between groups or individuals.<sup>51</sup> Thus, we can conclude that affirmative action measures are not a violation of the two Covenants. What should be noted is that, although the Human Rights Committee mentions the obligation, neither of the Covenants explicitly mentions any obligation on affirmative action measures. In addition to that, there is also no definition of the situation in which these actions should be taken nor about the forms of actions. This is a result of the complexity of the issue.<sup>52</sup>

#### 2.4.3. International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

This Convention was adopted in 1965 by the General Assembly and enforced on January 4<sup>th</sup> 1969. South Africa has ratified its law in accordance with this Convention in 1998. The Convention is important for South Africa, especially due to the fact that, in article 3, State Parties condemn “racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories

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<sup>49</sup> *Ballantyne, Davidson, McIntyre v. Canada* 31 March 1993, Communication Nos. 359/1989 & 385/1989 (UN Human Rights Committee) & Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.12.

<sup>50</sup> Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) p. 3.

<sup>51</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.12 & Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 5.

<sup>52</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.12.

under their jurisdiction".<sup>53</sup> It was also considered to be revolutionary due to the provision about national measures towards advancing specific ethnic or racial groups.<sup>54</sup> Within the Preamble of the Convention it is stated that State Parties have *"to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations"*.<sup>55</sup> This issue is raised in article 1 paragraph 4, which states that special measures, merely taken with the purpose of securing advancement of certain ethnic and racial groups in order to ensure that these individuals or groups equally enjoy or exercise human rights and fundamental freedoms, shall not be considered racial discrimination. This is only valid if these measures are temporary and do not lead to the maintenance of separate rights for different racial groups.<sup>56</sup> Article 2 paragraph 2 imposes a duty upon Member States to take special measures that ensure protection and development of certain racial groups or individuals. This is to guarantee the full and equal enjoyment of human rights and fundamental freedoms. This article also mentions that the measures cannot continue after the objective has been achieved.<sup>57</sup> Article 5 expands the obligations mentioned in article 2 by creating a specific obligation for state parties to eliminate racial discrimination and guarantee equality before the law. This article mentions specific rights, such as the equal treatment before tribunals and the right to freedom of opinion and expression for which these obligations are valid. General Recommendation no. 20 explains that this is also valid for all similar rights.<sup>58</sup>

The origin of both article 1 and 2 can be found in the United Nations Declaration on the Elimination of all Forms of Racial Discrimination. As noted, the Convention mentions 'special measures' in two separate articles. This is because in article 1 discrimination is defined and, in paragraph 4 of that article, it is described when differential treatment should not be seen as discrimination. Article 2 imposes duties upon States. Both articles do mention the temporary character of the measures. When special measures were discussed, some representatives had the concern that these measures could be used by

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<sup>53</sup> Article 3 International Convention on the Elimination of All Forms of Racial Discrimination, enforced on 4 January 1969.

<sup>54</sup> Mhambi, M. H. (2014). *Employment equity: the implementation and application of affirmative action in the workplace* (Master dissertation, University of Pretoria) p.4.

<sup>55</sup> Preamble Race Convention.

<sup>56</sup> *Article 1 paragraph 4 International Convention on the Elimination of All Forms of Racial Discrimination, entry into force 4 January 1969.*

<sup>57</sup> *Article 2 paragraph 2 International Convention on the Elimination of All Forms of Racial Discrimination, entry into force 4 January 1969 & Bossuyt, M. (2002). Prevention of Discrimination – The Concept and Practice of Affirmative Action. Commission on Human Rights, United Nations p.14.*

<sup>58</sup> Article 5 International Convention on the Elimination of All Forms of Racial Discrimination, entry into force 4 January 1969 & "CERD General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms". UN OHCHR. 15 March 1996.

Governments as a weapon to prolong the separation between certain groups and the rest of the population. Therefore, it was expressly stated that the aim of the measures was to ensure that these groups and individuals were integrated into the community to achieve equal development of all citizens. The aim was not to underline the distinction between racial groups.<sup>59</sup> From the above we can conclude that the ICERD aims to achieve both formal and substantive equality.<sup>60</sup>

Besides Declarations and Conventions, there are many more international documents that in some way mention the use of special measures, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). When this Convention was established, special measures were discussed. This was a controversial issue since some States were against them because they would mean 'reverse discrimination'. They did agree that the Convention should include the possibility to take special temporary measures in special fields in order to equalise the opportunities for women. Again, the fact that the measures were temporary was considered to be very important.<sup>61</sup> Article 41 of the Convention states that temporary special measures to achieve equality do not constitute discrimination. Despite all the discussion, the Convention currently contains nine provision that mandate affirmative action in different fields.<sup>62</sup> Furthermore there is the ILO Discrimination Convention of 1958. This Convention states that every Member State has to undertake action in order to establish a national policy that promotes equal treatment and opportunities regarding employment and occupation. The policy also has to eliminate discrimination. Article 5 of the Convention recognises that special measures designed to protect or advance people who require them due to discrimination in the past, will not constitute discrimination. This was one of the first articles in an international treaty that recognised this.<sup>63</sup> There are many more international documents that mention special measures which is showing the international recognition of the importance of the topic.

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<sup>59</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.14.

<sup>60</sup> Laher, I. (2007). *A critical analyses of employment equity measures in South Africa* (Master dissertation). Retrieved from [www.myscience.com](http://www.myscience.com) p.10-11.

<sup>61</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.15.

<sup>62</sup> Cohn, M. "Affirmative Action and the Equality Principle in Human Rights Treaties: United States' Violation of Its International Obligations." *Virginia Journal of International Law* 43.249 (2002) p. 254.

<sup>63</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 6.

## 2.5. Limits on affirmative action measures

As we have seen, it has been accepted that affirmative action measures are not contrary to international law, but this does not mean that there are no limits. There are certain requirements and limitations that they have to comply with in order to be legitimate measures. The most important requirements and limitations are:

1. Affirmative action measures are not allowed to lead to discrimination
2. Affirmative action measures require a sufficient and relevant ground
3. Affirmative action measures have to be temporary

### 2.5.1. Affirmative action and the principle of non-discrimination

An important issue regarding affirmative action measures is their relation to the principle of non-discrimination. This principle is considered to be one of the most fundamental human rights and is mentioned, in one way or another, in all international documents that are related to human rights. Non-discrimination is based on the philosophy that a State is not allowed to disadvantage an individual on a random basis.<sup>64</sup> The core of the non-discrimination prohibition is to remove factors such as gender or race from certain decisions. Opposed to that, affirmative action measures want to make sure these factors are taken into account in order to achieve true equality. When they are not carefully assessed and controlled, affirmative action measures might contradict with each other and violate the non-discrimination principle. Therefore, it is important to understand when a measure will constitute discrimination.<sup>65</sup> Logically, affirmative action measures may not lead to discrimination.

What has caused a lot of confusion is the interchangeable use of the terms 'discrimination' and 'distinction'. For example, the ICESCR uses the word 'discrimination', while the ICCPR uses 'distinction'. It is now generally accepted that both terms intend the same level of protection and that both have the purpose of excluding discrimination that is understood as an unjust distinction or arbitrary.<sup>66</sup> When we take a look at modern legal doctrine, we can conclude that it is accepted that 'discrimination' is used for

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<sup>64</sup> Human Rights Committee, General Comment 18, Non-discrimination (Thirty-seventh session, 1989), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994) p.1.

<sup>65</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.19.

<sup>66</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.19-20.

differences in treatment that are unlawful and arbitrary. ‘Distinction’ is used when it has not yet been determined whether the difference in treatment is justified or not. ‘Differentiation’ is a difference in treatment which is determined to be lawful. This means that not all the differences in treatment are automatically prohibited. Only differences that result to discrimination are.<sup>67</sup> Therefore the next question is when a difference in treatment becomes unacceptable or when it can in fact be justified? In order to answer this question, we have to look at case law.

In the dissenting opinion by Judge Tanaka in the South West African cases, he stated that equality was a principle and different treatment an exception. Therefore, different treatment must be motivated in order to prove reasonableness and *raison d’être*.<sup>68</sup> Within the Belgian Linguistics case, the European Court stated that: *“the principle of equality is violated if the distinction has no objective and reasonable justification.”*<sup>69</sup> The Court also mentioned that the difference in treatment had to pursue a legitimate aim and had to be proportional. This position was followed by the United Nations Human Rights Committee.<sup>70</sup> Case law shows that there are several requirements that affirmative action measures have to fulfil in order to be a legitimate difference in treatment. When a measure has a legitimate aim and reasonable justification it will not constitute discrimination.

#### 2.5.2. Sufficient and relevant ground

Another important element is the ground on which the distinction is based. The list of prohibited grounds that can be found in human rights documents is a non-exhaustive list. This means that other grounds can also be arbitrary, but also that grounds in the list do not necessarily have to be illegitimate. The decisive factor is the connection between the right that is practised and the ground. There has to be a ‘sufficient connection’, or relevance, between those two. The goal that is pursued by the legislation is not decisive.<sup>71</sup>

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<sup>67</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.19-20.

<sup>68</sup> SOUTH-WEST AFRICA CASES (SECOND PHASE), Judgment of 18 July 1966.

<sup>69</sup> Belgium Linguistics Case - ‘In the case “relating to certain aspects of the laws on the use of languages in education in Belgium” v Belgium’ (Application no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64).

<sup>70</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.21.

<sup>71</sup> & Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 14-15.

An important rule to keep in mind is that a legal rule is not automatically legitimate just because it pursues a legitimate goal. When the law is used to achieve certain goals, certain requirements have to be respected. An important one is respect for the principle of equality, meaning that no distinction can be made based upon a ground that is irrelevant. The evaluation of the connection between the right or freedom and the ground should mainly be a judicial one. According to Marc Bossuyt the same approach should be taken during the evaluation of the distinctions that are the result of an affirmative action policy.<sup>72</sup>

It is clear that certain measures need to be taken in order to achieve true equality for all people. However, not all measures that are taken with that particular goal in mind can be accepted as a legitimate measure. The fact that certain groups within society have suffered from disadvantage does not automatically mean that all distinctions are legitimate. It could also be unjustifiable if certain people belonging to a designated group would receive special measures when they do not need them, while at the same time refuse to give them to people that do need them but are not part of a designated group.<sup>73</sup> This could be a problem for South Africa and will be discussed later on. Marc Bossuyt also claims that affirmative action measures should be used in such a way that it takes measures to enhance the needs of a certain category.<sup>74</sup> The timing, location and measures of the policy are important factors. If these are right, favouring the targeted group can be possible without violating the rights of people that do not belong to that group. Important to note is that it is under no circumstances allowed that a person is deprived from a basic right simply because this would benefit a disadvantaged group to get over the consequences coming from past discrimination.<sup>75</sup> This means that, due to the unfair impact on innocent individuals, past discrimination is not considered to be a sufficient justification for affirmative action programs. In other words, “an injustice cannot be repaired by another injustice.”

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<sup>72</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 15.

<sup>73</sup> Murillo Martínez, E. (2011). AFFIRMATIVE ACTION MEASURES OR SPECIAL MEASURES: For Redressing Historical Injustices and Structural Discrimination against Afro-Descendants. *10th Session of Afro-Descendants Work Team*.p.5.

<sup>74</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 16.

<sup>75</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 16.



### 2.5.3. Affirmative action measures need to be temporary

The requirement of 'limited duration' has already been mentioned a number of times and is considered to be very important. Affirmative action measures may, in no case, lead to maintaining separate and unequal standards and they have to end as soon as their objectives have been achieved. This is to avoid that they will lead to a situation that is called "separate but equal".<sup>76</sup> In other words, when the goal is achieved these persons are no longer authorised to benefit from the measure. Or as M. McGregor puts it: "the object of the measure is limited to full and equal enjoyment of all rights and freedoms and nothing more."<sup>77</sup>

In his report A. Eide, mentioned that affirmative action is a solution to the problems of minorities. But, he added that it could lead to group conflict and, as a result, the temporary character of these measures is important. Affirmative action measures aim to correct conditions that damage the enjoyment of equal rights, but they are also measures to protect minorities and conserve their group identity. Thus, it is very important to keep in mind that affirmative action measures are compensatory and temporary.<sup>78</sup> Minorities are relevant because most countries that make use of affirmative action measures, use them to enhance the position of minorities. South Africa is one of the exceptions as it uses the measures for the majority of their population.

The requirement of limited duration also shows the difference between 'prevention of discrimination' and 'protection of minorities'. The main difference between these two is that 'discrimination' is about denying groups or individuals the equality of treatment that they may wish. "Protection of minorities" is described as the protection of groups that are not dominant. They wish for equality in treatment, but at the same time wish for a measure of differential treatment so that they can preserve the characteristics that distinguish them from the majority. The Secretary-General has stated that the protection of minorities required positive action, such as the establishment of schools. He also stated that the goals of protection of minorities and prevention of discrimination are not a contradiction. They both represent different developments of equality of treatment. Prevention of discrimination requires eliminating any

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<sup>76</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 16

<sup>77</sup> Idem 5 p. 165

<sup>78</sup> Minority Schools in Albania, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6) par. 65, 67, 68 & Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 19.

distinction imposed and protection of minorities requires safeguards in order to preserve certain distinctions.<sup>79</sup>

The case *Minority Schools in Albania*<sup>80</sup> is a very important case regarding the protection of minorities. This was a case before the Permanent Court of International Justice in which the complaint was about an amendment to the Constitution in Albania. This amendment stated that all private schools were forbidden. According to the Greek minority in the country this amendment would mean a violation of the Albanian Declaration of 1921, which is concerned with the protection of minorities. According to the Government, it was not a violation because it was a general measure that was also applicable to the majority.<sup>81</sup> The Permanent Court stated that equality in law prohibited discrimination of any kind. However, different treatment might be necessary in order to achieve equality in fact. The Court explained that it is not hard to think of situations in which equality of treatment of majority and minority might actually result in inequality.<sup>82</sup> Regarding the private schools in this particular case the Court stated that the schools are indispensable in order for the minority to enjoy the same treatment as the majority. The abolition in the amendment would destroy equality in treatment because the effect of the prohibition would be that the minority is deprived of the institutions that are appropriate to its needs. The majority would still have the institutions that are created by the State.<sup>83</sup>

## 2.6. Justifications for affirmative action measures

When a state decides to implement an affirmative action policy there is usually a great amount of protest. The State will justify the policy toward its citizens by using certain grounds as justification. These ground can differ per State since they depend on a specific social context.<sup>84</sup> One of the main justifications used is to redress or remedy injustices that have taken place in the past but still have

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<sup>79</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 18-19.

<sup>80</sup> *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6).

<sup>81</sup> *Minority Schools in Albania*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 64 (Apr. 6) par. 1, 14 & 15.

<sup>82</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 17-18.

<sup>83</sup> Bossuyt, M. (2000). *Comprehensive Examination of Thematic Issues Relating to Racial Discrimination - The concept and practice of affirmative action* (E/CN.4/Sub.2/2000/11). Commission on Human Rights, United Nations. p. 18.

<sup>84</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.4.

consequences today. Due to systematic discrimination, certain target groups have acquired an underprivileged position in society. This justification is used in several countries such as Australia and the United States but as we will see, also in South Africa.<sup>85</sup> An argument that was used in the U.S.A. is that ethnic and racial diversity in the workplace is necessary in order to speak of a just society. Also, an affirmative action policy can serve several goals. For example, members in important positions can become role models and motivate other members of the designated groups. However, it is important to notice that appointing less-qualified persons, based only on group membership, could lead to the reinforcement of stereotyping and may actually stimulate racial thinking. By promoting the interests of disadvantaged people and balancing the equality, affirmative action programmes are also used to prevent social unrest. By taking action against the inequality, the State hopes to prevent demonstrations and riots by the disadvantaged people.<sup>86</sup>

## **2.7. Conclusion**

This chapter has shown how the concept of affirmative action was developed and what the purpose and justifications of these measures can be. We have also seen that there are different types of affirmative action measures and that they do have an important place within international law. Affirmative action can be, directly or indirectly, found in several international documents. Important to note is that the measures, often called 'special measures', almost always have to be considered in conjunction with both the principle of equality and the prohibition of non-discrimination. An important conclusion is that affirmative action, when correctly implemented, is not seen as reverse discrimination. They are measures that are necessary in order to achieve true equality and not preferential treatment as they do not discriminate one part of society in order to advance another.

When affirmative action measures comply with the requirements that are laid down in law within the documents that have been discussed, they are not contrary to international law and are therefore legitimate. The affirmative action measures that are issued in South Africa have to comply with the requirements that are laid down in these international documents since they were ratified by them. If

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<sup>85</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.5.

<sup>86</sup> Bossuyt, M. (2002). *Prevention of Discrimination – The Concept and Practice of Affirmative Action*. Commission on Human Rights, United Nations p.5-6.

their measures do not meet those requirements they will possibly constitute discrimination and considered to be illegitimate.

### **3. What is the place of affirmative action within the legislative framework of South Africa?**

#### **3.1. Introduction**

As mentioned before, South Africa has a complicated history regarding discrimination and equality. Especially during apartheid, systematic discrimination was visible within all parts of society. The regime implemented legislation with the intention to specifically favour white male citizens. The concept of equality for all citizens was completely ignored. This resulted in inequality and disadvantages for a majority of the black, Indian and coloured people in South Africa but also for disabled people and women.<sup>87</sup> In the 1990's times were finally changing. South Africa got a democratic constitutional order and one of the main goal of the new regime was to achieve the objective of equality for all people. In order to establish this, they implemented a new Constitution and supplemented this Constitution with other legal instruments. Equality, the prohibition of unfair discrimination and affirmative action all gained a position within this Constitution and legal instruments. In this chapter the legal system of South Africa will be analysed. The most important parts of the legal framework regarding employment equity and affirmative action are the Constitution and the Employment Equity Act. Therefore, these two will be elaborated on. After this, the most important cases before South African courts will be addressed.

#### **3.2. The Constitution of South Africa**

The new Constitution of the Republic of South Africa was adopted in 1996 and can still be considered as the basis of the legal system. In the preamble the injustices of the past towards the South African peoples are explicitly recognized.<sup>88</sup> This recognition is very important, especially to those who have suffered from these injustices. Due to those injustices, the principle of equality became one of the founding values of the Constitution and obtained a place within the Bill of Rights.<sup>89</sup> Section 9 of the Constitution provides for this right as paragraph 1 states that:

*“Everyone is equal before the law and has the right to equal protection and benefit of the law”<sup>90</sup>*

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<sup>87</sup> McGregor, M. (2011). Judicial Notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces. *De Jure*. P. 112-113.

<sup>88</sup> Idem 1 P. 114.

<sup>89</sup> Budeli, M. (2014). Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994. *New York Law School* p. 5-6.

<sup>90</sup> Section 9 (1) of the Constitution.

According to Marie McGregor the interpretation that has been given to the phrase “equal before the law” is that all people, at the very least, will be treated equally by the courts of law.<sup>91</sup> In the same article ‘equal benefit’ is considered to be a phrase that encourages courts to see the concept of equality, as stated in section 9 (1), as a broader and more substantive concept.<sup>92</sup> This last remark refers to the two types of equality, formal and substantive which have been explained in the previous chapter.

Section 9 (2) of the Constitution states:

*“Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”<sup>93</sup>*

The Constitution wants to establish a society that is based upon social justice, human rights and democratic values.<sup>94</sup> According to section 1 of the Constitution, non-racism, non-sexuality and equality are founding values of the country<sup>95</sup> and the combination of formal and substantive equality is a strong base to protect the right to equality. However, the fact that all citizens in South Africa have the same right to equality based on the Constitution did not mean that they were necessarily all equal. Due to systematic discrimination in the past, people were still in a disadvantaged position and there was still disparity between different (racial) groups.<sup>96</sup> Therefore it was not sufficient to only guarantee true equality for all people, especially not for the disadvantaged ones.<sup>97</sup> In order to try to achieve true equality for all, unfair discrimination has been prohibited based on a non-exhaustive list of grounds.<sup>98</sup> In addition to this, the country also made a provision for affirmative action through *“legislative and other measures, designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination (...)”<sup>99</sup>*

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<sup>91</sup> McGregor, M. (n.d.). Affirmative action - a defence or a right? *The Quarterly Law Review for People in Business*, 11(3). p. 164.

<sup>92</sup> Idem 5 p. 164.

<sup>93</sup> Section 9 (2) Constitution.

<sup>94</sup> Preamble and p.114.

<sup>95</sup> Section 9 (2).

<sup>96</sup> Laher, I. (2007). *A Critical Analysis of Employment Equity Measures in South Africa* (Master's thesis, Rhodes University, Grahamstown, South Africa). p. 18.

<sup>97</sup> Section 9 (2) of the Constitution.

<sup>98</sup> Article 9 (3) and (4) of the Constitution

<sup>99</sup> Section 9 (2)

### *Affirmative action measures*

Affirmative action measures consist of legislative and other measures that are designed to either advance persons or categories of persons that are disadvantaged by unfair discrimination, or to protect them from it. In other words, the goal of these measures is to correct the imbalances of disadvantages and factual inequalities. Therefore, affirmative action measures are of a temporary nature and only a temporary method to promote equality.<sup>100</sup> Once equality has been achieved, the measure has to end. This has been addressed in the previous chapter.

Although it might seem like it, affirmative action is not an exception nor a limitation to the right of equality. When this would be the case the concept of equality would not have required affirmative action, it would only have been a possibility. The objective was to make affirmative action measures compulsory when they were necessary to achieve true equality and therefore they are part of the right to equality.<sup>101</sup> Taking affirmative action measures can be compulsory if this is necessary to establish equality for all people.

Although the Constitution seems to set some clear guidelines regarding affirmative action measures, there are several uncertainties. Therefore, we have to look beyond the Constitution in order to get a more complete picture. Especially at additional legislation and case law regarding affirmative action in the employment sector.

### **3.3. Supplementing the Constitution**

Within South African legislation there are two important Acts regarding discrimination, the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act. Since the last one does not specifically focus on the employer-employee relationship it will not be discussed and the focus will be on the first one.

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<sup>100</sup> McGregor, M. (2011). Judicial Notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces. *De Jure*. P. 113-114 & McGregor, M. (n.d.). Affirmative action - a defence or a right? *The Quarterly Law Review for People in Business*, 11(3). P. 164

<sup>101</sup> Idem 5 P. 165

### 3.3.1. Employment Equity Act

The Employment Equity Act (hereinafter: EEA) was created in order to give effect to section 9 (2) of the South African Constitution and has to be implemented in compliance with that Constitution. Implementing affirmative action measures in order to advance people from designated groups is one of the main purposes of the EEA. The act was the first labour legislation to promote affirmative action and employment equity within the work field.<sup>102</sup> It recognizes disparities within income, employment and occupation due to apartheid and other discriminatory systems and laws.<sup>103</sup> According to the EEA, these disparities have created disadvantages for people with disabilities, women and black people.<sup>104</sup> Therefore, these three categories are the beneficiaries of affirmative action.<sup>105</sup>

According to section 2 EEA the main goal of the act is to achieve equal employment opportunities within the workplace<sup>106</sup> which can be achieved by promoting equal opportunity and fair treatment. Therefore unfair discrimination has to be eliminated and affirmative action measures have to be implemented in order to restore the disadvantages in employment for designated people.<sup>107</sup> This shows us that both formal and substantive equality are represented within this act.<sup>108</sup>

#### *Prohibition of unfair discrimination*

What is remarkable is that neither the EEA, nor the Constitution, prohibits discrimination. Only unfair discrimination is expressly prohibited<sup>109</sup>, which means that fair discrimination is legitimate. However, both discrimination and unfair discrimination are not defined within the act, nor within the Constitution. Therefore, in every case it is up to the court to give content to the principle and to decide, based on the facts, whether or not there is a violation.<sup>110</sup> The court formulated a test in the Harksen v Lane case<sup>111</sup> that consists of two questions and helps to decide whether or not there is unfair discrimination.

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<sup>102</sup> Section 3 of the Employment Equity Act 1998 & Budeli, M. (2014). Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994. *New York Law School* p. 6.

<sup>103</sup> Preamble Employment Equity Act.

<sup>104</sup> The term 'black people' constitutes Africans, Indians and colored people and people of Chinese descent.

<sup>105</sup> Section 1 EEA.

<sup>106</sup> Idem 5 P. 166

<sup>107</sup> Section 2 of the Employment Equity Act 1998.

<sup>108</sup> Idem 3 p. 7.

<sup>109</sup> Section 9 (3-4) Constitution & Section 6 EEA.

<sup>110</sup> Idem 3 p. 7-8.

<sup>111</sup> Harksen v Lane NO and Others (CCT9/97) [1997] ZACC 12.



The first question is if the differentiation results into discrimination. If there is a connection between the differentiation and one of the listed ground of discrimination, discrimination can be established. If the differentiation is based on an unspecified ground, there is work to do for the employee. In such a case he will carry the burden of proof and thus has to prove that the differentiation leads to discrimination. The Harksen case specified that the employee has to demonstrate that the ground of the differentiation damages the fundamental dignity of people or disadvantages them in a comparable way.<sup>112</sup> According to Dupper 'grounding' differentiation will lead to a claim that is either based on direct or indirect discrimination. We call it direct discrimination when someone is treated in a less favourable way based on his/her sex, race, or another distinguishing factor. Indirect discrimination occurs when an, at first glance, neutral requirements disadvantages a disproportionate number of people coming from a specific group and this cannot be justified. The differentiation between direct and indirect discrimination has effect on the justifying grounds or defences that are accessible for an employer.<sup>113</sup>

When the discrimination has been confirmed the next question is whether or not this discrimination is unfair. The court in the Harksen case has set some guiding principles to help answering this question by distinguishing two situations. The first one is when the discrimination is based on a specified ground listed in the Constitution, the EEA or the LRA. In such a case the unfairness will be presumed. The other situation is discrimination based upon an unspecified ground. In that case the complainant will have to establish discrimination and also prove that it is unfair. The Court mentioned several factors in order to decide whether the discrimination is unfair.<sup>114</sup> All of these factors can assist in determining the unfairness however, it is not a non-exhaustive list. These factors will also be taken into account when the ground of the discrimination is a specified one. The difference is that in unspecified ground cases the applicant has the burden of proving that the factors are present and in specified ground cases the respondent has the burden of proving the absence of these factors.<sup>115</sup>

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<sup>112</sup> Dupper, O. (2001). Justifying unfair discrimination: the development of a "general fairness defence" in South African (labour) law. *Acta Juridica* p. 149-150.

<sup>113</sup> Dupper, O. (2001). Justifying unfair discrimination: the development of a "general fairness defence" in South African (labour) law. *Acta Juridica* p. 150.

<sup>114</sup> (i) The position of the complainants in society; (ii) The nature of the provision or power and the purpose sought to be achieved by it; (iii) The extent to which discrimination has affected the rights of their complainants and whether it has led to an impairment of their fundamental dignity.

<sup>115</sup> Dupper, O. (2001). Justifying unfair discrimination: the development of a "general fairness defence" in South African (labour) law. *Acta Juridica* p. 141-152.

If the outcome of the two-pronged test is unfair discrimination, section 36 of the Constitution might justify it under the limitation clause. This means that, under the Constitution, the respondent will get a second chance by showing that the discrimination can be justified in terms of section 36 (1) of the Constitution. In order for such a claim to be justified the limitation has to have a legitimate social purpose and has to be proportionate in relation to the end it tries to achieve.<sup>116</sup>

When we apply this test to see if affirmative action measures are a violation of the prohibition of unfair discrimination in the Constitution the first question has to be answered with a 'yes'. After all, the whole purpose of affirmative action measures is to differentiate. The second question also has to be answered with 'yes' since the measures do amount to unfair discrimination because the discrimination is based on a listed ground. However, it might constitute fair discrimination if the differentiation is rationally related to the outcome.<sup>117</sup> This was decided in another case before the court. The purpose of affirmative action measures is to achieve true equality, therefore the differentiation is rationally related to the outcome and it constitutes fair discrimination.<sup>118</sup>

Regarding the EEA, the act may prohibit unfair discrimination but it also recognizes that affirmative action measures, that are consistent with the purpose of the act, are not regarded as unfair discrimination.<sup>119</sup> This means that affirmative action measures can be used as a justification by employers against claims of unfair discrimination, they can use it as a defence. However, a person that applies for a job or a promotion cannot claim that an employer has to promote or appoint him based on the ground of affirmative action. The EEA makes clear that the intention of the act is not to supply a right of affirmative action.<sup>120</sup>

#### *Affirmative action measures within the EEA*

Affirmative action measures are addressed within the third chapter of the EEA. Section 15 (1) defines them as:

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<sup>116</sup> Dupper, O. (2001). Justifying unfair discrimination: the development of a "general fairness defence" in South African (labour) law. *Acta Juridica* p. 152-153.

<sup>117</sup> Pretoria City Council v Walker.

<sup>118</sup> Laher, I. (2007). *A Critical Analysis of Employment Equity Measures in South Africa* (Master's thesis, Rhodes University, Grahamstown, South Africa). P. 38-39.

<sup>119</sup> Section 6 (2) of the Employment Equity Act 1998.

<sup>120</sup> Idem 5 p. 167.

*“(...) 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.”<sup>121</sup>*

Section 15 (2) sets the rules regarding the content of affirmative action measures. The measures have to further diversify the workplace based on respect of all people and equal dignity. Furthermore, they have to include measures that identify and eliminate employment barriers that adversely affect people coming from designated groups. They also have to make reasonable accommodation for people from designated groups and ensure equitable representation of suitably qualified people coming from these groups. Finally, they have to retain and develop people from these same groups and implement appropriate training measures.<sup>122</sup> They may include preferential treatment towards persons from designated groups and setting a numerical goal but quotas are excluded.<sup>123</sup>

#### *Designated employers and employees*

Affirmative action measures are only applicable to certain employers and employees. These employers are called “designated employers”.<sup>124</sup> In general, designated employers consist of employers with a large number of sales and 50 or more employees. It also includes organs of the state and municipalities. Furthermore, an employer can also be bound by collective agreement. Employers that do not meet the criteria of a designated employer can voluntarily decide to comply with this section of the act.<sup>125</sup> Designated employers have an obligation to implement certain affirmative action measures that ensure that a suitably qualified person from a designated group has an equal employment opportunity and that these people are equally represented in all categories of the work field.<sup>126</sup> One of these obliged measures is that the employer has to create an employment equity plan and implement it. This plan must, amongst other things, include affirmative action measures that will be implemented and include the objectives to be achieved.<sup>127</sup> The plan has a minimum duration of one year and a maximum of five years. Before the plan has come to an end, the employer has the obligation to prepare another one. This is to ensure that affirmative action measures are applied in their most effective way and until they are

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<sup>121</sup> Section 15 (1) EEA.

<sup>122</sup> Section 15 (2) EEA.

<sup>123</sup> Idem 3 p. 12.

<sup>124</sup> Section 12, Chapter 3 EEA.

<sup>125</sup> Section 14, Chapter 3 EEA.

<sup>126</sup> Section 15(1) EEA & Budeli p.12.

<sup>127</sup> Section 13 & 20 Chapter 3 EEA & Idem 4 p. 167.

no longer necessary in South Africa. The goal of all of these measures is to “achieve reasonable progress towards employment equity.”<sup>128</sup>

The EEA also explicitly defines whom should be the beneficiaries of affirmative measures: people from designated groups. These are groups that have been discriminated in the past and the measures will allow them to reach the same level as those who have not been disadvantaged. In terms of this act, designated groups are blacks<sup>129</sup>, women and people with a disability.<sup>130</sup> This means that the beneficiaries are determined by gender, disability and race. Within the act it is not explicitly stated which of these prefers over the other however in practice, implementation of affirmative action measures favours race over gender and disability and Africans over Coloureds and Indians. This is mainly based on case law, which will be discussed later on.<sup>131</sup>

#### *Suitably qualified*

Not only the designated employers have to comply with certain requirements, there are requirements for the beneficiaries as well. A huge misunderstanding regarding affirmative action is that a person who belongs to a designated group can be employed instead of a white male, when the white male is clearly much better qualified for the job. In theory this is not possible because a person has to be “suitably qualified” in order to benefit from the measure.<sup>132</sup> If they do not meet this requirement, they will not be appointed for the job.

The EEA caused some changes regarding the meaning of the term “suitably qualified”. It is now a broad term that includes the potential that a person has to learn on the job. This broadening is important since the apartheid regime has caused a lack of education and work experience for many of the people belonging to designated groups. Therefore, new criteria have been established in order to determine whether or not a person is suitably qualified.<sup>133</sup> Section 20 (3) states that a person can be suitably qualified due to one, or a combination of these four factors:

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<sup>128</sup> Section 20, Chapter 3 EEA & Budeli p. 11-12.

<sup>129</sup> According to Budeli: “Black people” is a term that includes Africans, coloureds and Indians who are a citizen of the Republic of South Africa, either by birth, naturalisation, or descent.

<sup>130</sup> Section 1 EEA.

<sup>131</sup> Idem 3 p. 14.

<sup>132</sup> Section 15 (1) EEA.

<sup>133</sup> Idem 13 p. 69-70.

- formal qualifications;
- prior learning;
- relevant experience; and/or
- capacity to acquire, within a reasonable time, the ability to do the job.<sup>134</sup>

Within this act there is no further definition of these four factors which leaves questions such as what “reasonable time” constitutes, unanswered. These questions will have to be answered based on the facts of each case. Despite this, a designated employer is obliged to analyse all these factors when he determines whether or not a person is qualified for the job. The employer has to ascertain if the person, due to one or a combination of the factors, has the ability to do the job.<sup>135</sup> The fact that a person has no relevant experience cannot be used by an employer as the exclusive ground to make this determination. This will be considered as unfair discrimination.<sup>136</sup>

This should mean that we can eliminate one of the misunderstandings regarding affirmative action measures. An applicant that is not from a designated group will not be rejected for a job on the ground of gender or race, but because a person that is from a designated group has the abilities to do the same job as affectively as he can. Actually, an appointment that is only based on race or gender is considered as unfair discrimination towards the person that was not appointed.<sup>137</sup> However the results of the questionnaire show that in practice people, mostly from designated groups, do not feel that this theory is applied in practice. They feel that people from designated groups get jobs purely based on their race or gender. Therefore, although in theory this might not be an issue, it is still one of the main problems regarding the implementation of affirmative action measures.

#### *Enforcement of affirmative action measures*

In order for affirmative action measures to be effective they have to be enforced. The EEA mentions several enforcement measures. The first one is self-regulation. This means that every designated employer will have to assign a senior manager that is responsible for implementing and monitoring the employment equity plan.<sup>138</sup> There is also the possibility to give designated employers that fail to comply

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<sup>134</sup> Section 20 (3) EEA & Idem 4 p. 168.

<sup>135</sup> Section 20 (4) EEA & Supra 43 p. 168.

<sup>136</sup> Section 20 (5) EEA.

<sup>137</sup> Idem 13 p. 72.

<sup>138</sup> Section 24 EEA.

a fine. Furthermore, a Labour Inspector can also issue a compliance order.<sup>139</sup> These are all measures of punishment. There is however also an encouraging method to make designated employers comply, the awarding of State contracts. A State contract will only be given to a designated employer that complies with both Chapter II and Chapter III of the EEA.<sup>140</sup>

As we have seen, the EEA recognizes in an explicit way that apartheid and its discriminatory system have caused economic disadvantages for women, blacks and disabled people within the employment sector and addresses affirmative action measures. The act also provides more clarity regarding the requirements of designated employers.<sup>141</sup>

### 3.3.2. Reviewing case law

Affirmative action has been the topic in several cases before the court since the implementation of the Constitution and the EEA. In several of these cases the court has made clear that achieving equality is one of the cornerstones of the constitutional society. It also recognized that the consequences of past discrimination are still visible within society.<sup>142</sup> The judgements in these cases may clarify some of the issues regarding affirmative action measures and supplement the law regarding this issue. Therefore, a few of the cases that highlight and clarify affirmative action will be discussed below.

#### *Independent Municipal & Allied Trade Union v Greater Louis Trichardt Local Council*<sup>143</sup>

This was a case before the Labour Court in which a black candidate that was appointed although he had scored less than all other candidates, including candidates from the same designated group. The applicant union argued that this was unfair labour practice and that the appointment was not justifiable. The employer argued that this was in compliance with both Schedule 7 item 2(2) of the LRA and the Constitution.<sup>144</sup> The question the court had to answer was if a designated employer could use

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<sup>139</sup> Section 37 EEA.

<sup>140</sup> Section 53 EEA.

<sup>141</sup> *Idem* 5 p. 118.

<sup>142</sup> *Brink v Kitshoff* 1996 4 SA (CC) par 41.

<sup>143</sup> (J 644/97) [1999] ZALC 107 (16 July 1999).

<sup>144</sup> (J 644/97) [1999] ZALC 107 (16 July 1999) par. 7.

Budeli, M. (2014). *Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994*. New York Law School p. 15-16.

affirmative action to appoint a candidate that is less qualified over a more qualified candidate if both candidates are coming from the same designated group.<sup>145</sup>

The Labour Court held that appointing this candidate was not based on a policy. Appointing a less qualified candidate cannot be justified based on affirmative action because experience and merit should also be taken into account if an employer is using this ground to appoint a certain candidate. Therefore, this appointment constituted unfair labour practice as stated in Item 2 (1) (a) of Schedule 7 LRA. This means that the most suitable candidate should be appointed when the candidates are coming from the same designated group.<sup>146</sup>

*Fourie v Provincial Commissioner of the SAPS (Northwest province)*<sup>147</sup>

This case dealt with the issue of two candidates coming from two different designated groups that are applying for the same position. An African male police officer and a white female police officer both applied for a promotion. The promotion was given to the African male police officer. The female police officer argued before the Labour Court that she was the victim of discrimination based on race. The Police Service responded that they intended to correct underrepresentation of African police officers. The judgement of the Labour Court was that discrimination in this case was considered to be fair and in compliance with the EEA. The conclusion that evolves is that, in the context of affirmative action, a beneficiary from one designated group may be preferred over one from another designated group if that group is less represented than the other group.<sup>148</sup> This line of reasoning was continued in the Eskom Holdings case.<sup>149</sup> It is allowed to give preference to the candidate that belongs to the group that was most underrepresented during apartheid, even if employees are from the same designated group that should benefit from affirmative action measures.<sup>150</sup>

*Reynhardt v University of South Africa*<sup>151</sup>

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<sup>145</sup> Budeli, M. (2014). Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994. New York Law School p. 15.

<sup>146</sup> (J 644/97) [1999] ZALC 107 (16 July 1999) par. 25 & 32 & Budeli, M. (2014). Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994. New York Law School p.16.

<sup>147</sup> Fourie v Provincial Commissioner of the SA Police Service (North West Province) & another (2004) 25 ILJ 1716 (LC).

<sup>148</sup> Idem 3 p.17.

<sup>149</sup> Solidarity obo Christiaans and Eskom Holdings Ltd (2006) 27 ILJ 1291 (ARB).

<sup>150</sup> Idem 3 p.17.

<sup>151</sup> Reynhardt v University of South Africa (JS 1061/02) [2007] ZALC 96.

This case concerned a professor who applied for the position of Dean of Science and was recommended by a selection committee for this position. Despite this recommendation the university appointed a coloured professor that was less qualified. The professor brought the case before the Labour Court and claimed that he had been discriminated against based on race. Both the Labour court and the Labour Appeal Court were of the opinion that that he had indeed been unfairly discriminated because the target of the equity policy had already been achieved. After that target had been achieved, the employment equity plan was an expressed statement that employment equity was no longer necessary. The “most suitable candidate” then had to be appointed. The court held that UNISA had failed to show that the application was to promote the achievement of equality.<sup>152</sup> The conclusion of this case confirms that affirmative action measures are temporarily. Once the target has been achieved, the measure loses its legitimate ground.<sup>153</sup>

*Minister of Finance v Van Heerden.*<sup>154</sup>

The case was about a new pension scheme that was introduced by the Minister of Finance, which favoured mainly new black Parliament members. Mr van Heerden approached the High Court with the claim that this differentiation was unfair discrimination against certain groups.<sup>155</sup> The judgement of the High Court was in favour of Mr van Heerden. Both parties went to the Constitutional Court stating that the former judgement was inaccurate because it was based on a formal notion of equality.<sup>156</sup> The Constitutional Court created a test in order to determine whether affirmative action measures were in compliance with section 9(2) of the Constitution. Affirmative action measures are in compliance with this section are not presumed to be unfair. The test consisted of three questions:<sup>157</sup>

1. Do the measures target people or categories of people who have been disadvantaged by unfair discrimination?
2. Are such measures designed to protect or advance such people or categories of people?

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<sup>152</sup> Mushariwa, M. (2012). Does Affirmative action have a Lifecycle? *PER*, 15(1). p.416.

<sup>153</sup> Reynhardt v University of South Africa (JS 1061/02) [2007] ZALC 96 par. 35 & Budeli, M. (2014). Employment Equity and Affirmative Action in South Africa: a Review of the Jurisprudence of the Courts since 1994. New York Law School p.17 – 18.

<sup>154</sup> Minister of Finance v Van Heerden 2004 6 SA 121 (CC).

<sup>155</sup> Idem 153 par 12.

<sup>156</sup> Idem 153 par. 17.

<sup>157</sup> Idem 5 p. 119 & 120 and Idem 3 p. 20.



### 3. Do they promote the achievement of equality? <sup>158</sup>

Differentiation is considered legitimate when it is protecting or advancing persons that have been disadvantaged by unfair discrimination, as long as the measures are in compliance with the internal test of section 9 (2). This means that the beneficiaries of these measures must have experienced disadvantage by unfair discrimination. The court even stated that measures aimed at restitution, that were based on grounds of discrimination mentioned in section 9(3), could not be considered as unfair discrimination.<sup>159</sup>

#### *South African Police Service v Solidarity obo Bernard case*

This is a recent case concerning affirmative action that was decided by the Constitutional Court. It is considered as a very controversial case since several courts were part of it and they did not always agree with each other.

The facts of this case started in 2005 when the National Police Commissioner opened a promotion position for the rank of a superintendent, a position that was not reserved for someone from a designated group. Captain Barnard, a white female who was already part of the division, was denied the promotion on two occasions solely based on the fact that she was white. Both times she was on the shortlist and considered to be the best candidate by far according to a panel. Other members of the shortlist included members from other designated groups. Since she was already part of the division, the panel was of the opinion that her appointment would not positively affect its representation, however it would not have a negative effect either. Despite the recommendation, the National Commissioner declined the promotion of Captain Barnard both times. Another interesting fact is that none of the other shortlisted candidates were appointed either, the position remained unfilled.<sup>160</sup>

She then decided to take the case to the Labour Court. The court agreed with Captain Barnard that she had been unfairly discriminated on the ground of race and that the reasons given by the National Commissioner were insufficient. Therefore, the decision was invalid and unfair. The Police Service then decided to go to the Labour Appeal Court who set aside the decision of the Labour Court. They held that

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<sup>158</sup> Idem 5 p. 120 & Minister of Finance v Van Heerden 2004 6 SA 121 (CC) par. 37.

<sup>159</sup> Idem 3 p. 20.

<sup>160</sup> Idem 3 p. 21-22.

there was no discrimination since no appointment had been made at all. Captain Barnard then put a claim before the Supreme Court of Appeal who reversed the decision of the Labour Appeal Court and agreed with the Labour Court. In this case there was discrimination based on the ground of race and the Commissioner did not prove that this discrimination was not unfair.<sup>161</sup>

The Police service then went on to go to the Constitutional Court. They ruled that the SAPS was a designated employer and therefore had to implement affirmative action measures. The Constitutional Court was of the opinion that the Supreme Court should have made a decision that was based on section 9(2) of the Constitution and section 6(2) EEA. The Supreme Court decided the case on the principle of discrimination which was the wrong principle. The employment equity plan of the SAPS required the achievement of targets and therefore the Commissioner had the right and even the duty to make decisions that would achieve this target. This meant that the equity plan could be considered as a “restitutionary measure” which is justified by both the Constitution and the EEA.<sup>162</sup>

This case really shows how complex the South African jurisprudence is when it comes to affirmative action and equality within employment. Courts are not consistent in their decision making and overrule each other. In this case two courts decided that there was unfair discrimination, while the other two courts decided the opposite.<sup>163</sup> The case also shows that if there is no suitable candidate for a certain position, not appointing a member from a non-designated group that is suitable can be considered as discrimination.<sup>164</sup>

### 3.4 Conclusion

In this chapter we have seen that, due to the discriminative past of the country, the principle of equality has obtained a very important place within the Constitution of South Africa. The Constitution states that all people shall be treated equal before the law and have the right to equal protection. In order to achieve this affirmative action measures were introduced.

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<sup>161</sup> Idem 3 p. 22.

<sup>162</sup> Idem 3 p. 23.

<sup>163</sup> Idem 3 p. 23.

<sup>164</sup> Mushariwa, M. (2014). Moving forward from Barnard: Who are the true beneficiaries of affirmative action? *Juridicas*. p. 12.

We can conclude that affirmative action measures, although not uncontroversial, have obtained an important place within the legislative framework and the society of South Africa. They are represented in both the Constitution and supplementing legislation. The importance is also shown by the fact that affirmative action measures are not just a possibility but in certain cases even a duty. The legislative framework helps to get some clarity regarding the issues of this topic. Other uncertainties had, or still have to be dealt with, by the courts of South Africa. An important conclusion that can be drawn from both legislation and case law is that well implemented affirmative action measures do not amount to discrimination. They will pass the discrimination test because they are considered to be fair discrimination. The legislation however also makes clear that people from designated groups do not have a right to affirmative action. It is simply a measure or a policy that has to be used as a remedy to restore the right to equality. Despite the important place in the legislative framework and many judgements from the courts in South Africa, there are still many uncertainties and issues regarding affirmative action measures.

## **4. What are the main issues with the current affirmative action approach in South Africa?**

### **4.1. Introduction**

In the previous chapters we have seen that affirmative action has a place within both the international- and South African legal framework. Although on paper the policy is legitimate, this does not necessarily mean that society feels that it is just. The respondents to the questionnaire have given several problems they feel are caused by the current policy. This chapter will discuss the two main issues according to the respondents of the questionnaire. These issues concern the beneficiaries of the measures and the race-based approach of the policy. Almost every respondent mentioned these two issues in one way or another. It is important to look into these issues because, although on paper the policy seems legal and fair, there is resistance and criticism against the implementation and efficiency of the current policy. These issues might explain why this is the case.

### **4.2. Who should be the beneficiaries?**

The first issue evolves around the question who should be the beneficiaries of the measures. This is an important issue, because in order for a policy to be effective, it should at least benefit the correct people. Many feel that the current policy is only beneficial for a small group of people, who do not need special measures. The current policy is benefitting groups and this leads to the question if the measures should benefit groups or if it should focus on individuals? In order to answer this question, we need to know if 'disadvantage' should be a requirement in order to receive affirmative action measures.

#### 4.2.1. The current beneficiaries of the affirmative action policy

The interpretation of affirmative action measures, that they should give an equal opportunity to designated groups that have been disadvantaged due to discrimination, has created a loophole within the law. Within those designated groups, there are individuals that have not experienced any (direct) disadvantage due to discrimination. On the other hand, an individual that has been disadvantaged does not have a claim to affirmative action if he does not belong to a designated group but to a group that has been identified as privileged, even if he has not been privileged. This is illustrated by the example below:

*Person A is a black male who was born in France after his father moved there in 1975. His father studied at a university in Europe and became a doctor. 'A' gained South African citizenship through his father. His father made a considerable amount of money and the family returned to South Africa in 1993. 'A' studied at a very prestigious high school in South Africa and when he started with university, his father arranged and paid for everything. He then graduated from university with reasonable good results.*

*Person B, a white male, decided to start the same study as person A. He had to take out a student loan to afford this and is now in debt. He has graduated with the same results as person A.*

*The father of person C was arrested during apartheid without trial and killed in prison. His mother did not inherit any money from him nor did she obtain money for maintenance. 'C' had to travel 25 kilometres to school every day as the only school closer to his home was for white people. He earned a place at university and he took out a student loan to pay for his studies and worked in the evenings to pay for his living expenses. Due to his work, he had less time available for studying and he was not able to afford any of his textbooks and had to borrow them from friends. He graduated with semi-decent results but definitely not as good as person A or B.*

*All three decide to apply for the same job. On paper, the qualifications of person A and B are very similar and both of them stand out when they are compared to person C. Therefore, person C is automatically disqualified from the job application since he does not meet the requirements. Although on paper person A is completely equal to person B, he would be preferred over person B because he is a black male.<sup>165</sup>*

This example shows that the current rules of affirmative action, prefer person A over B. This is the righteous solution since both candidates' qualities are equal and the purpose of affirmative action is to make more jobs available to black people in order to establish substantive equality. What could raise concern is that it does not matter whether or not person A has suffered from actual discrimination or

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<sup>165</sup> Example from Laher, I. (2007). *A Critical Analysis of Employment Equity Measures in South Africa* (Master dissertation, Rhodes University, Grahamstown, South Africa).

disadvantage in the past. He can simply benefit because he is a member of a qualified group according to the South African law. Another point of concern is that person C, although he needs preferential measures and was disadvantaged by measures of the past, is not able to benefit from the affirmative action measures since he is disqualified based on his merit.<sup>166</sup> This shows that the policy could be mainly benefitting those that do not necessarily need preferential measures since they already have a good starting position compared to others from the same designated group.

As we have seen, affirmative action is in accordance with the Constitution. However, it will only pass the constitutionality test if the goal is to redress the imbalances of the past and to advantage those that were disadvantaged in the past. A potential problem could be that the current policy has the side effect of preferring people that do not need it. The question therefore rises if a person that comes from a designated group should have experienced actual discrimination or have been disadvantaged by practices of the past in order for affirmative action to be constitutional?<sup>167</sup> This question has raised a lot of discussion and unfortunately, the Constitution and the EEA do not provide for a clear answer. Therefore, we have to look at other sources such as the publications of academics and jurisprudence.

#### 4.2.2. The requirement of 'disadvantage' – Academic opinion

During the establishment of the EEA, the view that personal disadvantage should be a requirement was strongly supported. However, this changed into the support for the requirement of group membership because the goal of the EEA is the establishment of equal representation. Besides that, personal disadvantage would put the focus on wrongs done in the past and not on the future.<sup>168</sup> An academic in favour of the group requirement is Taylor<sup>169</sup>. He argues that discrimination, based on a characteristic of a person such as their colour, was a morally irrelevant ground.<sup>170</sup> However, in order to redress discrimination that had a collective target, special dispensation has to be given to that same collective target in order to achieve complete justice. The characteristic will become morally irrelevant as soon as

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<sup>166</sup> Laher p. 147.

<sup>167</sup> Laher p.148.

<sup>168</sup> McGregor, M. (2009). The application of affirmative action in South Africa p.133-134.

<sup>169</sup> Paul Warren Taylor (1923), American philosopher, Princeton University.

<sup>170</sup> Taylor, P. W. (2002). Reverse Discrimination and Compensatory Justice. In S. M. Cahn *The Affirmative Action Debate* New York: Routledge, p.1-2.

all the requirements of compensatory justice<sup>171</sup> have been fulfilled and then the designated groups are to be treated like everyone else.<sup>172</sup>

There are academics who do not share this view. An argument against the current policy of beneficiaries is given by Cowan<sup>173</sup> as he is of the opinion that special advantages should not be given to a group, since morally there should not be such group.<sup>174</sup> Individual injustices should not be ignored and be compensated, but injustices and compensatory benefits to them as group are not an option since in moral context such a group should not exist.<sup>175</sup> Based on this argument, the policy would actually continue the same type of discrimination it was supposed to tackle. Therefore, giving benefit to a group as a whole would be unjust. Consequently, disadvantage should be a requirement. This opinion is shared by several respondents to the questionnaire, mainly white respondents. They also feel that benefitting groups is unjust and actually worsening racism in South Africa. It therefore creates a backward and divided society.

The arguments above do not give a conclusive answer to the questions whether or not group dispensation is fair and legal or if disadvantage should be a requirement. Therefore, we will look into case law and discuss the key cases that relate to the issue of disadvantage.

#### 4.2.3. The requirement of 'disadvantage' – Case law

The issue was raised before the court in *George v Liberty Association of Africa Ltd*<sup>176</sup>. The court stated that the purpose of affirmative action is connected to its beneficiaries. Since the purpose is to redress the imbalances of the past, the beneficiaries should be those who have been disadvantaged in the past. The court stated that these were linked to gender, race and ability.<sup>177</sup> The court did recognize notions of 'degrees of disadvantage' because it accepted that within a group, there might be individuals that had not experienced disadvantage. Landman P stated that affirmative action was not primarily intended to

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<sup>171</sup> "In order to restore the balance of justice when an injustice has been committed to a group of persons, some form of compensation or reparation must be made to that group. The principle only applies where a violation of other forms of justice has taken place" (Taylor: p. 2).

<sup>172</sup> Taylor p. 3 & Laher p. 150.

<sup>173</sup> J.L. Cowan in 'Inverse Discrimination.

<sup>174</sup> Beckwith, F. J., & Jones, T. E. (1998). *Affirmative Action: Social Justice or Reverse Discrimination?* Prometheus Books. & Laher p. 149.

<sup>175</sup> J.L. Cowan in 'Inverse Discrimination.

<sup>176</sup> *George v Liberty Life Association of Africa Ltd* (1996) 17ILJ 571.

<sup>177</sup> Mhambi p. 43 & Laher p. 142.

benefit those individuals and an employer was allowed to prefer a candidate that had been personally disadvantaged over someone who did not experience this. Although the court did accept the substantive notion of equality, it did consider that disadvantage should be measured by the experience of an individual and not to groups.<sup>178</sup> With this judgement, the issue seemed to be clarified.

However, in the *Auf der Heyde*<sup>179</sup> case, the court refuted the decision of the *George* case by stating that the academic opinion was that the term 'disadvantage' did not mean that every individual had to prove that he/she had suffered from actual disadvantage. The court argued that beneficiaries of affirmative action should be member of a group that had been disadvantaged, direct or indirect, by society. Although this view is contrary to judgement in the *George* case, according to McGregor, it seems to be in line with the EEA.<sup>180</sup> It also appears to be in line with the view of the academics that were discussed above.

Finally, in the *Stoman*<sup>181</sup> case that was discussed in the first chapter, the court clarified the issue. In this case the court also accepted the notion of equality and added that in a society that had a history of systematically discrimination, one could not assume that people were on an 'equal footing'. The court held that the intention of the legislator, when it created affirmative action measures, was not to make the application of those measures depending on individual circumstances. The emphasis should be on the group of which that individual is a member. *"The aim is not to reward the fourth respondent as an individual, but to advance the category of persons to which he belongs and to achieve substantive equality (...)."*<sup>182</sup>

So, should previous disadvantage be a requirement for affirmative action? Academics, but mostly judges in the *Stoman* case have given a clear theoretical answer to this and that answer is 'no'. An individual does not need to have experienced actual discrimination or have been disadvantaged by practices of the past in order for affirmative action to be constitutional. He can benefit simply because he belongs to a designated group. Although this answer seems clear, it does not solve the problems that are experienced in society.

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<sup>178</sup> McGregor, M. (2009). The application of affirmative action in South Africa p.136.

<sup>179</sup> *Auf Der Heyde v University of Cape Town* (C603/98) [2000] ZALC 30 (5 May 2000).

<sup>180</sup> McGregor, M. (2009). The application of affirmative action in South Africa p.137-138.

<sup>181</sup> *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T).

<sup>182</sup> McGregor, M. (2009). The application of affirmative action in South Africa p.138-140.



### 4.3. The race-based affirmative action approach

The second problematic issue concerns the connection between affirmative action and race. The current system uses race as the most important determining factor within the affirmative action policy and this requires racial classification in order to establish who is black and who is white. With the end of apartheid, the optimistic expectation was that this classification would come to an end, unfortunately the contrary was true.<sup>183</sup> South African courts have decided that making use of a racial hierarchy based on these classifications is legit if they are used for affirmative action policies. This means that the same racial hierarchy is used as during apartheid, it has just been reversed.<sup>184</sup>

Racial classification might not be desirable as it requires the use of some of the humiliating processes that were used during apartheid but most importantly, people will have to be classified into groups. It comes with the difficulty of how to classify people that are of mixed race and who makes the decision to which racial group a certain individual belongs to? Yet, another concern is that the current system makes race as big of an issue today as it was during apartheid. People are still stimulated to think of others in terms of the racial group they belong to instead of as just a human being. This goes against the goal of creating a strong society and racial integration. Cohen warns that “preference by race yields disharmony, distrust and disintegration.”<sup>185</sup> Therefore it might be best to replace the system with a system that does not use race classification. However, not everyone agrees with this as some argue that race classification is still necessary in South Africa to achieve true implementation of the EEA since it will give employers the opportunity to define the representation in their workplace.<sup>186</sup> Without a system of classification it would not be possible to determine which group would require preferential treatment.

#### 4.3.1. Racial hierarchy

Besides a system of racial classification, the current policy also uses a racial hierarchy. In the case *Public Service Association – Gerhard Koorts v Free State Provincial Administration*, the applicant was a white woman who claimed that she should benefit from affirmative action. She was denied a job that was given to a black person. The employer argued that she did not suffer from the same extent of

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<sup>183</sup> Section 1 of the EEA mentions black people, women and people with disabilities as designated groups for affirmative action measures

<sup>184</sup> Laher. P. 156

<sup>185</sup> Oppenheimer, M., & Kok, C. (2014). Non-Racial Affirmative Action in Employment. @ *Liberty*, 16. P.7-8.

<sup>186</sup> Laher p. 163-164.

discrimination as the black person and therefore the latter should benefit more. The court agreed with this statement.<sup>187</sup> Over the years, this viewpoint was confirmed in multiple cases<sup>188</sup> and these cases have established a racial hierarchy for affirmative action measures. The question is if this created hierarchy should be used, as it will continue the existence of a racial hierarchy and therefore will be compared with the ideas of apartheid.<sup>189</sup> The main problem is that it continues the differentiation and the existence of different groups in South Africa which is contrary to the idea and purpose behind the value of equality. It should bring the groups together, and eventually achieve that people no longer think in groups instead it seems to divide the groups even more.

Besides these issues there is also the question if the link between disadvantage and race is still accurate. It may have been accurate immediately after the abolishment of apartheid, but is this still valid?<sup>190</sup> The answers from the questionnaires show two main reasons why this approach could be problematic. Firstly, due to the race link, the scope of affirmative action is limited. Therefore, the policy will continue to be criticized since it mainly benefits the people of the middle and high class. In the case *Stulweni v SA Police Service*, the limitation of that scope was confirmed when the court made clear that the measures have the aim of addressing the representativeness of previously mentioned designated groups and this does for example not include religion. Therefore, an employer cannot advance an applicant to a vacancy by using his religion as the ground for an affirmative action measure.<sup>191</sup>

Furthermore, today there are black people that can no longer be seen as disadvantaged. Although poverty is still an accurate issue in South Africa, and mostly valid for black people, there is also an increase in social status and income of individuals within that group. Using race to determine who should receive benefits, may result in privileged people receiving unnecessary benefits while at the same time, genuine disadvantaged people are excluded. This is because there are only a limited number of places available in the workplace, individuals who have attended the best schools and universities, and are black, could block other less fortunate black people from finding a job.<sup>192</sup> We have seen this in

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<sup>187</sup> Public Service Association – Gerhard Koorts v Free State Provincial Administration CCMA FS3915 21 May 1998

<sup>188</sup> For example *Solidarity obo Christiaans v Eskom Holdings Ltd* (2006) 27 ILJ 1291 (ARB) and *McInnes v Technikon Natal* (D322/98) [2000] ZALC 152 (1 March 2000).

<sup>189</sup> Laher p. 161.

<sup>190</sup> Oppenheimer, M., & Kok, C. (2014). Non-Racial Affirmative Action in Employment. @ *Liberty*, 16. p.3

<sup>191</sup> Mhambi p. 43.

<sup>192</sup> Oppenheimer, M., & Kok, C. (2014). Non-Racial Affirmative Action in Employment. @ *Liberty*, 16. p.3.

the example we mentioned earlier where candidate 'C' was not even considered for the job. The following example given by Oppenheimer and Kok also illustrates the problems mentioned above:

*"A black attorney beat the odds in the apartheid era by obtaining an excellent education – and by now earning a large income. He has no need for preferential treatment, unlike many people among the marginalised black majority. Under a race-based system of affirmative action, he is nonetheless likely to be made a partner in a top law firm because this helps the firm to fill its racial quota. It also, gives him the opportunity to boost his income even more, since he will now share in the profits of the firm as a whole".<sup>193</sup>*

The son of this attorney will receive schooling at top institutions and when he applies for a job, the company will use a racial quota system. Since he is a good candidate, he probably would have been appointed without the racial quota. However, for as long as the racial system exists, the company will use his appointment to 'tick a box'. His appointment will reduce the chances for other black people, especially for those who were not able to go to the best institutions but still received good grades despite the fact that they had to work much harder. Such candidates will have many desirable qualities, but unfortunately for them, the current system has two separate tracks: one based on race, and one based on merit. Neither of those who really addresses the disadvantage they have experienced in life.<sup>194</sup>

#### 4.3.2. Consequences of the race-based approach

*"You always want to believe that you were hired because you were the best... But everything around you is telling you, you were brought in for one reason: because you were a quota... No matter how hard I worked or how brilliant I was, it wasn't getting me anywhere. It's a hell of a stigma to overcome."<sup>195</sup>*

The proponents of race preference state that its possible unfairness must be tolerated because the consequences are positive and necessary. However, according to Oppenheimer and Kok this is incorrect, they state that the consequences of race preference are not good at all. This is because, amongst other things, it creates a divided society and injures the relations between races in the long term. This is

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<sup>193</sup> Oppenheimer, M., & Kok, C. (2014). Non-Racial Affirmative Action in Employment. @ Liberty, 16. p.3.

<sup>194</sup> Oppenheimer, M., & Kok, C. (2014). Non-Racial Affirmative Action in Employment. @ Liberty, 16. p.3-4.

<sup>195</sup> Cohen, C., & Sterba, J. P. (2003). *Affirmative Action and Racial Preference A Debate*. New York: Oxford University Press. p. 117.

confirmed by many respondents of the questionnaire as they state that it is damaging the economy and destroying social peace. Also, it does not deal with the real problem, which is that many students and job applicants are not (academically) competitive and it allows racial discrimination in order to achieve political objectives.<sup>196</sup>

According to Cohen<sup>197</sup> and others, besides the negative consequences mentioned above, an important consequence is the negative burden that is put on those that are supposed to benefit. This is because although some members benefit from the preference, the group as a whole is undermined. By giving a group special favours, you mark them as needing those special favours. If a black person is hired at a good company because he was the best qualified candidate, he has to deal with the stigma that he was only chosen because the company had to meet its racial quota. They are not recognised by their colleagues for their abilities and talents, because the current system encourages those colleagues to believe that he was only appointed because he is black. Therefore, many (highly qualified) blacks feel a resilience against racial preference. No matter how hard they work, they are always questioned and stamped as an 'affirmative action hire or admission'. According to Cohen, affirmative action is forcing a link between certain groups and weak performance.<sup>198</sup> It is true that there are other factors, such as experience, that play a role in the decision-making process, but race or gender are very often decisive. Cohen also states that many of those who have received appointments would not have been appointed if they would have been white.<sup>199</sup> This last statement is also mentioned by many of the respondents in the questionnaire. In practice, the current policy is only looking at race rather than merit, as a consequence unqualified people are hired. They feel that preference is always given to the person from the designated group and therefore they experience the current policy as reverse racism ('omgekeerde rassisme'). Most of the white respondents acknowledge that there are still people that need the affirmative action policy but the current implementation is not correct. Hiring of unqualified people to achieve a quota is not in accordance with the law, but maybe even more importantly, it is causing a lot of distress in society and is bad for the economy.

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<sup>196</sup> Cohen, C., & Sterba, J. P. (2003). *Affirmative Action and Racial Preference A Debate*. New York: Oxford University Press. P. 109.

<sup>197</sup> Carl Cohen, Ph.D., is Professor of Philosophy in the Residential College of the University of Michigan.

<sup>198</sup> Cohen, C., & Sterba, J. P. (2003). *Affirmative Action and Racial Preference A Debate*. New York: Oxford University Press. P. 117- 118

<sup>199</sup> Cohen, C., & Sterba, J. P. (2003). *Affirmative Action and Racial Preference A Debate*. New York: Oxford University Press. P. 110-111. & Oppenheimer, M., & Kok, C. (2014). Non-Racial Affirmative Action in Employment. @ Liberty, 16. P.6

Despite all the negative consequences, there is still substantial support for preferences amongst the designated groups. This could be explained because every individual member of such a group is a potential beneficiary of the policy. Although the policy might not be good for the group as a whole over a longer period of time, it may result in personal benefit for the individual.<sup>200</sup>

#### **4.4. Conclusion**

This chapter has shown that the two main issues discussed are complicated, because arguments in favour and against both can be made. Even the court does not always agree with what has been said in previous cases. In the end, the legislation and the courts might have given clear answers regarding the legitimacy of both the group- and race based approach however, this does not mean that the problems are resolved. Both issues are causing many problems in the society and economy of South Africa and are important factors as to why there is so much resilience against the policy. On paper it all seems fine and the idea behind the policy, creating substantive equality, is supported by most people, white or black. However, according to many respondents of the questionnaire and several academics, the current policy is not achieving what it is promising and may even create more and bigger problems. Many feel that both issues stimulate people in South Africa to think of others in groups and this is actually worsening the problem of racism in South Africa. They also feel that the system is not working because it is mostly benefitting those that do not need it and, contrary to what is laid down in legislation, employers do not look at the qualities of the candidates but at their racial quota when hiring new employees. As one respondents stated 'it is about who you know, and not what you know'. The group approach also leads to inequalities within a group. This creates a feeling of an unjust system that is not addressing the real issue. Therefore, these are two very important issues that should be resolved by the South African government.

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<sup>200</sup> Cohen, C., & Sterba, J. P. (2003). *Affirmative Action and Racial Preference A Debate*. New York: Oxford University Press. p. 121-122.

## 5. Affirmative action measures in other countries – Lessons to learn for South Africa?

This chapter will look into the legal systems of three other countries, the United States of America, Malaysia and Brazil, who have decided to implement affirmative action measures. These countries have been selected because they are from different parts of the world and integrated affirmative action measures under different circumstances and for different reasons. They experience similar issues as South Africa, but handle them in different ways. They also have different success rates regarding to the policies that they implemented. The objective is to compare these legal systems to the system of South Africa and evaluate if there are lessons to learn for South Africa. These lessons might make the system in South Africa more efficient or confirm that they have chosen the right path.<sup>201</sup> It will especially focus on the two issues that were discussed in the previous chapter.

### 5.1. Affirmative Action in the United States of America

Since affirmative action was introduced in the U.S.A. many years before the implementation in South Africa, the country might learn something by studying the developments in the U.S. Especially regarding the two major issues they have to deal with, the beneficiaries and race-based approach as these have also proven to be relevant issues in the United States.

#### 5.1.1. The (legal) origin of affirmative action within the United States of America

The right to equality has an important place within the legal system of the U.S.A. as it is guaranteed to all persons within the 14<sup>th</sup> Amendment of the United States Constitution. This Amendment states that *“no state shall deny to any person within its jurisdiction the equal protection of the laws”*.<sup>202</sup> Although this seems a very straight forward legal rule, simply guaranteeing the right does not necessarily mean that there is equality in society. Therefore, the country also introduced anti-discrimination laws, but it soon became clear that this was not sufficient to counteract the effects of years of inequality and oppression. This led to the introduction of affirmative action in 1961 by an Executive Order that prohibited discrimination based on race, colour or national origin against an employee.<sup>203</sup> This Order established the commitment of the Federal Government to promote complete equal employment

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<sup>201</sup> Laher p.92.

<sup>202</sup> 14<sup>th</sup> Amendment, Section 1, United States Constitution.

<sup>203</sup> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

-- Executive Order 10925 (1961).

opportunities by using positive programs in every executive department of the Government.<sup>204</sup> The order did not intent to implement preferential treatment for the affected groups, but had the objective of eliminating discrimination.<sup>205</sup>

### *Civil Rights act*

In 1964 the government implemented the Civil Rights Act which meant the solidification of affirmative action. This act contained the legal rule that a recipient of federal funding who, in the past had discriminated against a person based on race, national origin or color, was obliged to take affirmative action measures in order to overcome the effects of this prior discrimination.<sup>206</sup> Title VII of the act prohibited discrimination in public education, voting and in employment regarding firms that had more than 15 employees.<sup>207</sup> Like the Executive Order, the act did not have the objective of giving preferential treatment to a specific group or to maintain a racial balance. On the contrary, when an employer would maintain a racial balance this would constitute a violation of the act since maintaining this balance would result in hiring employees based on their race.<sup>208</sup> Since the implementation of the Executive Order and the Civil Rights Act, federal contractors are obliged to take affirmative action measures, these measures include measures regarding recruitment and advancement such as training programs and other positive measures.<sup>209</sup> The contractors are required to document their affirmative action programs within special reports that contain information regarding the practices, policies, programs and employment statistics of the contractor. The enforcement of these legal rules are executed by the US Department of labor.<sup>210</sup> Employees that are covered by these measures are qualified minorities, persons with disabilities, women and veterans.<sup>211</sup>

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<sup>204</sup> Mhambi p.26 & Office of Federal Contract Compliance Programs. (2002). *Facts on Executive Order 11246 - Affirmative Action*. United States Department of Labor.

<sup>205</sup> US Legal. (n.d.). *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.2.

<sup>206</sup> Civil Rights Act (1964) (34 CFR § 100.3(b)(6)(i)).

<sup>207</sup> Title VII of the Civil Rights Act of 1964 via <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

<sup>208</sup> The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission. (n.d.). Retrieved from <https://www.archives.gov/education/lessons/civil-rights-act/> & US Legal. (n.d.). *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.2.

<sup>209</sup> US Legal. (n.d.). *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.1.

<sup>210</sup> Legal Information Institute. (n.d.). *Affirmative Action*. Retrieved from Cornell University Law School website: [https://www.law.cornell.edu/wex/affirmative\\_action](https://www.law.cornell.edu/wex/affirmative_action) & Executive Order 11246.

<sup>211</sup> US Legal. (n.d.). *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.1.

The implementation of affirmative action measures did not come without protest and since the implementation, it has been contested many times. The policy was most heavily attacked during the administration periods of Reagan and Bush. Despite these attacks, the policy was reaffirmed by the Civil Rights Act 1991 but the battles against affirmative action measures did not end there. Since 1991 several campaigns have been started, mainly on state level, against them. It is to be expected that these battles will continue since affirmative action still is a very sensitive subject.<sup>212</sup>

#### 5.1.2. Court decisions and the development of affirmative action

Affirmative action has been the topic of several cases before the courts in the United States. These cases have developed the place of affirmative action within employment law and they reflect the development of affirmative action within the United States. Therefore, some of the landmark cases will be discussed below.<sup>213</sup>

The first landmark cases that are worth mentioning took place in the 1970's. The first one is that of *Griggs v. Duke Power Co.* in which the Supreme Court decided that Title VII of the Civil Rights Act does not only forbid practices that are adopted with discriminatory motive, but also those that do not have a discriminatory intent but do have a discriminatory effect on women and minorities.<sup>214</sup> The other important case was the Supreme Court decision in the case of *Regents of the University of California v. Bakke*.<sup>215</sup> The university had reserved 16 of the total 100 places for minority applicants. A white applicant went to court because he was of the opinion that this admission policy was of a discriminatory nature. The Supreme Court decided that the use of racial quotas did constitute a violation of the Equal Protection Clause. However, the court did allow race to be a factor in admission decisions in order to achieve a diverse student body since this was a 'compelling state interest'.<sup>216</sup> These two decisions were important 'wins' for the affirmative action policy.

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<sup>212</sup> US Legal. (n.d.). *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.1-2.vg.

<sup>213</sup> US Legal. (n.d.). *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.1.

<sup>214</sup> *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

<sup>215</sup> *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

<sup>216</sup> *Affirmative Action: Court Decisions*. (2013). Retrieved from National Conference of State Legislatures website: <http://www.ncsl.org/research/education/affirmative-action-court-decisions.aspx>.

& US Legal. (n.d.). *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.2.



During the Reagan and Bush Administrations in the 1980s, the affirmative action policy was heavily criticised. The Reagan administration even had the objective of ending affirmative action and therefore weakened the policy by budget cuts and other measures. This weakening of affirmative action is also visible in the Supreme Court decisions of that time. In *Watson v. Fort Worth Bank and Trust* the burden of proof in cases of employment discrimination was shifted from the employers to the plaintiffs.<sup>217</sup> The plaintiff had to prove that the hiring procedure of the employer were discriminatory. And in another case the court decided that a plaintiff had to prove that a specific employment practice resulted into discrimination. Disparate impact alone was not enough to prove discrimination.<sup>218</sup> These decisions meant a set-back in the affirmative action policy since it became harder to prove that affirmative action was necessary and therefore legitimate.

In order to re-establish affirmative action, the Civil Rights Act of 1991 was implemented. This act shifted the burden of proof back to the employers. In addition, the largest affirmative action program was instituted by the Federal Communications Commission in 1994. An important court case during this period was that of *Adarand Constructors, Inc v Pena* in which the court decided that racial classifications that were laid on by the federal government also have to comply with a standard that is described as 'strict scrutiny'.<sup>219</sup> This is the strictest standard of judicial review that is used by courts to determine whether or not government policies are constitutional.<sup>220</sup>

Despite the efforts made, affirmative action measures continued to weaken, mainly due to Congress that was controlled by Republicans. The most important critique that they had on affirmative action was that it constituted a form of 'reverse discrimination' against white males and that the policy prevented firms from hiring the best qualified person for the job. In several states affirmative action was even completely banned.<sup>221</sup> This development is not directly noticeable in court decisions but we can see some changes in the decisions during this decade in comparison with earlier ones. For example, in the

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<sup>217</sup> *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988).

<sup>218</sup> *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) & *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.2.

<sup>219</sup> *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), par. 498.

<sup>220</sup> West's Encyclopedia of American Law. (2008). The free dictionary. Retrieved from <http://legal-dictionary.thefreedictionary.com/>.

<sup>221</sup> *Affirmative Action Law & Legal Definition*. Retrieved from Hillstrom, Northern Lights website: <http://definitions.uslegal.com/a/affirmative-action/> p.3.

Hopwood v. Texas case of 1996 the decision in the Bakke case was overruled as the court ruled that “race could not be a factor in admission decisions.”<sup>222</sup> But in the 2003 case Grutter v Bollinger the court decided in favour of affirmative action. In this case a white resident from Michigan filled a complaint at the court after she was denied admission to the University of Michigan Law School. According to her she had been discriminated based on race and therefore her 14<sup>th</sup> Amendment right was violated. Her claim was that she was only rejected because the University used race as a deciding factor within the selection procedure. As we have seen in the Adarand case, all racial classifications by the government have to be analysed under strict scrutiny. However, this does not mean that all race-based measures are invalid. The court decided that although affirmative action was no longer justified as a measure to redress past oppression, this policy promoted a diverse student body which was a 'compelling state interest.’<sup>223</sup> To conclude, in the case Wygant v Jackson Bd. of Educ., the court set a rule on the period of time of the measures. The court held that affirmative action programs had to be subjected to periodic review to assess if they were still necessary and limited to a certain period in time.<sup>224</sup>

### 5.1.3. A comparison between the U.S.A. and South Africa – Lessons to learn?

The U.S.A. and South Africa share some similarities regarding their racial history and affirmative action measures. Both countries have a history of black oppression that was also illustrated in their legal system and they both still struggle with justice, equality and freedom. In both countries the right to equality has an important place within the Constitution and they both experienced that simply guaranteeing this right was not sufficient and therefore decided to implement additional legal rules to establish true equality. These additional rules were affirmative action measures. These measures were laid down in legislation and further developed by court decisions.<sup>225</sup> Although their histories share similarities, there are important differences that should be kept in mind. The countries have, for example different demographics, populations, cultures and economics. The two most important

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<sup>222</sup> Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).

A petition for certiorari to the United States Supreme Court was granted based on the importance of the issue. The main issue in petitioners' claim was that they were laid off because of their race, and that was a violation of the Equal Protection Clause of the Fourteenth Amendment. In reviewing the decision, the Supreme Court looked to the precedent set in Brown v. Board of Education, in which the central issue was that of ending segregation based on race. The Supreme Court found there was no place for racial discrimination in public education and applied this principle not only to students, but to everyone. Based on this principle, the Supreme Court reversed the decision.<sup>223</sup> Grutter v. Bollinger, 123 S. Ct. 2325 (2003) par. 318-319.

<sup>224</sup> Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986)

<sup>225</sup> Higginbotham, F. M. (2000). Affirmative Action in the United States and South Africa: Lessons from the Other Side. *Temple International & Comparative Law Journal*, 13(2). p. 188-189.

differences are that the U.S. is a developed country and therefore had other means when implementing their affirmative action policy. Also, the designated group within the U.S.A. is a minority while in South Africa it is the majority group of the population.<sup>226</sup>

### *Beneficiaries*

Within the U.S. affirmative action programs, African Americans are not the only beneficiaries. Designated groups for example also include women, Hispanics, Asians and veterans.<sup>227</sup> However, the primary beneficiaries in most cases are women and minorities. There have been discussions about who exactly should be the beneficiaries of the measures but in general, affirmative action programs cover all the groups that have been discriminated against under the law in history.<sup>228</sup> This general agreement does not mean that there are no problems relating to the beneficiaries.

The United States have to deal with similar problems relating to beneficiaries as South Africa. Like in South Africa, the measures mainly benefit black people from the economic middle class. Those are the people that do not really need it. The people that do need the preferences, are unable to benefit because they lack the required qualifications. Despite the fact that quotas are not permitted and only qualified individuals should be hired, the measures will cause employers to hire less qualified employees which reduces quality and efficiency.<sup>229</sup> Unfortunately, the U.S. has not yet seemed to have find a solution for this problem and therefore this it still one of the main arguments used by opponents of the policy.

### *Race-based approach*

As in South Africa, affirmative action programs are not popular with the public, mainly because of the race-based approach. The race-based approach has two main problems. The first one is that it stigmatizes its beneficiaries because they compete under lower standards. Also, the approach continues,

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<sup>226</sup> Mhambi p.29 & Higginbotham, F. M. (2000). Affirmative Action in the United States and South Africa: Lessons from the Other Side. *Temple International & Comparative Law Journal*, 13(2). p. 189-190.

<sup>227</sup> Who are the Intended Beneficiaries of Affirmative Action? (n.d.). *NC State University Affirmative Action in Employment Training*. Retrieved from <https://www.ncsu.edu/project/oeo-training/aa/beneficiaries.htm>.

<sup>228</sup> Higginbotham, F. M. (2000). Affirmative Action in the United States and South Africa: Lessons from the Other Side. *Temple International & Comparative Law Journal*, 13(2). p. 215-2016.

<sup>229</sup> Higginbotham, F. M. (2000). Affirmative Action in the United States and South Africa: Lessons from the Other Side. *Temple International & Comparative Law Journal*, 13(2). p. 209.

and even worse, racial separateness because it classifies people into race groups.<sup>230</sup> This is not how it should be. As stated by Justice Scalia: *"In the eyes of the government, we are just one race here. It is American."*<sup>231</sup> Both issues are also a problem in South Africa.

Due to these issues, voices were raised to replace the race-based approach. In 2014, universities in six states, were no longer allowed to use racial explicit affirmative action and as a result the idea was raised to introduce the race-neutral affirmative action programs.<sup>232</sup> The objective of these programs is the same, to change the racial composition of education and employment however, they do this by giving preferences based on characteristics that have a connection with race.<sup>233</sup>

But are these programs constitutional? The race-based approach needs to pass the strict scrutiny test in order to be legal. The Supreme Court has stated that the race-neutral approach also has to fulfill this test as it has the same effect and purpose as the race-based approach.<sup>234</sup> However, race-neutral affirmative action is much more popular amongst the public. If it stays that way, the Supreme Court might be inclined to find ways to facilitate this approach and find a way around strict scrutiny.<sup>235</sup>

Besides the popularity the race-neutral approach has with the public, there are also other advantages. Perhaps the most important one is that academics believe that it can achieve the same level of racial diversity as the race-based approach, but without racial separation and with less stigmatizing to the beneficiaries, it will not burden them as much as the race-based preferences seem to do.<sup>236</sup> These are two of the main disadvantages related to the current affirmative action approach in South Africa. Also, this approach does not require that people are placed into specific race groups in order to determine who should receive preferences. However, besides these advantages there are also certain downsides.

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<sup>230</sup> Higginbotham, F. M. (2000). Affirmative Action in the United States and South Africa: Lessons from the Other Side. *Temple International & Comparative Law Journal*, 13(2). p. 208.

<sup>231</sup> Ararand, 515 U.S. par 239.

<sup>232</sup> Fitzpatrick, B. T. (2014). Is the Future of Affirmative Action Race Neutral? Retrieved from <http://ssrn.com/abstract=2426656> p.8-9.

<sup>233</sup> Fitzpatrick, B. T. (2014). Is the Future of Affirmative Action Race Neutral? Retrieved from <http://ssrn.com/abstract=2426656> p.1.

<sup>234</sup> Confirmed in several cases e.g.: Hunter v. Underwood, 471 U.S. 222,227-28, 233 (1985) & Hunt v. Cromartie, 526 U.S. 541, 546-49 (1999).

<sup>235</sup> Fitzpatrick, B. T. (2014). Is the Future of Affirmative Action Race Neutral? Retrieved from <http://ssrn.com/abstract=2426656> p. 17.

<sup>236</sup> Higginbotham, F. M. (2000). Affirmative Action in the United States and South Africa: Lessons from the Other Side. *Temple International & Comparative Law Journal*, 13(2). p. 207.

According to Fitzpatrick the most important problem is that the approach will be much less efficient in achieving racial diversity. This means that in order to achieve the level of racial diversity that is desired, an employer or university will have to pass on other criteria that they consider to be important.<sup>237</sup> It is hard to say if the advantages outweigh the costs.

The race-neutral policy that uses correlates has proven to be successful in the achievement of racial diversity in universities. Unfortunately, it is harder to find evidence that this is also the case in the employment sector.<sup>238</sup>

It is hard to conclude whether or not the system can be qualified as a success within the U.S.A. since this differs from state to state. What South Africa can learn from the experiences in the U.S.A. is that a race-neutral approach might be worth looking into. Especially since the current policy comes with many problems. Besides that, they should not ignore critique and it is important to have enough support for the measures. Because in the U.S. this lack of support has resulted in the ban of affirmative action measures in certain states. Regarding the beneficiaries, there is unfortunately not much to learn for South Africa as the U.S. deals with the same problems and they have not yet been able to find a solution to solve them. If they do find a solution in the future, this can be very valuable for South Africa.

## **5.2. Malaysia and affirmative action**

### 5.2.1. The (legal) origin of affirmative action in Malaysia

For a long time, Malaysia was a British colony and under their rule, mass immigration of both Indian and Chinese people took place, which led to the fact that Malay people became a minority in their country. This changed in the mid-1960s when Malay people became the majority due to the exclusion of Singapore and the inclusion of North Borneo. After the independence in 1957 the Bumiputera, the indigenous people of Malaysia, did not have a strong position within their own country. Economically they were far behind the Chinese people in the country.<sup>239</sup> Malays owned a very small percentage of the capital and businesses in the country and the majority of their population lived in rural areas and

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<sup>237</sup> Fitzpatrick, B. T. (2014). Is the Future of Affirmative Action Race Neutral? Retrieved from <http://ssrn.com/abstract=2426656> p. 18-23.

<sup>238</sup> Fitzpatrick, B. T. (2014). Is the Future of Affirmative Action Race Neutral? Retrieved from <http://ssrn.com/abstract=2426656> p.10-11.

<sup>239</sup> Laher p.122-125.

worked in the rice cultivation sector.<sup>240</sup> Despite developments, by the late 1960s the economic and social differences between the indigenous people and the non-Bamiputera were disproportionately high which created a very tense environment within the county.<sup>241</sup> The government of Malaysia recognized the problem of racial fragmentation but did little to overcome it.<sup>242</sup> Due to the lack of action on the side of the government the people started a revolution on May 13<sup>th</sup> 1969.<sup>243</sup>

As a result of the revolution, the ambitious affirmative action policy which gave preferential treatment to Malays was introduced under the name 'New Economic Policy' (hereinafter: NEP). Almost all major opposition parties became partner to the national coalition and it was this large political basis that gave the country the legitimacy and the power to start the NEP. As a result, both affirmative action measures and the NEP were laid down in Malaysian law. To a certain extend the NEP can be compared with the EEA in South Africa, however an important difference is that for the NEP a set time was established in which it would operate, namely from 1970 until 1990.<sup>244</sup>

#### 5.2.2 Affirmative action and legislation

The legal foundation for measures of affirmative action are to be found in the Constitution. In this Constitution both the principle of equality and the provision regarding the special position of Bamiputera people have a place. However, article 8 of the Constitution contains the principles of equality and prohibition on discrimination:

*"All persons are equal before the law and entitled to the equal protection of the law"*<sup>245</sup> and

*"There shall be no discrimination in favor of any person on the ground that he is a subject of the Ruler of any State"*<sup>246</sup>

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<sup>240</sup> Lee, Hwok-Aunm "Racial Inequality and Affirmative Action in Malaysia and South Africa" (2010). *Dissertations*. Paper 291, p. 44.

<sup>241</sup> Laherp. 125-126.

<sup>242</sup> Lee, Hwok-Aunm "Racial Inequality and Affirmative Action in Malaysia and South Africa" (2010). *Dissertations*. Paper 291, p. 46.

<sup>243</sup> Laher p.126.

<sup>244</sup> Lee, Hwok-Aunm "Racial Inequality and Affirmative Action in Malaysia and South Africa" (2010). *Dissertations*. Paper 291, p. 46-48 & Laher p.126-127.

<sup>245</sup> Article 8 paragraph 1 of the Malaysian Constitution.

<sup>246</sup> Article 8 paragraph 3 of the Malaysian Constitution.

Despite the fact that discrimination is prohibited by the Constitution, exceptions are possible. This possibility is laid down in paragraph 2 of the same article as it states that discrimination is prohibited “*Except as expressly authorized by this Constitution*”.<sup>247</sup> This article gives the possibility to introduce affirmative action measures as long as they are expressly authorized by the Constitution.

An example of such an article in the Constitution is article 153 which states that the King, the Yang di-Pertuan Agong, is responsible for safeguarding the special positions of the Malays and natives of any of the States of Sabah and Sarawak.<sup>248</sup> In order to execute the purposes of article 153, the King can reserve, as he finds reasonable:

- Educational and training privileges, scholarships or facilities that are accorded by the Federal Government;
- Positions within the federal public services;
- licenses or permits to operate a trade or business and places in higher learning institutions.<sup>249</sup>

The privileges that are mentioned above are very well protected against revocation. In article 159 (5) it is laid down that an amendment to article 153 can only be made with a special two-third majority of the total members of each of the Houses of Parliament. Furthermore, the consent of the Conference of Rulers is necessary. Besides this, article 10 (4) gives the Parliament the permission to prohibit questioning of any matter regarding the position, privileges or rights that are protected by article 153.<sup>250</sup> Remarkable is that the scope and limitations of article 153 has never been litigated. However, this does not mean that there are no limitations to this article. For example, affirmative action measures are only allowed in sectors that are mentioned in State or Federal Constitutions. Furthermore, the Parliament is not allowed to restrict trade or business solely to natives or Malays.<sup>251</sup>

This last part shows that the policy is very far reaching. This is the main reason why, despite of the success of the policy, there are many opponents. The organisation of Equal Rights Trust published a report in November 2012 in which they concluded that the affirmative action measures mentioned in

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<sup>247</sup> Article 8 paragraph 2 of the Malaysian Constitution.

<sup>248</sup> Article 153 of the Malaysian Constitution & Lee, Hwok-Aunm “Racial Inequality and Affirmative Action in Malaysia and South Africa” (2010). *Dissertations*. Paper 291, p. 43.

<sup>249</sup> Saleem Faruqi, S. (2003). Affirmative Action Policies and the Constitution. *Kajian Malaysia*, 21(1). p. 34 & article 153 Federal Constitution of Malaysia.

<sup>250</sup> Saleem Faruqi, S. (2003). Affirmative Action Policies and the Constitution. *Kajian Malaysia*, 21(1). p. 35

<sup>251</sup> Saleem Faruqi, S. (2003). Affirmative Action Policies and the Constitution. *Kajian Malaysia*, 21(1). p. 36 & 39

articles 153 and 89-90, fail to meet the criteria of defining positive affirmative action. The privileges that are contained in these articles therefore result into 'racial discrimination' as defined by the Convention on the Elimination of All Forms of Racial Discrimination. They call the policy in Malaysia 'a worst practice of affirmative action' and urge Malaysia to repeal their affirmative action laws.<sup>252</sup> Therefore it might not be the best example for South Africa. However, this does not mean that there are no lessons to learn.

### 5.2.3. A comparison between Malaysia and South Africa – Lessons to learn?

The historical backgrounds of Malaysia and South Africa show several similarities. In both countries the people who had come to the country became the privileged ones and the indigenous people were left behind. This later group, who was the majority, received lesser economic opportunity and education and lived in much poorer living environments than the minorities in their country.<sup>253</sup> Also, in both countries the economic and social indifferences are based on racial differences and these situations created instabilities, tension and only a revolution could resolve this.<sup>254</sup> They are also comparable because they both introduced affirmative action policies whilst they were an economically developing country meaning that they could not rely on the resources that the first world countries could in order to implement the measures in a way that was functional, effective and practical.<sup>255</sup> In both countries the majority race group is the designated group. Although this group is politically dominant, it is also economically disadvantaged. Furthermore, the Constitution in the countries lays down the foundation for both affirmative action and equal rights to citizens.<sup>256</sup>

#### *Lessons to learn*

In both countries the main reason for the implementation of affirmative action measures was the disadvantaged position of the majority people. The NEP, had two important goals, the eradication of poverty regardless of race, and achieving substantive equality for the Baniputera people. This second goal is very comparable with the goal of the EEA in South Africa, the accomplishment of substantive equality for designated groups. The first goal however, is in contradiction with the EEA because the goal

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<sup>252</sup> Petrova, D. (2012, November 22). Affirmative Action versus Equality in Malaysia [Oxford Human Rights Hub]. Retrieved from <http://ohrh.law.ox.ac.uk/affirmative-action-versus-equality-in-malaysia/>.

<sup>253</sup> Lee, Hwok-Aunm "Racial Inequality and Affirmative Action in Malaysia and South Africa" (2010). *Dissertations*. Paper 291, p. 12.

<sup>254</sup> Laher. p. 125.

<sup>255</sup> Laher. p.126. & Mhambi p.38.

<sup>256</sup> Lee, Hwok-Aunm "Racial Inequality and Affirmative Action in Malaysia and South Africa" (2010). *Dissertations*. Paper 291, p. 20.



of the later one is to treat all people equally in a formal way by ensuring equal treatment for all employees due to the elimination of unfair discrimination. In order to achieve this, race does play an important role in the policy of South Africa. Although the targeted groups and goals may be comparable, the path both countries have chosen to achieve those goals are very different. In the Malaysian constitution the Baniwa people get a 'special position' which forms the basis of the affirmative action measures. This is not the case in South Africa, where the constitution mentions measures that advance or protect people that have been disadvantaged by unfair discrimination. These people do not get a special position.<sup>257</sup>

The approach of South Africa and Malaysia regarding affirmative action in the employment sector is very different. Malaysia implemented affirmative action measures that have a much narrower scope and they used a less codified process to implement them. They also set clear goals in order to achieve the goal of substantive equality. In contrast, South Africa implemented employment equity laws that are valid for both the public and the private sector. Both countries did use the racial compositions of their populations as the targets of their affirmative action policies.<sup>258</sup> The approach of Malaysia has some advantages. When a goal has been achieved, it can be removed from 'the list' and the focus can be put on something else. This system makes it very easy to measure whether or not the NEP is successful. Another advantage is that the NEP is not distracted by goals that are already fulfilled, this makes it a potentially effective system.<sup>259</sup> This could be an important lesson for South Africa, the policy will be qualified as successful depending on the achievement of those goals.

However, there are also some downsides to the policy. It is very ambitious and wide, maybe even too ambitious and too wide. Basically, it wants to achieve substantive equality for all people by focussing on one group. There are arguments about whether this goal has been successful or not. Substantive equality has been mainly achieved but the eradication of poverty in the country has not. South Africa does not want to achieve substantive equality for all people, but for a limited group of people, the

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<sup>257</sup> Lee, Hwok-Aunm "Racial Inequality and Affirmative Action in Malaysia and South Africa" (2010). *Dissertations*. Paper 291, p. 51 & p.115 & p.128.

<sup>258</sup> Lee, Hwok-Aunm "Racial Inequality and Affirmative Action in Malaysia and South Africa" (2010). *Dissertations*. Paper 291, p. 111 – 113 & Laher p.128.

<sup>259</sup> Laher p.128-129 & Mhambi p.38-39.

designated groups. This is a far less wide approach and more easily to manage, therefore it might be the better approach.<sup>260</sup>

Another important lesson for South Africa is that in order for affirmative action policies to continue and to be considered as successful by both the politicians and the people, they have to lead to economic growth. This is because the revenues of the government have to be high enough so that they can afford to distribute the assets to the designated people. Secondly, a rising economy is essential to reduce poverty because the growth of incomes can only happen in such an economy. Also, growth is necessary to get the resources to increase health care and education levels.<sup>261</sup> Malaysia was able to maintain a stable economy after implementing far-reaching affirmative action measures because, although the measures were binding, the enforcement was flexible. This flexibility made it possible for the government to give preference to the promotion of economic growth, which is important to all people, when this is necessary. The government response to economic problems by adjusting the affirmative action measures made sure that the beneficent effect on one group did not have a negative effect on the rest of the population. This was also possible because despite the fact that the measures were aimed at specific groups, they were not disadvantageous to the rest of the population.<sup>262</sup> This is an important lesson for South Africa because opponents claim that the current policy is very bad for the economy. This was also mentioned in the questionnaire. Because employers do not hire employees based on their qualities, and because a lot of the highly educated people leave South Africa due to the affirmative action policy, it has a bad influence on the economy.

### **5.3. Brazil and affirmative action**

Over the past years several countries in Latin America have developed affirmative action programs. It is interesting to look into Latin America since their programs are relatively new and therefore still developing. Also, Latin America has gone further than most countries by embracing affirmative action as a human right. Brazil has been the leading country in this development and therefore their experiences with affirmative action will be discussed below.<sup>263</sup>

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<sup>260</sup> Laher. p.136 & Mhami p.40-41.

<sup>261</sup> Laher. p.131.

<sup>262</sup> Laher p.131-132.

<sup>263</sup> Hernandez, T. (2013). Affirmative Action in the Americas. *Americas Quarterly*. Retrieved from <http://law.fordham.edu/30459.htm> p. 1.

### 5.3.1 The (legal) origin of affirmative action in Brazil

Brazil was a colony of Portugal until it declared independence in 1822. After this declaration the Brazilians took control of their own government. What is remarkable is that until recently, discussion about race was forbidden. The country stated that all people were equal in a substantive way, regardless of their race. This claim was considered to be a national myth as statistics showed that there was in fact an enormous gap between black and mixed race people and white people in economic and social differences. For example, black men in the country earned 48 % less than white people and of the people living in poverty, over 60% was black.<sup>264</sup> The position of the government was altered after the Third World Conference against Racism in 2001 and Raul Jungmann, Minister of Agrarian Development, introduced the 'Program of Affirmative Action for Black Men and Women.'<sup>265</sup> The objective of affirmative action in Brazil is consistent with the objective in South Africa namely, to correct the consequences of racial discrimination and to create a society that is in accordance with the 'harmonious multicultural reputation'.<sup>266</sup>

#### *Affirmative action and legislation*

An important article in the Federal Constitution of Brazil is article 3. It states that the objectives of the Federal Republic of Brazil are to ensure a free, just and solidary society; a substandard living conditions and the eradication of poverty and reducing social and regional inequalities. It also seeks to *"promote the well-being of all, without prejudice as to origin, sex, color, race, age and any other forms of discrimination."*<sup>267</sup> The government has used this article as the legal basis to introduce affirmative action measures.

As in the other countries that have introduced affirmative action programs, there were and still are opponents in Brazil. Before the court those opponents have made claims against the constitutionality of affirmative action. The court has upheld the laws against all of these challenges. In 2012 they unanimously decided that the policies were constitutional and in fact essential for the state to meet the obligation of equality of opportunity for every citizen. One of the judges went even further by stating that the provision in the constitution that established the government responsibility *"to build a free, just*

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<sup>264</sup> Marger, M. N. (2015). *Race & Ethnic Relations* (10th ed.). Stamford: Cengage Learning p.444-445

<sup>265</sup> Laher p.92-94.

<sup>266</sup> Laher p. 95.

<sup>267</sup> Article 3 (4) Federal Constitution of Brazil & Telles, E., & Paixao, M. (2013). Affirmative Action in Brazil. *LASA Forum*, 44(2), 11.

and supportive society” requires that the government repairs past damages that are suffered by Afro-Brazilians. He argued that affirmative action is necessary in order to fulfil this requirement stated in the constitution.<sup>268</sup> In addition, the Supreme Court in 2012 concluded unanimously that both class- and race-based quotas were constitutional.<sup>269</sup>

### 5.3.2. Employment Equity Measures

Although Brazil has implemented far-reaching affirmative action laws in the area of university admissions, it has not done the same in the area of the labour market.<sup>270</sup> The government did introduce certain measures that were valid for the public sector. On May 13th 2001, President Fernando Henrique Cardoso, signed a decree that had to promote diversity within government agencies and the federal public administration. It instituted a rule that 20% of the positions that did not require a civil service exam, should only be made available to people with dark skin. This led to another problem. Within Brazil there are, approximately, 300 different classifications of race that have various shades of brown skin colour. Due to this, opponents argued that ‘free-riders’ or opportunists could easily exploit the affirmative action system and gain all the benefits from the program.<sup>271</sup> This is more or less the same issue that has been used by opponents in South Africa where they claim that parts of designated groups could benefit from affirmative action although they do not need it or have no history of being discriminated against.<sup>272</sup> Activists from the Black Movement also had the opinion that a race-based approach was problematic. Therefore, Brazil decided that only the minority racial status of a person is not enough to become a beneficiary of affirmative action measures and they added the class criterion. The combination of class and race has proven to be a successful combination and the most important group of beneficiaries are now ‘poor blacks’.<sup>273</sup>

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<sup>268</sup> Hernandez, T. (2013). Affirmative Action in the Americas. *Americas Quarterly*. Retrieved from <http://law.fordham.edu/30459.htm> p. 2. & Laher p. 96.

<sup>269</sup> Telles, E., & Paixao, M. (2013). Affirmative Action in Brazil. *LASA Forum*, 44(2), 11.

<sup>270</sup> Telles, E., & Paixao, M. (2013). Affirmative Action in Brazil. *LASA Forum*, 44(2), 11.

<sup>271</sup> Laher p. 97.

<sup>272</sup> Laher p.97.

<sup>273</sup> Peria, M., & Bailey, S. R. (2014). Remaking Racial Inclusion: Combining Race and Class in Brazil' New Affirmative Action. *Latin American and Caribbean Ethnic Studies*, 9(2) p. 17-18.

### 5.3.3. A comparison between Brazil and South Africa – Lessons to learn?

Since the implementation of affirmative action in Brazil is quite recently, it is too early to determine whether or not the policy is successful or not. However, there have been certain issues that could be relevant and interesting for South Africa.<sup>274</sup>

The implementation of affirmative action by Brazil has often been called ‘poor’. Looking at this implementation, the most important deficiency is that there is a lack of consistency and uniformity. A person that is applying for a job cannot be sure whether or not measures of affirmative action apply to him due to this lack of uniformity. This inconsistency has been created by using different systems in different states, making the whole system very confusing.<sup>275</sup> There are different policies introduced at local, state and federal level.<sup>276</sup> This has made the measures in Brazil so inconsistent that they seem to have no direction at all. Since the measures are this inconsistent it will be hard to measure their success.<sup>277</sup> South Africa should therefore not adopt the Brazilian system in order to achieve success at the national level. It could look at the state level structures once they have adopted the policy at a national level.<sup>278</sup>

Another issue is the implementation of quotas. Brazil has implemented quotas and this has proven to be problematic. Implementing a quota cannot be seen as an active affirmative action measure, it is simply requiring a number and nothing more. It will only have a harmful effect on the economy and does not help to improve equality. This last statement is based on the idea that the implementation of a quota will lower the standard of performance because there will be a trend to hire people simply to achieve the quotas.<sup>279</sup> We have seen that South Africa has specifically excluded quotas from its affirmative action policy, this seems to be a good decision. However, this does not mean that they are not dealing with the same problems. The process of hiring in South Africa also seems to be about ‘ticking a box’ and not about the qualities of the candidates. Unfortunately, Brazil has not found a solution to this problem either.

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<sup>274</sup> Laher p.100.

<sup>275</sup> Laher p.97.

<sup>276</sup> Hernandez, T. K. (2013). Affirmative Action in the Americas. *Americas Quarterly*.

<sup>277</sup> Mhambi p.30.

<sup>278</sup> Laher p. 100 – 101.

<sup>279</sup> Laher p.101.

Based on the issues discussed above it seems that, on both of these points, the system used in South Africa is less problematic and more efficient than the one in Brazil. Brazil could therefore learn from the South African system instead of the other way around.<sup>280</sup> A lesson that South Africa could learn from Brazil is that they use a race and class based approach. They take both race and socioeconomic factors into account. This system seems to be more efficient as it benefits the people that are the intended beneficiaries of affirmative action. Also, they have created incentives for education institutions to implement effective policies by rewarding them. At the moment South Africa is only offering State contracts and no incentives for private education institutions.<sup>281</sup> As mentioned, the policy in Brazil is very young however, it is interesting for South Africa to follow its developments as it seems to face some of the same problems as South Africa.

Growing numbers of Brazilians and beneficiaries consider affirmative action as positive. This is because they see that the programs are starting to work. As a student states: *"Many quota students do very well, and they definitely deserve to be here; this fact has changed my opinion of quotas in the last few years"*.<sup>282</sup> Also, the acceptance of legal and constitutional justification seems to be a reason for the success of the programs. The result is that in Brazil, affirmative action has a much stronger legal position and more support than in most other countries. Many countries can learn from this, including South Africa.

#### **5.4. Conclusion**

The systems that were discussed have shown that there are some lessons to learn for South Africa. The 'strict scrutiny' test that is used in the U.S.A. could be beneficial to the policy in South Africa. The flexibility and clear goals of the system in Malaysia and the incentives and class based approach that are used in Brazil could improve the effectiveness and success of affirmative action measures in South Africa. Especially the implementation of clear goals could make the system in South Africa more effective.

South Africa can also learn important lessons by looking at the experiences of the other countries in order to prevent the mistakes that they have made. In other words, they should learn from the mistakes of others. Examples are the inconsistency of the policy in Brazil and the lack of support in the U.S.A.

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<sup>280</sup> Laher p. 101.

<sup>281</sup> Mhambi p.30-31.

<sup>282</sup> Hernandez, T. K. (2013). Affirmative Action in the Americas. *Americas Quarterly*.

Another important lesson is that international law should be kept in mind in order to avoid the situation that was created in Malaysia. Although the policy might be considered as successful, it is in contradiction with the Convention on the Elimination of All Forms of Racial Discrimination, making the measures racial discrimination. This is something that South Africa should avoid.

Compared to other countries, the system in South Africa also has certain parts that are more effective. Their decision not to implement quotas seems to be a good one, looking at the experiences of Brazil. Taking a less wide approach in what the policy should achieve is a better approach than the very wide approach that Malaysia decided to take. This seemed to be too ambitious and therefore can never be completely achieved and gives opponents the possibility to criticize the system.

When adopting the parts of the system of other countries South Africa should keep in mind that the characteristics of the country and the population do play a role in the success or failure of a system. A policy that is successful in the U.S.A. could be a total failure in South Africa because the circumstances in both countries are different.

## 6. Conclusion

As the introductory chapter explained, the objective of this thesis was to look into the affirmative action policy within the employment sector of South Africa, more in particular the legality and effectiveness of that policy. The goal was to answer the following research question:

*Affirmative action in the employment sector: a legitimate and effective way to achieve true equality in South Africa ?*

We have seen that affirmative action is a way to restore and/or obtain true equality. Its purpose is to achieve and ensure substantive equality by addressing individual and structural discrimination, while at the same time recognizing the space for differences in multicultural societies. As this is what the government of South Africa wanted to achieve on first hand, the decision to implement these kind of measures seems to be a good one. It was also mentioned that the measures are always addressed at a certain group consisting of persons that have the same characteristics. In South Africa these characteristics are race, gender and ability. The first character, race, is by far the most important one for South Africa which is why the measures have mainly targeted black people.

We can conclude that affirmative action has obtained an important place within the international legal system as it was the topic of several court cases and can be found, directly or indirectly, in international documents. These cases and documents show that affirmative action is not illegitimate beforehand. It can exist alongside the principles of equality and non-discrimination. This is because the principle of equality does not always require that all people are treated equally. In certain situations, it is legitimate to make distinctions and this 'space' is used by affirmative action measures. Another important conclusion is that correctly implemented measures do not constitute reverse discrimination and can help to achieve true equality. Measures are correctly implemented if they are not disproportionate and have been taken with the clear goal of correcting or ending discrimination in mind. If this is the case, they are considered to be a legitimate differentiation under international law. However, there are important limitations. For example, the goal has to be sufficiently connected to the right that is practised and the measures have to be temporary. They have to end as soon as the objectives have



been achieved. When they continue after the achievement of the goal they will most likely be qualified as discrimination.

The three principles mentioned above also have an important place within the South African legal system. Besides the Constitution, the most important legal document regarding affirmative action is the E.E.A. This act lays down the foundations for the policy and even obliges certain employers to take affirmative action measures. What it is not doing is granting certain people a right to affirmative action, it is merely a defence for employers that are accused of discrimination. Therefore, there is no right to affirmative action with South African law. Case law is also very important for affirmative action as it tries to fill the gaps that are left behind by legislation and to an extent they have been able to achieve this. However, there are still uncertainties and because every case is different in one way or another, it is to be expected that there will be many cases in the future.

Within South African law a test was created in order to find out if an affirmative action measure is in accordance with the principle of non-discrimination. The outcome of this test, for every affirmative action measure, is that it will lead to unfair discrimination as affirmative action measures always differentiate based on a listed ground. However, if the measure is correctly implemented and sufficiently connected to the goal it wants to achieve, it will constitute fair discrimination. This means that every measure has to stand in relation to the goal of achieving true equality in order to be legitimate.

What could however become a problem in the (near) future is the requirement that the measures have to be temporary. Since the E.E.A. has no set ending, it is unclear when the measures will come to an end. At the moment we can only conclude that they will probably come to an end when substantive equality for all has been achieved. However, it is unclear how this will be measured and when this would be the case. Therefore, this is an issue that deserves attention from the South African government.

It seems that equality, non-discrimination and affirmative all have been able to obtain a very important place within the South African legal system and that they are able to coexist. From the above we can conclude that in theory and in general, correctly implemented affirmative action measures are legitimate and could be a good solution to end the long-term effects of discrimination. This answers the first part of the research question.

The effectiveness and legitimacy issue in practice is a different story. What became clear, also from the responses to the questionnaire, is that although in theory the measures might be legitimate and seem effective, this does not necessarily mean that this is also the case in practice.

There are many issues with the current policy but the two main ones are related to the beneficiaries and the race-based approach. These two topics have also been extensively discussed by the courts and it looked like they gave a clear answer regarding the legitimacy of both the group- and race based approach. But again, this is the answer in theory. In practice, there is still discussion about both issues as many people feel they lead to problems in both the society and the economy of South Africa. Most (white) respondents to the questionnaire agreed that equality is still an important issue in South Africa and that many black people are still in a disadvantaged position. However, they feel that the current measures are unjust and are doing more harm than good. Due to the race-based approach society is still divided and race still plays an important role. Also, the measures do not seem to benefit those who need it and disadvantage many which gives them the feeling that the measures are unjust although they know that they are in accordance with the law. Although in practice the most qualified person should still be appointed, this seems not to happen in practice. The race criterion in many cases seems to be the only factor on which the hiring decision is based. This results in the hiring of unqualified people for all sorts of positions which is bad for the economy.

So far, the South African government was not able to resolve these issues and actually did little to overcome them. Therefore, it might be interesting for them to look at other countries who have implemented affirmative action measures. This thesis looked at the policies of the U.S.A., Malaysia and Brazil. It turns out that these two topics are also important issues in the policies of all of these countries, but unfortunately they were not able to give clear solutions. The most important lesson can be learned from Brazil as they made an important change and decided to implement a class-based approach that seems to work. This could be a solution to both the race-based and the beneficiary issue as it looks at the social position of a person before granting them affirmative action measures. This way, people from all race groups have the possibility to be a beneficiary of affirmative action measures and the measures seem more fair. However, South Africa should keep in mind that, also with this approach, they have to let a person's qualifications and experience play an important role in the decision-making process. Otherwise some of the same problems might occur. What is also important to keep in mind that when

nothing is changed, dissatisfaction amongst people will grow and in the U.S.A. this has led to abolishment of affirmative action measures in certain states.

The second part of the research question is a more difficult to answer. Some will say that the measures are effective as they have helped people from designated groups to get a job. However, many people from designated groups are not able to benefit from the current measures and after more than 20 years, there is still an enormous gap between the living standard of Black and White South Africans. Even people within the same race-group do not agree with each other on this topic. However, we can conclude that many people feel that the measures are not effective and unjust. Not just because they are disadvantaged by them but because they are not doing enough and harming society. Therefore, the idea behind the measures might be good, but adaptations are needed in order for the policy to be truly effective.

## Recommendations

The most important issue regarding the current affirmative action policy within the employment sector of South Africa is that theory and practice are not in accordance with each other. On paper the policy is legitimate and seems to be a good solution to deal with the consequences of past discrimination. Nevertheless, the practice is different and the policy is causing problems in society. This is something the government of South Africa should not ignore and look into.

What should be kept in mind that the policy was introduced in order to correct the past, but it should also be concerned with the future of South Africa. In that future there should be no discrimination at all, against no one. Furthermore, people should no longer think of others in terms of 'Black, Whites and Colours', they are all South Africans. In order to achieve this the government should not use policies that stimulate this way of thinking. In other words, the current race-based approach should be altered and the racial hierarchy should be abolished. An alternative could be the class-based approach that is used in Brazil.

Another recommendation concerns the beneficiaries of the measures. I personally do not agree with the argument put forward by Taylor that because the discrimination in the past was directed at groups as a whole, affirmative action measures should also be given to groups as a whole. However, I also do

not believe that an individual approach would be the solution as this would result in other problems such as that every individual would have to prove that he or she was discriminated in the past. Although the group approach used at the moment might be problematic I believe that, with certain adaptations, this is a better alternative. These changes are essential as the current policy of beneficiaries is not effective as it is creating problems and the right people do not seem to benefit from it. Therefore, again I would recommend that the South African government would look into the class-system that is used in Brazil. This system makes sure that the deciding factor is not just race, but someone's social position plays a very important role as well. In South Africa this would probably mean that the biggest group would still be Black people however, it would target the right people within this group and not just those that do not need it. Also it would mean that white people, more specifically white men, would not be excluded beforehand. If their social position requires it, they could also be a beneficiary of affirmative action. This would not completely abandon the race issue, but it would be an improvement. Of course this would come with the difficulty of creating class groups, but this is a far better alternative than the race groups. In Brazil, growing numbers of the population consider affirmative action a good thing because they see that it is working. This is exactly what South Africa needs because it should be about eradication poverty in general, not about eradicating poverty for Black people. Although in practice this group will need most help.

Another important recommendation is that there should be a set ending to the E.E.A. That way, at that ending time it can be measured whether or not the policy has achieved its goal or not. If it has, it can probably come to a definite end and if not, it should be altered. This would also be in accordance with international law which requires affirmative action measures to be temporary. It will also show the people that these measures are of a temporary nature and that there is a clear goal to achieve. At the moment, the measures seem endless and people lose sight of the goals it wants to achieve. This makes them lose their faith in the measures. What would also be helpful is if besides the end goal of substantive equality for all, certain interim targets would be set. When these are achieved, their successes can be celebrated at this would probably have a positive effect on people's opinion on the policy. If they are not achieved the policy can be altered in time.

Furthermore, an independent body should be created that has the task of governing the affirmative action policy. They can oversee the implementation, check its effectiveness and propose adaptations based on that effectiveness. In the end they can recommend to end the policy when its goal is achieved,

or based on the success rates of the intermediate goals they can propose adaptations. Also, this would mean that there is another body, besides the government, who would look into the effectiveness. This will probably give the people more confidence in the system.

A final general recommendation is that more attention should be given to equality of education as it plays a very important role in the creation of an equal society. If everyone would get access to the same level of education it would help to equalize the starting position that everyone has on employment market. Student grants given to underprivileged students could be helpful. Someone's background and family will always play a role, but education could make an enormous difference and narrow this gap. This does not start with university admissions but at primary school.

I believe that these recommendations could help to increase the effectiveness of and support for the affirmative action policy in South Africa and as a result, help to create the nation that was envisaged after the revolution in 1994 because the current policy is not the way to level the playing field.

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## Attachment: Questionnaire responses

### Questionnaire regarding the affirmative action policy within the employment sector of South Africa

Respondent nr. 1

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Gender: female

Age: 23

Race: white

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, they are measures that have a good motive, but very bad implementation.

2. Do you consider affirmative action measures to be necessary? Please explain.

Yes and No- in the regard where it helps to improve previously disadvantaged people's circumstances, it is a good thing. But in the regard where people are employed and promoted based on the colour of their skin- no.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

I think it might have been lawful and just when it was just implemented, but with the younger generation who does not see colour, it is seen as unlawful as some races are granted all opportunities while others who may have been more deserving are being overlooked.

4. Do you consider the measures to be discriminatory? Please explain.

In a way, yes. When decisions are based purely on race, they become discriminatory. If this measures was implemented correctly to give previously disadvantaged and currently disadvantaged people equal opportunities, then I would not consider discrimination but the way it is implemented now- yes.

5. Do you think that the measures are helping the right people? Please explain

No. People who work for what they want in life are overlooked, even disadvantaged people that are trying to make a difference is sometimes overlooked. Then others are just handed opportunities such as jobs or bursaries, and they are not even interested, but because it is free, they take it.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain

I am privileged to have a job, and a degree for what I have worked very hard, therefor I cannot say that I am restricted by these measures. I do however see a lot of people whose opportunities are restricted by these measures.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, every time I have to fill in my race or gender on any official form, banking details or any other type I feel these measures affecting me.

8. In your environment, what is the general opinion on the affirmative action policy?

It could've been a very good thing, if it was not implemented wrongly.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes, I think the idea of affirmative action was to promote previously disadvantaged people's lives, but it has become like a turn-around apartheid where people want to exclude one race for what their ancestors have done just like they have been excluded. Therefor my opinion is that once we look at everyone as people and ignore race and gender when looking for a suitable candidate, the employment sector will fix itself.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

I do believe that people's lives need to be improved and that unemployment cannot go on like it is, so alternatively once a CV is sent in, look only at qualifications and not at anything else, further if the candidate lacks 1 or 2 courses to be suitable and there is no one better, employ said person and supply the lacking courses.

11. Do you have any other remarks?

No.

Thank you for your cooperation!

Respondent nr. 2

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Gender: female

Age: 54

Race: white

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes I have heard of the affirmative action measures, from media and personal discussion. I regard them as an attempt to provide work for the previously disadvantaged and to insert individuals friendly toward the current government into positions of authority.

2. Do you consider affirmative action measures to be necessary? Please explain.

In real terms or in terms of effective provision of services etc, no they are not necessary - in fact they have been counter productive, but in terms of achieving the aims of the ANC yes they were necessary.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Just ... ? yes probably it is fair that those who had no chance at a decent living and therefore a good life for themselves and there children have now been able to achieve both (it would have been very nice however if they had managed to drag more of there own people along though) - no you know of the black diamonds?

Law .... that concept is a joke and in the old RSA it was a bad joke to many too ...

4. Do you consider the measures to be discriminatory? Please explain.

Of course they are discriminatory ... I am concerned that the people who are getting the jobs are by no means the best qualified.

5. Do you think that the measures are helping the right people? Please explain

No they are not helping the people yet but my hope (but not my honest expectation) is that in a few years time when the children who have been educated in a "free and fair" new South Africa come into those positions of authority etc they will realise the deep truth of Ubuntu and live accordingly.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain

That is a very difficult question to answer without a very long story ... I am completely and absolutely the master of my own destiny and I will find the opportunities when I seek them (I love my life - I made it !)



7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes just before leaving my small home town of Oudtshoorn, which has been embroiled in a long fight for the local municipal offices which were lost to the ANC some two years before they eventually vacated those offices under pressure from national government - I went into the library and was met by very unfriendly even antagonistic service ... I suggested that the young lady get into politics where she could sit around doing nothing and steal from the people - the young lady informed me that that was what she actually did .. one of the ANC counsellors just evicted but who still had a "right" to gainful employment

8. In your environment, what is the general opinion on the affirmative action policy?

Mostly there is very little understanding and the expectations are not positive ... my people (not really my people you should understand) are not happy !

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes there are problems with the policy and the solution is simple ... Employ the person most qualified or with the most promise, to do the job.

10. If you do not agree with the (current) affirmative action policy, can you think of any  
See my answer to no9 ...

11. Do you have any other remarks?

This is a very difficult issue for someone who has not made South Africa there home (for many years) to understand but perhaps this little nugget may help you to understand a little bit - most Europeans that have come to live in my country that I have come across over the years have developed real frustrations with the African way of doing things ... without "white" management not a lot gets done

Thank you for your cooperation!

Respondent nr. 3

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Gender: Female

Age: 24

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, I think it is ridiculous because I was not part of the reason for which affirmative action is taking place but I am being disadvantaged because of it.

2. Do you consider affirmative action measures to be necessary? Please explain.

No, everyone should receive benefits according to their performance and not their race

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

No, it is discrimination based on the past actions and the people who are benefiting from the affirmative action have equal opportunities

4. Do you consider the measures to be discriminatory? Please explain.

Yes, it is an unjust infringement on my human rights and unconstitutional but Section 36 of the Constitution allows it

5. Do you think that the measures are helping the right people? Please explain

No, because it is hardworking South Africans get disadvantaged and other people get advantaged purely on race and not hard work and it is discouraging and people therefore leave the country to find fair treatment elsewhere.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain

It is restricting my opportunities to the point where I as a hardworking white South African female, born post-apartheid, with a degree from a University are not able to find a job in my own country.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, I could not study Medicine because of my race I knew I would never get accepted no matter how hard I work. I have been rejected by law firms purely based on race.

8. In your environment, what is the general opinion on the affirmative action policy?

Because everyone in my environment are born post-apartheid we do not see the justice in it, it is basically putting South Africa back in the past and not moving us forward as a united country. Affirmative action is keeping the divide of races alive.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

I think when it comes to employment there should be no affirmative action or any advantage other than that of skill and hard work and experience. I do understand that not everyone has the opportunity to go to the best schools so using affirmative action to allow students from disadvantaged backgrounds to enter university is fair but after that it should be based on what you as a person can offer a company.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

Refer to question 8 for my recommendation.

11. Do you have any other remarks?

I hope for adequate leadership in our country to realise that we have far worse problems than that of the past and to focus on how to unite our country and keep the educated and experienced people in our country rather than denying them work based on race and encouraging them to leave South Africa. SA is losing highly skilled qualified people and it is damaging our country's economy and faith.

Thank you for your cooperation!

Respondent nr. 4

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Gender: Female

Age: 26

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes. Affirmative action measures within various industries in South Africa are common and are implemented in a variety of ways. Most notably is the statutory requirement that a company, partnership or other profit seeking entity must attain a minimum Black Economic Empowerment (BEE) rating. This rating is measured by the number of employees that fall under the so called "disadvantaged groups" – being the race groups blacks, Indians and coloureds and the female gender group. The rating scale is measured from black females (highest BEE rating) to white males (no/low BEE rating).

2. Do you consider affirmative action measures to be necessary? Please explain.

Yes, affirmative action measures in principle are necessary. Companies in South Africa are predominantly white male dominated in upper management tiers and are likely to continue to be so dominated without some sort of affirmative action policy. I am however of the opinion that the current affirmative action policy implemented in South Africa does not attain this objective.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Within the context of South Africa, taking holistically in light of the country's history, affirmative action policies are just. They are intended to actively correct our past wrongs and address disparities within the country's business industries, education and service sectors to ensure everyone attains a "level playing field."

The current policies and measures are obviously lawful as they are enacted in legislation.

4. Do you consider the measures to be discriminatory? Please explain..

The current measures do discriminate against white South Africans, particularly white males, but the discrimination is just in that it services a necessary public policy objective.

5. Do you think that the measures are helping the right people? Please explain

No, I think the measures are intended to help the right people but in practice they don't. What often happens is that a company run predominantly by white males will employ (or sell shares to) a black partner. There is a mutual understanding between both parties that the black partner is not required to actively participate in the company but has merely been employed to improve the company's BBE rating. The black partner is satisfied with the arrangement because often receives an inflated salary. In practice,

many black “businessmen/woman” are partners in a number of companies merely to improve the BBE status or obtain tenders from the government without actively participating in the company. This structure prevents talented and skilled persons (black or white) from filling that role.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain

As a white South African, the measures restrict my opportunities. I was unable to study medicine due to the stringent entrance requirements in place for white applicants, as opposed to black applicants who are required to meet minimum standards.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, refer to the answer to question 6.

8. In your environment, what is the general opinion on the affirmative action policy?

Being a white South African female, the general opinion amongst my community members regarding affirmative action policies is relatively negative. Affirmative action policies negatively affect white males, and thereafter white females, the most. In addition, being in a generation that was in no way involved in the Apartheid era, but nonetheless are now required to carry the burden of correcting the negative consequences of Apartheid, causes much animosity and disagreement.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes, the current affirmative action policies are not effective. They benefit a small group of individuals, ie. black businessman who are already in advantageous positions. The manner in which the policies are implemented must be changed and in addition, as the policies currently stand, the discrepancy between the skill set a white South African requires for a position and that which a black South African requires is too large. This results in black persons being appointed to positions for which they are wholly inadequately qualified. This should be rectified through improved education policies (including a form of preference), as opposed to affirmative action policies in the workplace.

In addition, I believe that the affirmative action policies in South Africa require a type of “sunset clause”, ie. that they will only be in place for another few years. These policies cannot prevail indefinitely.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

Refer to the answer to question 9 above.

11. Do you have any other remarks?

Thank you for your cooperation!

Respondent nr. 5

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Gender: Male

Age: 23

Race: Caucasian (White)

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, affirmative action policies are created in order to correct past imbalances created by colonialism and apartheid which had previously disadvantaged black people, Indian people, women and people with disabilities.

2. Do you consider affirmative action measures to be necessary? Please explain.

They are a much needed remedy however they are poorly implemented. While there is a definite and obvious need for some form of correction for true equality and justice, I do not believe that the current system is the right way to correct past imbalances.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Affirmative action is lawful but not entirely just at present. Past discrimination should not be corrected through present discrimination. Instead it should be corrected through education and development.

4. Do you consider the measures to be discriminatory? Please explain.

Yes, it is in a sense a positive discrimination. The idea is in the right place but unfortunately poor implementation, corruption and lack of education has resulted in the system only benefitting a select few, and discriminating against others

5. Do you think that the measures are helping the right people? Please explain

No! While there are some who are correctly benefitting, I believe that there are many more who are not benefitting correctly from affirmative action. I don't think that they want a hand-out but rather a helping hand.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Restricting. As a white male, the policy excludes me completely and instead aims to advance other groups. While I'm not against the idea of equality and justice, I do not believe that two wrongs make a right.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, I was told about a company's affirmative action policies when I applied for a job. They did select me for the job, but it was my first encounter with AA.

8. In your environment, what is the general opinion on the affirmative action policy?

Negative. The white males are generally against it, and African colleagues from my university are also against it as they feel that employers only look at their colour and not their accomplishments.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes. Poor administration, implementation, and development hampers the system. The system either needs a complete overhaul or replacement so that inequality can be or properly corrected.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

Free education would be the best alternative, especially for previously disadvantaged workers as education is the great equaliser. Another possible replacement policy could be government allowances to go with wages can also help, instead of placing the burden of AA on the businesses.

11. Do you have any other remarks While the current system is not good, it is better than having no system.

White males aren't against the idea of inequality, they are just against the idea of a bad, corrupt system that is not really fixing any problems and instead creates more in the long term.

Thank you for your cooperation!

Respondent nr. 6

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Gender: Male

Age: 24

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

They are said to be driven by the promotion of equality.

2. Do you consider affirmative action measures to be necessary? Please explain.  
Yes, for the sake of equal opportunity.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Yes, their initial intention was just. However, I have had black people in South Africa personally tell me that their main aim is to disempower the white South African society. Therefore, affirmative action lately comes across to me as more of a political 'Trojan horse': aimed at disempowering white South Africans economically – I do not believe that is not lawful in terms of human rights.

4. Do you consider the measures to be discriminatory? Please explain.

In the modern sense, yes. The degree of affirmative action leads many non-black South African citizens to lose their ambition – which should relate to the concept of expectancy theory.

5. Do you think that the measures are helping the right people? Please explain.

No, because from what I have seen, they are completely racially-based. Affirmative action should not neglect the groups of society who have been deprived in the socio-economic sense. In addition, little attention has been paid towards affirmative action regarding disabled South African citizens. The affirmative action practices are based mainly towards the advantage of black people; they are neglecting other groups, who are still disadvantaged. I know what I am talking about in terms of the lack of affirmative action towards disabled South African citizens.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Not necessarily. I made a point to develop myself into a piece of human capital that an organisation does not want to lose. A number of organisations have shown interest towards me. However, to the less ambitious, hard-working and persistent white male, I believe that the case will be as such. I did also make a point to work hard at university and develop valuable skills so that I can leave South Africa if I am being deprived to too great an extent – South Africa is suffering a brain drain (FYI).



7. Do you have any experiences with affirmative action measures? If yes, please explain.

Not personally.

8. In your environment, what is the general opinion on the affirmative action policy?

It depends on the racial group with whom I am socialising. Most white people see it as reverse discrimination. Most black people see it in the light of justice.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

They do not provide a deadline for affirmative action – whether it be time-based or human resource development-based.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

Yes I can, but I will keep that identified gap for my own thesis.

11. Do you have any other remarks?

I think that the international community generally talks too much about the South African context without bothering to do adequate research into the history of South Africa, from the perspectives of the English, Afrikaans and the black tribes. Therefore, the minute that a non-South African begins to talk about apartheid, I automatically assume that they don't know that whole story of the topic that they so confidently talk about. My experience and observations in such cases have more often than not supported my assumption.

The 'victim' card that is often used by black politicians and black society are just a manipulation tactic. I read a statistical report on a while ago that suggests that only a small fraction of today's black population in South Africa actually experienced apartheid. People must remember that the black South African population went through a miniature baby boom and multiplied drastically. Therefore, the large percentage of black South Africans in the latter day have come from what was initially a much smaller population. Therefore, of the vast number of black individuals who claim to have lived in apartheid – only a fraction of them, even theoretically, would have actually lived during the apartheid era. Hence, as mentioned, the question should be about the actual proportion of today's black people who were truly victims of apartheid and lived during that era. Of course, most of the black people claim to have been since it gives them an advantageous standing in almost any argument that occurs within the South African context.

Thank you for your cooperation!

Respondent nr. 7

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Gender: Female

Age: 46

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, they are supposed to correct the imbalances of the past, yet I believe it is a form of reverse racism and also we are not getting the skills needed. This results in poor performing organisations

2. Do you consider affirmative action measures to be necessary? Please explain.

No. I believe everyone should have an equal opportunity to be appointed into a job

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

They are lawful if they are applied as the law intended it to be. However the current way it is used are unlawful because you are excluding an entire race from participating in the economy of a country

4. Do you consider the measures to be discriminatory? Please explain.

Yes, they are discriminating against an entire race

5. Do you think that the measures are helping the right people? Please explain.

No. From experience I can tell you that the people whom have been appointed often feel side-lined and battle to perform in the positions

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

I have been disadvantaged. I have been told that I would be the perfect candidate for the position but my skin colour is not right, as a result I have been unemployed for nearly six months and I am a highly educated individual

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, being in the HR field I work with them every day

8. In your environment, what is the general opinion on the affirmative action policy?

That it is unfair and detrimental to the business

9. Do you think that there are problems with the (current) affirmative action policy within employment?

If yes, what are they and how can they be solved?

There are huge problems. As a result of affirmative action many skills has been lost to the economy that cannot be replaced. People are placed in positions just because of their race and lack the skills to perform the job resulting in bad performance. I believe that when people apply, gender, race add age should not make a difference. Applications should therefore only reflect education, skills and experience. Only when interviewed should the applicants biographical details become apparent.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

The policy may have good intentions, but 21 years after democracy the playing field has been levelled. Therefore the policy should be abandoned and we should be looking and rebuilding this country only using skills.

11. Do you have any other remarks?

I feel that this policy has deprived me of moving forward in my career. To be honest I feel that my country does not want me here and I am currently looking for employment outside of South Africa.

Thank you for your cooperation!

Respondent nr. 8

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Gender: Female

Age: 22

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes. Affirmative Action measures are the measures used to achieve Employment Equity

2. Do you consider affirmative action measures to be necessary? Please explain.

I do. Past discrimination (Apartheid) created a big gap in our country. I feel that AA measures are there to redress past discrimination and create equal opportunities for every employee in the organisation.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Yes. They were brought in to place to redress past discrimination and ensure equal opportunities

4. Do you consider the measures to be discriminatory? Please explain.

No. These measures are put into place to identify any barriers/discrimination. Once these barriers are identified the company will be able to set a action plan to ensure that the barrier is solved

5. Do you think that the measures are helping the right people? Please explain.

Yes. As these measures are discussed by a committee it gives the opportunity for everyone in the company to identify any barriers/discrimination

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Advancing your opportunities. These measures were brought into place to give everyone equal opportunities

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes. I am a consultant for Labournet. Thus I am responsible to ensure that all my clients are complying with the EE legislation and to ensure that AA measures are developed for every barrier that has been identified.

8. In your environment, what is the general opinion on the affirmative action policy?

Companies do not agree with the changes that should be implemented. Some companies just comply with EE legislation as they know that possible fines could be implemented if they do not comply.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

No.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

11. Do you have any other remarks?

AA measures fall hand in hand with EE legislation. It is difficult to just take a look at Affirmative action as AA measures are used to reach EE within a organisation.

Thank you for your cooperation!

Respondent nr. 9

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Gender: Female

Age: 26

Race: Indian

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, as solutions to unfair discrimination

2. Do you consider affirmative action measures to be necessary? Please explain.

Yes, in order to correct discrimination and unfair treatment of employees

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

It depends, there is no set 'affirmative action' to carry out, companies usually do a 'barrier analysis' to identify any unfair discrimination and then decide on a corrective action to correct it, which is known as the 'affirmative action' measure. So it is dependent on who sets the affirmative action and what is stated in the affirmative action.

4. Do you consider the measures to be discriminatory? Please explain.

As above explained

5. Do you think that the measures are helping the right people? Please explain.

As above explained in Q 3

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

As explained in Q 3

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, I assist companies to conduct barrier analysis to identify discrimination, and then propose possible affirmative action measures to use to correct the barrier

8. In your environment, what is the general opinion on the affirmative action policy?

If done in the correct way, it is of good opinion as people feel that they are being represented and their interest

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

No

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

11. Do you have any other remarks?

For more information , please read through the Employment Equity Act as this goes hand in hand with affirmative action measures

Thank you for your cooperation!

Respondent nr. 10

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Gender: Male

Age: 24

Race: Caucasian

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes I have heard of affirmative action in the employment sector. I would describe it as employment requirements being in favour of the previously disadvantaged.

2. Do you consider affirmative action measures to be necessary? Please explain.

I believe they are no longer necessary as the group that it is favour is no longer at a disadvantage.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Currently in South Africa I do not as it is deemed to be "positive discrimination" to a group that is a minority in the country. If the group that it is in favour of, was in such a way disadvantaged currently, it would then be considered just/fair.

4. Do you consider the measures to be discriminatory? Please explain.

Yes I do, as stated above it is "positive discrimination"

5. Do you think that the measures are helping the right people? Please explain.

No the measures are not helping the right people. As stated previously it is in support of a majority. This is a step backwards in my opinion.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Yes I am. If I had to apply for another job elsewhere, which is a BEE compliant position, my race determines whether I am a candidate or not rather than looking at skill/qualifications needed.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Luckily I do not

8. In your environment, what is the general opinion on the affirmative action policy?

We prefer not to enforce it where possible as our company's values are fair

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?



No There isnt

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

The current policy, which was drawn up 20 years ago to aid the equalization of our nation's diverse races, is outdated and does not aid in any way in today's society within South Africa

11. Do you have any other remarks?

Rather than enforce affirmative action in South Africa, dispose of the policy, make it equal between potential candidates. Rather target the start of the problem, focus on developing an education system that we can be proud of. This way, it will help those from different communities, classes and backgrounds equally. The potential to be employed someday will then remain in your hands due to hard work and skill rather than what colour skin you bare.

Thank you for your cooperation!

Respondent nr. 11

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Gender: Female

Age: 24

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

I am currently working as a manger in a very large firm. When employing new people HR instructs me that I need to employ a black candidate. I do not find this fair as I do not make any decisions based on the colour of peoples skin colour but on merit.

I have been instructed to select black employees to make permanent. This is not fair in my opinion as I feel such decisions need to be made according to your years of service and performance not just solely on your skin colour.

If a person browses the job market you will find adverts for job openings will stating that they prefer that a black male apply for this position.

2. Do you consider affirmative action measures to be necessary? Please explain.

I feel that we should operate on a merit basis to avoid any type of discrimination having said this I feel that black people of South Africa need to be provided with more opportunities to gain higher education and competencies to qualify for these positions.

The current affirmative action system has led to people being employed into positions they are not competent for leading to major draw backs on companies productions

3. Do yo consider affirmative action measures to be just and/or lawful? Please explain.

I do not feel these measures to be lawful as many people who are worthy candidates for the job position are rejected based on skin colour. I feel this is a form of racism against other races in South Africa.

4. Do you consider the measures to be discriminatory? Please explain.

Yes. As stated above positions are given to people based purely on skin colour and not on merit.

5. Do you think that the measures are helping the right people? Please explain.

No. Currently in South Africa the very poor people such as domestic workers are unable to supervise and guide their children in the learning processes due to their working hours and their lack of education. The children of these parents end up dropping out of school and begin working to support their family. Pressure is being put on employers to employee black people but the government is not taking enough measure to ensure that the previously disadvantaged people are educated.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

I feel my opportunities are restricted because there will not be an opportunity to be promoted as only previously disadvantaged candidates are considered for promotions.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

8. In your environment, what is the general opinion on the affirmative action policy?

The total concept is understood and accepted due to South Africa's past we realize that actions need to be taken to bring the black citizens on the same level as the white citizens; the issue is that white people are now being discriminated against and are not provided any opportunities.

This has led to an increase in poverty, lack of education and unemployment in the white community. It appears to be a role reversal of apartheid.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Instead of forcing an employer to employ a person based on their race there should be a formula to determine who the best candidate is overall for example:

10 = most desirable

Race = 1 – 10 example; Black = 10, white = 3, coloured = 9, Indian = 8 etc.)

Qualifications as per criteria = 1 -10

Experience = 1 – 10

Interview skill test = 1 -10

Interview score = 1 – 10

This can be used as a scoring system to choose the best candidate for the position while still enforcing affirmative action.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

11. Do you have any other remarks?

I feel that South Africa needs to focus on the quality of education currently provided, government bursary's should be given to unprivileged students for higher education purposes, the development of skills in older generations is needed, strict measures need to be taking on the prevention of underage sex, afterschool centres need to be provided in squatter camps where at least one teacher is present to assist children with their homework and this will ensure children are supervised when their parents are at work.

Thank you for your cooperation!

Respondent nr. 12

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Gender: Female

Age: 24

Race: white

Occupation: Candidate Attorney

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, it is very strict when it comes t

2. Do you consider affirmative action measures to be necessary? Please explain.

It was necessary for a few years after apartheid, but now it is becoming a big issue and causes racism to grow within companies with a strict affirmative action policy.

3. Do yo consider affirmative action measures to be just and/or lawful? Please explain.

NOT AT ALL. IT IS RASIST!!!!

4. Do you consider the measures to be discriminatory? Please explain.

Yes

5. Do you think that the measures are helping the right people? Please explain.

No, companies rather employ a BEE person, that is not qualified than appoint a NON- BEE person.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Yes, when I apply for jobs the will just inform you that they have to appoint a black woman and therefore you do not qualify. It is something that happens quite often.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, was demoted and a BEE candidate was appointed in my position

8. In your environment, what is the general opinion on the affirmative action policy?

It is a problem and the community is quite negative about it.

9. Do you think that there are problems with the (current) affirmative action policy within employment?

If yes, what are they and how can they be solved?

Yes, if people are retrenched within a company, whites will go first , because if the blacks are let go they will have a strike.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

Yes, people be measured not on the colour of their skin but on their qualifications and experience.

11. Do you have any other remarks?

Thank you for your cooperation!

Respondent nr. 13

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Gender: Female

Age: 49 years and 10 months

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, it is enforced here in South Africa. My understanding is that if individuals of different nationalities have the same qualifications, the position goes to the individual who was previously disadvantaged.

2. Do you consider affirmative action measures to be necessary? Please explain.

Based on South Africa's history, it is necessary to correct the imbalances but unfortunately it is not being correctly enforced in our country and should therefore be scrapped.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

In an ideal world is just but practically it is not lawful as it gives room to unfair treatment as the employer hides behind 'affirmative action' to justify unfair labour practice.

4. Do you consider the measures to be discriminatory? Please explain.

Unfortunately we live in an imperfect and corrupt world so in most instances these measures are discriminatory. Many times people are employed based on skin colour even though there are individuals who are more qualified and suited to the position but they happen to be the wrong skin colour or nationality.

5. Do you think that the measures are helping the right people? Please explain.

Only on a very small scale. The bulk of the people who are employed are not suitably qualified or experienced for the position resulting in a drop in standard/compliance which in turn affects the morale within the company. In my observations, due to nepotism within our ANC government, only a select few are truly benefitting from these measures.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

My opportunities are being restricted as I am a white single parent despite being considered a specialist in my field with extensive experience. White – part of the advantaged group under the previous government so I am not a suitable candidate and single mothers are not considered to be reliable

workers. The fact that I am the sole bread winner does not count in my favour. I have also found that due to white people finding alternative employment difficult, they are open to abuse from the employer in fear of losing their jobs and there is no real recourse as the general attitude is that they lived advantaged lives and it is now payback time.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

I was initially promoted and based on the fact that I am white, I was sidelined and the position given to a black male. Due to being the highest qualified in the department and providing a higher standard of work I was worked out of the company due to management not being comfortable with my level of expertise. I was accused of trying to put the other employees in a bad light simply by doing my job according to FAIS standards.

8. In your environment, what is the general opinion on the affirmative action policy?

It is unfair, discriminatory and reverse racism

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes, regardless of the qualifications (or lack thereof) African (black) people are being employed and paid to do a job they are incapable of fulfilling. The coloured people who were previously disadvantaged are even worse off now and affirmative action does not include them.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

No I don't as it has lead to unfair discrimination. All people need to be employed purely based on qualification – in the event of both the white and African individual being equally qualified, the option should go to the African person to ensure there is a fair distribution.

11. Do you have any other remarks?

Affirmative action will never work when people bring their emotions into play. Far too many people have low EQ's and cannot distance their personal feelings from the task at hand so affirmation action is doomed to fail.

Thank you for your cooperation!

Respondent nr. 14

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Gender: female

Age: 25

Race: white

\*Zimbabwean working in South Africa after having studied in South Africa for 7 years.

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes. I would describe it as clear intentions to appoint people solely on their race rather than level of competence and education. I.e. race is the deciding factor regardless of the quality of the candidates work.

2. Do you consider affirmative action measures to be necessary? Please explain.

I understand the initial reason. However I believe it has become a tool in South African politics to garner votes amongst the majority of people and borders of apartheid type discrimination due to its long during nature and inconsistent application.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Lawful yes – it is legislated in South Africa. Just – no. It is discriminatory. It is being applied more harshly as the years progress and I believe that it erodes at the unity fought for by Mandela and the equality enshrined in the constitution. It is over 20 years since apartheid and affirmative action is being applied increasingly more harshly creating an imbalance and causing rights of those who were not involved in the apartheid years to be affected. It is causing a sense of entitlement amongst certain sectors of the youth and a sense of bitterness amongst others. Affirmative action is causing people who were educated in South Africa (black and white) to take their degrees and education elsewhere rather than apply it in South Africa because they feel discriminated against.

4. Do you consider the measures to be discriminatory? Please explain.

Yes – it is based on racial discrimination. The very thing that caused the initial imbalance of opportunities.

5. Do you think that the measures are helping the right people? Please explain.

No. South Africa functions on a considerable amount of nepotism and favouritism. Its tender allocations for example, it is not favouring the right people necessarily but those that are friends with whoever is deciding the outcome, that also happens to fit the racial profile. Its not favouring the poor person who



needs a chance at big business, because if he is not well connected enough in most cases he too is overlooked.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Without a doubt restricting. The fact that I am a Zimbabwean national of course makes the restriction even more, despite the fact that South Africa educated me up until Masters level.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

A lot of jobs cannot even be applied for if i am white. If you read on the websites of a lot of the lawfirms advertising positions you will see what I mean. The recruitment processes make provisions for very few white students as the firms or businesses wish to maintain their BEE statuses.

8. In your environment, what is the general opinion on the affirmative action policy?

That it was an honourable endeavour to begin with, it has run its course, and is now being used as a tool for discrimination and advancing political agendas. In business and sport. Its no longer about the well being of South Africa as a nation and the advancement of those previously disadvantaged. Its creating a new group of disadvantaged and is racist.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

They can be solved by appointing people on merit (education and competence) rather than race.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

As mentioned above. I believe it was necessary, but has become a political tool rather than something that rights previous wrongs. I believe a lot of South Africa's economic issues will be relieved if people and businesses are allowed to appoint whoever they want based on merit and competence rather than race. The alternative therefore is removing the racist element of the current policy. It creates more tension between the races and costs South Africa the benefit of both black and white people who would rather have no part in this.

11. Do you have any other remarks?

Thank you for your cooperation!

Respondent nr. 15

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Gender: Female

Age: 22

Race: Caucasian (White)

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, I know about affirmative action policies as I have to work with it when recruiting new personnel for the company I work for. The AA policies to correct past imbalances of apartheid which had previously disadvantaged black people, Indian people, women and people with disabilities.

2. Do you consider affirmative action measures to be necessary? Please explain.

I think it was necessary but it has to come to an end some time. In the past few years it has done more damage than good because it is poorly managed. I don't think it is necessary anymore as the previously disadvantaged groups are the majority and the advantaged group (white males) are the minority.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Affirmative action is lawful, but it has come to a point now where there is discrimination against everyone who isn't black. People are being put in jobs where they don't have the education and knowledge just so that companies comply with AA. Getting a good job should be based on a person's knowledge and performance, not their skin colour.

4. Do you consider the measures to be discriminatory? Please explain.

Yes, it is in a way discriminatory. It has been implemented and managed so poorly that only a few benefit from it, the scope of people it is supposed to benefit doesn't match up with the actual number of people that has benefited from it.

5. Do you think that the measures are helping the right people? Please explain.

No! The system has failed the people. It only puts focus on 'getting the job' but it lacks to support people to get the job. By support I mean education and training. How do they expect people to get the job and perform if they don't help them with the necessary tools to perform.

6. 6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Restricting. As a white female I fall into the scope of the measures, but the whole idea of AA has been so badly controlled and managed that when people hear or think of AA they immediately assume it only includes black and coloured people.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, I am part of the recruitment process at my work and we always have to advertise vacancies according to AA measures but very few who apply actually meet the requirements for the job. We have had to turn down a lot of applications of good candidates because they didn't fall into the scope of AA people.

8. In your environment, what is the general opinion on the affirmative action policy?

Most have a negative opinion especially white males. In general a lot of black people are also unhappy because their achievements get overlooked, they feel they only get jobs because of their skin colour.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes, there is poor implementation and management of the policy. It is a complete system failure. They need to look at different ways they can implement it.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

Free education and training should be available for all especially previously disadvantaged workers. People need to be rewarded by their education and accomplishments and not their skin colour.

11. Do you have any other remarks?

I do believe that everyone should have the same opportunities, but that will be better addressed with education and the burden should not be on companies, the government should take responsibility for the skills pool of the workers.

Thank you for your cooperation!

Gender: Female

Age: 23

Race: Caucasian (White)

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, affirmative action was created to correct past imbalances and it aims at empowering black people, coloured people, women and people with disabilities.

2. Do you consider affirmative action measures to be necessary? Please explain.

I don't consider affirmative action measures to be necessary anymore today. This country has been a democracy for 21 years and I feel affirmative action is past its time.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Affirmative action is a part of our legislation, but it is a form of discrimination which is against our constitution.

4. Do you consider the measures to be discriminatory? Please explain.

Yes, it is a form of discrimination. For some it's beneficial and others detrimental. Some people who are capable of doing the work gets left out of the recruitment process based on their ethnicity.

5. Do you think that the measures are helping the right people? Please explain.

No! You get chosen for a position based on your ethnicity not on your qualifications.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Restricting. I am a white female with limited job opportunities because of affirmative action. I enjoy studying but what is the point of getting all the qualifications just to be left out of a job interview because of my skin colour.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes, the company I am working for on a part-time basis is now only hiring people based on EE and any person not belonging to the designated group will not be able to apply for a permanent position.

8. In your environment, what is the general opinion on the affirmative action policy?

Negative. All people believe that affirmative action is now past its best before date and other policies and plans need to be looked at because times are changing.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes. The system is not being managed effectively and it is outdated. A new policy/system needs to be implemented or it should be scrapped because everyone deserves a fair chance when applying for a position in a company.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

I think no policy is needed in today's workplace. Everyone should get a fair chance at any company and no one must be appointed because they were previously disadvantaged. Apartheid is over and we must look forward not back. Most of today's youth who are entering the labour force don't even know what apartheid was so they can't be counted as previously disadvantaged.

11. Do you have any other remarks?

Affirmative action is haltering our economic growth and development. Companies don't want to breach the law by not following the regulations of affirmative action, so they hire within that framework and it is not necessarily the best candidate for that position which halts productivity and output of the company.

Thank you for your cooperation!

Respondent nr. 17

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Gender: Female

Age: 27

Race: White, Afrikaner

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, affirmative action measures are predominant in state departments (Organs of State and municipalities) and larger companies who employ 50 or more workers. Some employers are also obliged to comply with affirmative action measures by way of bargaining council agreements.

Affirmative action has the potential to be an “honourable” way in which to make the workplace more representative and fair. In essence it should ensure that qualified people from designated groups have equal opportunities in the workplace. It is an important aim of affirmative action to ensure that designated groups are equally represented in all job categories and levels, seeing as these groups have been under-represented in many work areas.

However, in practice affirmative action has often been distorted into something that equates to reverse racism (in Afrikaans the term “omgekeerde rassisme” is often used). This refers to certain instances where employers (or the state) have employed unqualified employees from designated groups, where qualified white employees are available to fill the post, to meet racial quotas without aforethought.

2. Do you consider affirmative action measures to be necessary? Please explain.

Yes, if well handled, affirmative action has the potential to ensure that equal opportunities are provided in the workplace. However, if badly managed, it will simply re-distribute resentment, damage the economy and destroy social peace. The reason why affirmative action needs to be undertaken on a just and equitable basis, is to ensure that the country doesn't remain backward and divided.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

On paper it seems fair, but in practice affirmative action has evolved into an unjust way to promote unqualified people and has serious adverse effects on qualified white Afrikaners, especially males.

4. Do you consider the measures to be discriminatory? Please explain.

The measures are discriminatory insofar as unqualified people are employed at the expense of properly qualified and capable employees. The government also focuses mainly on affirmative action instead of pairing these measures with an extensive job creation “action plan”. The result is that unemployment is at its highest rate ever and affirmative action is hampering the growth and improvement of certain sectors by employing unqualified individuals. This has a negative effect on our economy and social peace.

5. Do you think that the measures are helping the right people? Please explain.

The measures are often abused to assist certain individuals. In current government departments a promotion or appointment is more about “who you know” than “what you know”. People abuse these measures to appoint family, friends or contacts of colour without due consideration to the requirements for the job. This prevents worthy candidates, from previously disadvantaged backgrounds, from benefitting from affirmative action.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Insofar as I am concerned, these measures only restricted my opportunities of getting into one of the larger law firms, as these companies appoint candidates according to a “race quota”. However, affirmative action has encouraged many white Afrikaners to rather start their own ventures, therefore promoting entrepreneurial skills development etc.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

I am currently employed by a small sized law firm and affirmative action is not applied by our directors. Therefore, I am not touched by it.

8. In your environment, what is the general opinion on the affirmative action policy?

The general opinion of affirmative action is that it doesn’t work. White Afrikaner males are frustrated by it and many white South Africans view affirmative action to be racist and retribution against all white South Africans for the evils of apartheid.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Explained above. The problems can only be solved with bigger commitment from the government to evaluate and control these measures.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

It is necessary to provide equal opportunities for all due to the inequalities caused by apartheid. However, my opinion is that this can only be done through bettering education and ensuring accessibility of education (including tertiary education) to previously disadvantaged individuals. The issues pertaining to the accessibility and affordability of education are apparent in the recent upheavals at university campuses across the country. Education should be a priority before affirmative action. If all individuals receive the same opportunities to be educated, eventually the problems pertaining to the employment of unqualified individuals will also be addressed.

11. Do you have any other remarks?

Respondent nr. 18

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Gender: Female

Age: 25

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes, in fact I studied Industrial Psychology and a part of our studies is about Labour Law and includes AA and EE. I would say that AA is a good idea applied incorrectly. Nelson Mandela had the right idea with AA and even structured it correctly but what is currently happening in practice is not what was meant with AA.

2. Do you consider affirmative action measures to be necessary? Please explain.

I think AA is needed but what we are currently doing is incorrect. There is still a large gap between different races and something needs to be done in order to improve our situation but not what we are currently doing. Our current methods are also causing problems with the different race groups and possibly worsening racism in SA. We need to explore other options.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

I believe current measures are unjust and not benefiting SA at all. I am currently searching for an internship and the majority of the job postings say that they prefer BEE candidates and some even say "only coloureds and Indians need apply". This is unfair. I understand that preference is given to people of colour but it feels like why do I bother? I have also been told "don't even try; you're wasting your time". I just want an opportunity to be chosen despite my colour.

Further, as a white South African born after apartheid and who had nothing to do with apartheid, I feel discriminated against and that are current policies are racist. Even in school, you're not selected for provincial teams or district sport teams because you're not the "right" colour. We need to get to a point where we realise what we are currently doing is NOT working.

4. Do you consider the measures to be discriminatory? Please explain.

Yes. Think question 3 answers the question.

5. Do you think that the measures are helping the right people? Please explain.

No. If you look at statistics in the corporate world there are some improvement but if you look at population's statistics you will realise that not much have improved. The Africans are still suffering. The majority live under the poverty line and struggle to survive. Certain Africans are succeeding in this



regime but not all. These policies are only benefiting some and not all. Our policies and practices also benefit Africans, while other people of colour are left out.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

Definitely restricting, how can you get a job if you're asked not to even apply for it or you are not even considered because it's a BEE job and quotas needs to be met.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes. Mostly what I have already mentioned. Not even being considered for a job or asked not to apply.

8. In your environment, what is the general opinion on the affirmative action policy?

Majority of the opinion is negative. Unjust, unfair, discriminating, not working, causing problems, frustrating.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

Yes. Currently we are placing people in positions they are not qualified for. Take Jacob Zuma. He only has grade 3 under his belt. He is not educated and can't even understand that sacking the minister of finance will have consequences for SA's economy. How can this be our president? Or take the person he appointed after he fired the minister who asked why are we worrying about the exchange rate, while we buy in Rands. Or the Minister of health who gave potatoes to assist with the fight against HIV/Aids. Not medicine, but potatoes. Companies are just trying to fill their BEE quotas but not considering the consequences of hiring the unqualified.

The dream: Education. Start from the bottom up and educate. The masses need to be educated. Education should be up to standard and free for all.

Real solution: Educate companies and individuals. Teach them what is meant with AA and how to apply it correctly. Further teach every person their rights regarding AA and EE. If everyone understands what the law is then people cannot take advantage of it.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain..

Education. We need to extinguish the need for such policies and this will only be done by educating the masses and eliminating racism. We need to get to the point where race is not an issue. You hire for talent and quality and not for colour. How do you do that? I have no idea. Seems like a hopeless case.

11. Do you have any other remarks?

Good luck with your thesis.

Thank you for your cooperation!

Gender: Male

Age: 25

Race: White

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes. As a way to include black people in the employment sector which sometimes lead thereto that race are considered more important than merits.

2. Do you consider affirmative action measures to be necessary? Please explain.

Yes. We have a society where the far than greater portion of were, inter alia, economically excluded and therefore should there be some affirmative action. However, more than 20 years after the ned of Apartheid one must consider the viability of the current affirmative action measures.

3. Do yo consider affirmative action measures to be just and/or lawful? Please explain.  
explain.

Yes. As stated above was far than the greater portion of South Africans were economically excluded.

4. Do you consider the measures to be discriminatory? Please explain.

Yes. Any policy, legislation or otherwise which specifically excluded one race or culture with the purpose to benefit anther is considered discriminatory

5. Do you think that the measures are helping the right people? Please explain.

No. One cannot turn a blind eye to the rapidly growing middle class, however, BEE mostly benefit the well-connected few which then breaks down the prospects of BEE

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

I am a white male. I am literally at the bottom of the food chain on employability. However, BEE has forced me to push myself and make myself employable regardless of BEE

7. Do you have any experiences with affirmative action measures? If yes, please explain.

Yes. From school level and on the sport field preference was given to black people based on a quota system in picking provincial teams. And with work I have applied for preference is always given to AA candidates

8. In your environment, what is the general opinion on the affirmative action policy?

Very negative as the AA has been going on too long.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

YES. Too much emphasis is placed in replacing white with black faces. The focus should be placed solely on development and funding education from a primary level. Race should not be considered over merits as it is degrading to qualified black people and discriminatory to white people

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

See above

11. Do you have any other remarks?

Thank you for your cooperation!

Gender: Male

Age: 27

Race: Black

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1. Have you ever heard of affirmative action measures within the employment sector? If yes, how would you describe them?

Yes: The affirmative action measures in the employment sector are measures intended to empower previously disadvantaged members of our society in the employment sector.

2. Do you consider affirmative action measures to be necessary? Please explain.

Considering our recent horrible past experiences in our country where people used to be discriminated based on the colour of their skin, affirmative action measures are necessary to correct the injustices of the past to and equity in society.

3. Do you consider affirmative action measures to be just and/or lawful? Please explain.

Yes, they are lawful since they are intended to achieve substantive equality amongst members of our society. They take into account our background, status in the economy and previous experiences to determine the amount of support that we require to participate actively in the economy/employment sector.

4. Do you consider the measures to be discriminatory? Please explain.

Yes, the measures are discriminatory because they treat people differently. However, based on our constitution, the discrimination is fair since it is intended to correct the injustices of the past that are still prevalent in our country.

5. Do you think that the measures are helping the right people? Please explain.

Although the measures in the business sector have often benefited the rich and already business connected members of our society, in the employment sector, the measures have indeed helped to empower a number of black people who could not be where they are but for the measures.

6. Are you of the opinion that the measures are restricting or advancing your opportunities? Please explain.

The measures are advancing my opportunities, if it wasn't for them, as a black person, I would not be where I am today career wise.

7. Do you have any experiences with affirmative action measures? If yes, please explain.

I have no direct experience except being unexpectedly hired by a predominantly white company. I suppose the measures indirectly contributed to the hiring patterns and policies of the company.

8. In your environment, what is the general opinion on the affirmative action policy?

Most black people are grateful of the opportunities that they have been exposed to since the measures were introduced.. However other races are concerned that the measures have limited their opportunities.

9. Do you think that there are problems with the (current) affirmative action policy within employment? If yes, what are they and how can they be solved?

The only problem is that Black people are only hired at the staff level and not at the managerial level. The measures seem to have failed to bring meaningful race transformation at Managerial level.

10. If you do not agree with the (current) affirmative action policy, can you think of any alternatives? Or is the policy or an alternative not necessary at all? Please explain.

Although the measures are not perfect, I am convinced that they are the best that we have for now. What we need is more cooperation from the private sector and other races in supporting the measures and empowering black people to participate actively in sectors and industries where they were previously barred by law to participate in.

11. Do you have any other remarks?

None.

Thank you for your cooperation!

