

AFFIRMATIVE ACTION: A  
COMPARATIVE PERSPECTIVE

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*There is nothing more difficult to arrange, more doubtful of success, more dangerous to carry through, than to initiate a new order.*

Niccolo Machiavelli

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## AFFIRMATIVE ACTION: A COMPARATIVE PERSPECTIVE

### Chapter 1

#### Introduction

The issue of affirmative action is topical world wide, but is of particular relevance to South Africa, which is attempting to end discriminatory employment practices, and to promote employment opportunities for previously disadvantaged groups. The experience of other countries in striving for employment equity is thus of express interest.

This study will, of necessity, be restricted to specific areas. It begins by examining several definitions of affirmative action. This is followed by a discussion of the philosophical rationales for and against affirmative action. The examination then centres on selected international experiences of affirmative action. It then turns to the implementation of affirmative action in the South African context, from a constitutional and legislative view, looking at the Green Paper on Employment and Occupational Equity, and highlighting the similarities of Canadian employment equity legislation. The practical implementation of affirmative action in South African companies and local government is then explored. Finally, this study concludes with a discussion of the merit principle, as a guiding policy in the implementation of affirmative action, and a critique of the quota and job reservation system.

#### Definitions

Julio Faundez<sup>1</sup> defines affirmative action as treating persons belonging to a specific group differently so that they obtain an equitable share of a specified good. In the sphere of employment, its object is generally to ensure that the target group should be equitably represented in the workforce of a particular employer.

The Labour Market Policy Commission suggests the following definition of affirmative action as "...a policy and programme applied by an employer that is aimed at redressing the inequalities that exist within the workplace as a result of unfair discrimination."<sup>2</sup>

The US Commission on Civil Rights in turn gives, as Pierre Hugo suggests<sup>3</sup>, an

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<sup>1</sup> "Promoting affirmative action" Faundez J *Industrial Law Journal* (1994) 15(6) 1187

<sup>2</sup> "Restructuring the South African Labour Market", *Chapter 8 - Employment Equity*, Labour Market Policy Commission, Unpublished material from the Institute of Development and Labour Law, University of Cape Town, 140

<sup>3</sup> "The South African debate on affirmative action: learning cues from India, Malaysia and post-independence Africa.", Pierre Hugo, *Politeia* vol 12 no 1 1993, *Journal for the Political Science*, UNISA, 44

internationalised measure of the term, "[a]ffirmative action encompasses any measure, beyond simple termination of a discriminatory practice, adopted to correct or compensate for past or present discrimination or to prevent discrimination from recurring in the future."

Affirmative action then, entails firstly, a means of transforming the racial and gender composition of the workforce, through ending discriminatory employment practices, and the setting of targets or quotas, and secondly, more broadly, increasing the participation of previously disadvantaged groups in the economy as a whole. Not only should this bring about a more equitable distribution of economic spoils in society, it is theorised, but the increased economic activity of bringing more people into the main stream economy, should contribute to a more rapid economic growth. Affirmative action should thus be seen as being part of a broader developmental framework.

### **Discrimination**

According to DJ Joubert<sup>4</sup>, affirmative action can only be viewed against the background of discrimination. In the legal sphere, discrimination means an illegal, or ethically impermissible, decision, practice or policy that takes one of a number of legally or ethically forbidden factors (such as race or gender) into account when making that distinction. The Labour Market Policy Commission states that discrimination in the labour market occurs when non-productivity-related criteria (such as race, gender, age, ethnicity, disability, sexual orientation, and others) are relied upon in the allocation and utilisation of labour such as in recruitment, firing and retrenchment.<sup>5</sup>

There are several reasons Joubert highlights for prohibiting discrimination or for regarding it as unethical.<sup>6</sup> If a society is based on meritocracy, the purpose of excluding discrimination would be to exclude decisions based on non-meritocratic factors. Where a society is not based on meritocratic factors, then other values will be used in making decisions regarding the basis of permissible and impermissible discrimination.

Joubert notes<sup>7</sup> that Blumrosen distinguishes between three kinds of discrimination:

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<sup>4</sup> "Affirmative action in employment: The rationale" Joubert DJ *De Jure* (1994) 27(1) 116

<sup>5</sup> Labour Market Policy Commission 137

<sup>6</sup> Joubert 116

<sup>7</sup> Joubert 116-117

- (a) Discriminating with the motive of causing economic harm;<sup>8</sup>
- (b) using unequal treatment with the intention of causing economic harm;<sup>9</sup>
- (c) using an employment practice which has an adverse effect on members of a particular group (eg disadvantaged minorities in America, or females).<sup>10</sup>

The learned author<sup>11</sup> comments that the evil motive concept of discrimination referred to in the first two types of discrimination is, in American law, at the heart of "disparate treatment" remedies. Further, the adverse effect of discrimination in the third type of discrimination is, also according to American law, at the heart of "disparate effect" remedies. This third definition is related to the recognition of group interests, namely the realization that every member of a group has an interest in the status of every other member.

Joubert<sup>12</sup> concludes that discrimination that is based on race, colour or ethnic origin, is seen as a function of racism, and racism is regarded as wrong. The group which practices discrimination acts on the ideas contained in stereotypes to the disadvantage of the group discriminated against not because of lack of individual merit, but because of an imputed lack of merit.

MP Banton<sup>13</sup> comments that laws against discrimination do not prevent an employer from dismissing an inefficient worker because he or she is of a particular race. Rather, they are designed to prohibit an employer from dismissing a worker *on the grounds* of that worker's race or sex. This I interpret is in order to prevent or remedy the arbitrary nature of discrimination.

### **Remedial or preferential**

Joubert<sup>14</sup> mentions that affirmative action is either remedial or preferential.

Remedial affirmative action is intended to remedy past discrimination and, in the sphere of employment, refers to efforts to assure equality of access to employment opportunities for all qualified individuals and elimination of the effects of prior discrimination actually suffered. Preferential affirmative action

<sup>8</sup> eg refusing to employ a particular person.

<sup>9</sup> eg paying a particular person less than others.

<sup>10</sup> eg refusing to employ persons from a particular group.

<sup>11</sup> Joubert 117

<sup>12</sup> Ibid

<sup>13</sup> Banton MP *Discrimination* (1994) Open University Press 7

<sup>14</sup> Joubert 117

refers to preferential treatment given, formally or informally, to someone because of that person's race or gender, disability or other factor giving rise to the preferential treatment. Whereas the goal of remedial affirmative action in employment would be to achieve equality of access, the goal of preferential affirmative action would be to achieve representational parity (proportionality) in employment.

## Chapter 2

### Philosophical Perspectives

Julio Faundez summarises<sup>15</sup> the philosophical perspectives of affirmative action well.

#### Justice and equality

He asserts that justice and equality are connected in the sense that justice requires that like cases be treated alike.<sup>16</sup>

If A and B are exactly alike but one is given more of a good than the other, the discrimination in their treatment is arbitrary and hence inconsistent with justice. Conversely, unequal treatment between A and B would not be regarded as unjust if there is a justifiable ground for such unequal treatment. That is, unless A and B differ in some material respect, they ought to be treated equally.<sup>17</sup>

The argument is thus about whether using the same grounds to remedy discriminatory acts of the past can ever be justified: that is, whether reverse discrimination is permissible.<sup>18</sup>

#### Reverse discrimination

The reverse discrimination argument against affirmative action is, according to Faundez, as follows:

if arbitrary discrimination has occurred because morally irrelevant characteristics of persons - such as sex, religion or race - have been taken into account to treat them differently, it would not be morally permissible to take into account the same characteristics in order to compensate them for the initial act of discrimination.<sup>19</sup>

In other words, a ground for discrimination once found irrelevant is always irrelevant.

Those who oppose affirmative action contend that is an inappropriate form of compensation. Although they will allow for the principle of compensation to prevail

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<sup>15</sup> Faundez *Affirmative Action* 3

<sup>16</sup> Ibid

<sup>17</sup> Ibid

<sup>18</sup> Faundez *Affirmative Action* 4

<sup>19</sup> Ibid

over the rule of distribution in some circumstances. For example, should the same employment position become available at a subsequent time, Goldman<sup>20</sup> accepts that the victim of discrimination should be preferred over a better-qualified candidate for the same position.

### **Compensation for past wrongs**

James Nickel<sup>21</sup> puts up a strong defence of affirmative action, denying that it involves discrimination. According to him, the preferential treatment involved in affirmative action for purposes of reparations is not based on a morally irrelevant characteristic, but on the fact that members of that group were treated unfairly because of their race. He continues to argue that, the characteristic which was the basis of the act of discrimination, is not the same as the characteristic which is used to extend preferential treatment under affirmative action programmes. Hence, Nickel concludes, affirmative action cannot be regarded as discrimination in reverse.

A criticism has been levelled at Nickels defence of affirmative action on the grounds that it is based on a theory of group rather than individual rights.<sup>22</sup> Cowan<sup>23</sup> believes that affirmative action can only be justified as remedy to benefit those individuals who have suffered unjust discrimination. One can explain this by using the example of Bill Cosby. It is arguable that his children would not need to benefit from affirmative action programmes, due to their privileged upbringing.

However, Nickel<sup>24</sup> insists on his original formulation on the grounds of efficiency. This is because often *most* members of a group have been victimized by discrimination, and the only administratively feasible way of providing reparations to the individual victims is by instituting affirmative action programmes which benefit all the members of a given group.

But is this necessarily so? Goldstone suggests an alternative means to objectively assess deprivation, which is discussed below.

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<sup>20</sup> Quoted in Faundez *Affirmative Action* 4

<sup>21</sup> Quoted in Faundez *Affirmative Action* 4-5

<sup>22</sup> Faundez *Affirmative Action* 5

<sup>23</sup> Quoted *ibid*.

<sup>24</sup> Quoted *ibid*

## Group and collective rights

Paul Taylor<sup>25</sup>, unconcerned with the argument about reverse discrimination, advocates a straightforward recognition of group rights. According to Taylor,

when members of a given group are victims of unjust discrimination because of their membership of the group, compensation is owed to the group as such, and not just to the individual members of the group who have been victims of discrimination. Membership of the group, under this view, is not accidentally associated with the unjust treatment, but it is essentially tied to it. The argument goes one step further to suggest that because membership of the group is essentially tied to the discriminatory social practice it is also a morally relevant characteristic for the purpose of applying the principles of compensatory justice.<sup>26</sup>

Faundez quotes<sup>27</sup> Taylor concluding that to deny the existence of the group is to deny a social reality - a reality which cannot morally be ignored as long as the wrongs that created it are not corrected.

## Distributive justice - principle of utility

Faundez offers<sup>28</sup> this succinct description:

The principle of utility is one of the principles of distribution which can be used to justify preferential treatment of groups. According to this principle, the good things of life should be distributed in accordance to the rule of the greatest good of the greatest number. Accordingly, if the social benefits brought about by affirmative action outweigh the harm to which it gives rise, then, under a utilitarian approach, affirmative action would be justified.

Thus affirmative action which favours groups can be justified on the ground that it furthers social cohesion and integration. It is argued that since affirmative action brings about greater equality amongst groups, social tension is reduced and the prospects of speedy social or national integration increase. The affirmative action programmes in Malaysia and India are cited as examples which might be justified on this ground.<sup>29</sup>

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<sup>25</sup> Quoted *ibid*

<sup>26</sup> Faundez *Affirmative Action* 6

<sup>27</sup> *Ibid*

<sup>28</sup> Faundez *Affirmative Action* 7

<sup>29</sup> *Ibid*

Additionally, it is seen as desirable to achieve representativeness in the workforce or student population. It is argued that preferential treatment may be justified on the grounds of *efficiency* since productivity may be enhanced by having a more heterogeneous workforce, for example a police force operating in an ethnically mixed area.<sup>30</sup>

Social utility may also justify preferential treatment when the service to be performed by those who benefit from the preference would not have been performed otherwise, or when it has a beneficial effect on the expectations of the members of a particular group.<sup>31</sup> Nagel cites<sup>32</sup> the example of increasing the number of black doctors in a black community. Either a massive expansion of total medical school enrolment could take place, or preferential treatment to black admissions could be given. The factoring of costs would lend weight to the later argument.

### **Alternative approaches - the "Goldstone doctrine"**

Judge Goldstone offers a perspective<sup>33</sup>, which attempts to move the debate towards a programme in which objectively assessed deprivation is a preferable criteria for affirmative action, as opposed to an exclusive focus on race. Such a move away from an obsession with race would be more in keeping with the attempt to create a more harmonious society. It also deflects the criticism of reverse discrimination. It is well worth quoting this perspicacious viewpoint in length.

I believe that one can find objective criteria from race both in the education field and in the employment field. One can find criteria such as bad school education. I believe that one such criteria could be the attendance of a Department of Education and Training school. That would qualify somebody to benefit from Affirmative Action. Other criteria could be, for example, living in a squalor or other bad conditions, not having had a proper environment for developing one's school years (sic), and having to live in exile or having been a political detainee. I believe that these are objective criteria and they are important for this reason, mainly because they do not just assume that people deserve the benefit of Affirmative Action simply because of their skin colour. These and other criteria will enable to be deserved (sic) Affirmative Action to get it. At the same time, they also carry with them, I believe, an automatic end to Affirmative Action programmes. By this I mean that as more and more South Africans receive a decent education and as more and more South Africans live in decent circumstances, the need for people to receive the benefits of Affirmative Action

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<sup>30</sup> Ibid

<sup>31</sup> Ibid

<sup>32</sup> Quoted ibid

<sup>33</sup> Quoted in Hugo 53

will slowly disappear.

This is, with respect, a powerful and persuasive argument indeed. It projects a more focused form affirmative action, where those who truly are in need of remedial action receive it. In other words, such an objective approach can overcome the problem of "the free rider", to borrow a term from political philosophy.

It also recognises the fact that affirmative action is a temporary measure, designed to level the playing field, so to speak. Thus some of the danger of a group gaining a vested interest the privileged treatment it receives, and fighting for its maintenance is diminished. This has been a significant problem in India and Malaysia especially since the intended beneficiaries of affirmative action policies are in the majority. Indeed in Malaysia, the system of special privilege has become so pervasive, that no criticism or even debate about the issue is permitted.

Dr Mamphela Ramphele, vice-chancellor of the University of Cape Town shares a similar sentiment to Judge Goldstone. Her belief, as quoted in an article in the Financial Mail<sup>34</sup>, is that affirmative action will have no moral or ethical basis until criteria move from race to geographic and socio-economic disadvantage. Only then, she argues, will public policy intervention have "a more rational basis."

The development economist Nicky Natrass<sup>35</sup>, talks of "the complex network of power differentials within SA society. Racial cleavages are cross-cut with rural-urban, gender, class, regional and cultural divides which complicate the nature of disadvantage and discrimination."<sup>36</sup>

The problem with the usual conception of affirmative action then, as the Financial Mail points out<sup>37</sup>, is that it is a crude policy instrument. Whilst its intention is to help the disadvantaged, to lift them out of the poverty trap caused by past discrimination, it is, however mostly framed in general terms, with little attention paid either to gender or other considerations.<sup>38</sup>

The general thrust of the above arguments, seem to be that affirmative action, as traditionally framed, offers too simple a solution to a very complex issue. The needs of the disadvantaged members of society are thus inadequately met, unless

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<sup>34</sup> "Affirmative Action - Experienced by Whites as Reverse Discrimination", Financial Mail, 18 October 1996, 30

<sup>35</sup> In a dissenting opinion on a presidential commission which investigated labour market policy in 1996

<sup>36</sup> Financial Mail 30

<sup>37</sup> Ibid

<sup>38</sup> Ibid

deprivation is objectively assessed and targeted for remedial action.

## Chapter 3

### Legislative Framework

We now turn to the legislative framework within which affirmative action is implemented regards providing equal opportunity.

#### Interim Constitution

Nicholas Smith describes<sup>39</sup> subsection 8(1) of the interim Constitution of South Africa as guaranteeing every person equality before the law and the equal protection of the law. He adds that subsection 8(2) provides that no person shall be unfairly discriminated against. Further, the section also provides that not all unequal treatment will be unconstitutional; subsect 8(3) reads:

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

Smith concludes<sup>40</sup> that this subsection protects affirmative action programmes from being automatically struck down in terms of the other subsections of the equality provisions.

#### The Green Paper on Employment and Occupational Equity

The Green Paper then seeks to eradicate all forms of discrimination in the labour market. The Summary describes<sup>41</sup> the aim of employment equity as, "to help redress disadvantages emanating from past racial policies and, as far as possible, to ensure the accommodation of differences between people in the workplace." It goes on further to define employment equity as centring on:

1. [E]radication of unfair discrimination of any kind in hiring, promotion, training, pay, benefits and retrenchment, in line with Constitutional requirements. The government will give individuals easier access to remedies.
2. [M]easures to encourage employers to undertake organisational transformation to remove unjustified barriers to employment for all South Africans; and to accelerate training and promotion for individuals from historically disadvantaged

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<sup>39</sup> Smith N "Affirmative action under the new constitution" 85

<sup>40</sup> Ibid

<sup>41</sup> Government Gazette No.17303, 1 July 1996, 6

groups.<sup>42</sup>

According to the Summary, employment equity fits in the context of the deep inequalities in income and status associated with race and gender in South Africa. The approach taken then, combines anti-discrimination measures to protect individuals with measures to encourage institutional and cultural change by employing organisations.

More specifically, as a Naledi Policy Memo points out<sup>43</sup>, the Green Paper advances the following measures to bring about organisational change:

- prohibition of harassment on the job;
- decision-making about career events;
- an organisational audit;
- employment equity plans.

The first two of these measures are designed to prohibit harassment in the workplace (such as hate speech or sexual harassment), and discrimination in selection and recruitment. The organisational audit and employment equity plans are discussed in more detail:

### **The Organisational Audit**

The conducting of an organisational audit is meant to provide employers, employees and other stakeholders with the requisite information to decide on "realistic and efficient steps to change."<sup>44</sup> The Green Paper lists the following information which the audit should provide:<sup>45</sup>

- employment, pay and benefits by race, gender and disability;
- programmes and policies on human resource development;
- organisation of work in terms of skills and responsibilities;

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<sup>42</sup> Ibid

<sup>43</sup> "From Formal Equality to Equity' - An Examination of the Green Paper on Employment and Occupational Equity.", Roseline Nyman, Naledi (National Labour & Economic Development Institute) Policy Memo, August 1996, 2

<sup>44</sup> Government Gazette 36

<sup>45</sup> Nyman 4

- transport, housing and caring arrangements by race and gender;
- languages used and language competence;
- physical facilities for disabled people and women;
- procedures for hiring, training, promotion, retrenchments and transfers;
- grievance and internal procedures.

The Green Paper describes the process as follows:<sup>46</sup>

The process starts with the organisational audit. On that basis, the plan can identify ways to eliminate obvious barriers to historically disadvantaged groups. Ultimately, it should lead to a thorough review of work organisation, grading systems and training. Generally, it should help employers develop greater flexibility in recognising and using skills, improve career pathing and enhance access to training.

The Green Paper comments further that:<sup>47</sup>

The development and implementation of employment equity plans must go hand in hand with broader efforts to create an affirming environment. Fair and open labour relations and respect for human rights and diversity form a critical foundation for employment equity. Employers and employees should participate in training on conflict management, cultural and gender diversity and institutional change.

The Naledi Policy Memo is unclear as to whether the organisational audit will be restricted to workers or extended to management.<sup>48</sup> However it recommends that the total organisational hierarchy should be subject to scrutiny. Thus it believes that not only wages, but director's share of profits should be disclosed. This latter requirement, if correct, will prove to be extremely controversial, given the question of the violation of the right to privacy which it provokes.

The Memo believes that public access to the document will facilitate government's role in collating, centralising and interpreting the information and thus expedite the monitoring process.

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<sup>46</sup> Government Gazette 37

<sup>47</sup> Ibid

<sup>48</sup> Nyman 5

## Employment Equity Plans

The Memo describes the employer's responsibility to draft employment equity plans as probably the most important feature of the Green Paper's recommendations.<sup>49</sup> It continues by stating that employment equity should play the role of a programme for workplace change and some of the measures include:

- a profile of employees by race, gender and disability identifying areas;
- measures to :
  - restructure procedures for hiring, training, promotion, retrenchment and transfers to prevent discrimination;
  - identify and minimise aspects of work and training that hinder people from historically disadvantaged groups;
  - accelerate more equitable recruitment training and promotion to make people from historically disadvantaged groups more representative;
  - develop an organisational culture that welcomes diversity;
- goals and timetables for implementation;
- details on the role of unions and other stakeholders.

The Memo adds<sup>50</sup> that more detailed measures entail plans for building physical infrastructure to accommodate women and disabled people and the investigation of more flexible working hours, work-related day-care and assistance with transport and housing - which should aid women in particular.

Interestingly, the Memo, adopting a pro-labour stance, criticises the omission of quotas as a specific policy recommendation<sup>51</sup>. This omission is justified, according to Mpho Mokwana, equal opportunities director at the Ministry of Labour, on the basis that, "the Green Paper does not in any way propose draconian laws to coerce anyone," and that, "[w]e cannot have laws for the sake of having them, without being able to enforce them."<sup>52</sup>

The Memo comments as follows:<sup>53</sup>

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<sup>49</sup> Ibid

<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Ibid

<sup>53</sup> Ibid

It is problematic that Mokwana labels coercion draconian. If discrimination is outlawed by the Constitution, the highest law of the land, then compulsion to eradicate such discrimination is justified. It is not acceptable to reason that because laws cannot be enforced, therefore we should not have them. The fact that the state is unable to combat crime effectively does not mean we should call for the abolition of criminal legislation. It means we should evaluate the institutions that have to enforce legislation. In any event, the state is not the only enforcement agent.

The Memo argues further that "[t]o propose the development of goals and timetables without set quotas means employers will not have sufficient direction to ensure the implementation of real change."<sup>54</sup> Therefore, so the Memo reasons, "[a] degree of compulsion is necessary to bind (sic) employers to redress the racial and sexual imbalances in the workforce."<sup>55</sup>

Aside from any practical considerations of enforcement however, a system of quotas and job reservations is seriously flawed - as is commented on further elsewhere in this paper. It brings with it a number of unintended negative consequences, as experienced by India and Malaysia. Instead of being a means of rectifying past imbalances, it can have the effect of entrenching sectoral interest in the indefinite preservation of the system, and can exasperate social cleavages. For this reason, it is welcome that the Green Paper proposes an alternative approach to encouraging employment equity, which we will turn to presently.

### **Incentives and Sanctions**

The Green Paper proposes incentives that will favour employers who promote employment equity, such as the granting of government tenders and providing subsidies.

In regards to sanctions, the Department of Labour will explore administrative and legal sanctions for non-compliance, including the imposition of fines.

In disputes about employment equity, the CCMA or Labour Court may require an employer to take corrective action, such as promoting an employee who was denied promotion on discriminatory grounds.

### **Assessment**

#### **Targets**

The setting of realistic targets would seem to be the most feasible means of

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<sup>54</sup> Naledi Policy Memo 6

<sup>55</sup> Ibid

increasing the representation of disadvantaged groups in the workforce. As the experience of the Greater Benoni City Council illustrates, if there are no black civil engineers currently available to fill posts, that fact cannot simply be remedied by the setting of quotas or reserving jobs. A long term perspective, which takes into account the reality of the skills available in the job market, is preferable.

However it remains to be seen whether the government will have the political will to sustain a system of targets, in the face of pressure for quotas from the organised labour movement. The approximate economic growth rate of the country in the foreseeable future is a slow 3 to 4 per cent per annum. As the experience of South African Breweries (discussed elsewhere) demonstrates however, the implementation of meritorious affirmative action is more successful, and rapid, where there is high economic growth and expansion. Therefore, even if most entry level positions are granted to affirmative action candidates, and affirmative action is actively promoted in senior management positions, the speed of implementation may not match popular expectations.

#### Incentives

The provision of incentives to encourage the promotion of employment equity is certainly preferable to quotas and job reservation. However, this system is by no means perfect. There is a very real danger of nepotism and corruption, as the example of Zimbabwe demonstrates.

Furthermore, the example of Malaysia demonstrates that minority groups such as the Chinese and can still maintain their hegemony in the economy, through the setting up of "front companies." These are ostensibly run by Malays, but are in effect controlled by Chinese owners. If one were to be quite cynical, one might compare this to the number of "black empowerment groups" which are part of any consortia applying for radio or gambling licences in South Africa today. One needs to question whether previously disadvantaged groups are truly benefitting, or a new elite is merely being created. Thus any system proposing favouritism in a tendering process needs to be treated with circumspection.

In the United States, a variety of laws, administrative regulations and court rulings, have aimed at providing access to public and private goods such as government jobs and business contracts to racial, ethnic or communal groups deemed to have been unfairly deprived of such access.<sup>56</sup>

Although South Africa has a tradition of a non-activist judiciary, the new administrative regime may play a similar supervisory and enforcement role to the courts in the United States.

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<sup>56</sup> Hugo 44

### Sanctions

Regarding the imposition of sanctions, this might provide the compulsion of employers needed to effect change that the Memo calls for, without having to resort to the invidious measures of quotas and job reservation.

In Germany, very heavy fines against companies that discriminate against disabled people, seems to be quite effective. Therefore, such a system of sanctions, so long reasonable and fair in their imposition, may prove to be equally effective in South Africa.

There is a danger here that companies may be tempted to put members of formerly disadvantaged groups into token positions, simply to escape being fined. An effective organisational audit may temper this, by determining whether people are really being utilised in their functions. But at the end of the day, it is the companies themselves that will bear the costs of such a short-sighted approach.

### The Institutional Framework

The Memo summarises the institutional framework within which the proposed employment equity legislation will work.<sup>57</sup>:

#### The Department of Labour

Responsible for ensuring compliance with the proposed legislation and codes of practice.

#### The Directorate of Equal Opportunities

Will guide the process of policy formulation and implementation. Its tasks will include:

- developing codes of good practice;
- establishing regulations that define when a company must submit plans and how to assess the plans;
- examining employer's workplace practices;
- establishing performance indicators and timetables; and
- establishing machinery for the collection and collation of data from the relevant employers, and ensuring its translation into statistics.

#### The Labour Inspectorate

Will undertake monitoring and enforcement activities.

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<sup>57</sup> Nyman 6

**Bargaining Councils**

Submit regular reports to the Minister of Labour to establish sectoral patterns and norms.

**The Commission for Conciliation, Mediation and Arbitration (CCMA)**

Responsible for resolving workplace disputes through conciliation, mediation and arbitration.

**The Employment Equity Advisory Council (EEAC)**

An advisory council to the Minister of Labour which tasks include giving expert advice and monitoring progress.

**Assessment**

Mokwana refers above to the lack of capacity to enforce draconian laws, as a reason for not implementing a quota system. There may be a concern that administering sanctions and incentives could prove a burdensome task as well. The large bureaucracy required to ensure compliance with the proposed legislation, as outlined above below, threatens to be both expensive and unwieldy. However, a similar bureaucratic structure seems to operate quite effectively in Canada.

**Employment Equity Legislation in Canada**

Canada provides a useful comparison to further assess the proposed measures of the Green Paper. Indeed the Canadian Charter of Rights and Freedoms (the Charter) provided inspiration for much of South Africa's Bill of Rights, and it appears that the influence of Canadian jurisprudence has extended to equity legislation.

Subsection 15(1) of the Charter<sup>58</sup> has similar provisions relating to equality rights to subsection 8(1) of the interim Constitution of South Africa. These guarantee every person equality before the law and the equal protection of the law.

Subsection 15(2) of the Charter, in turn also has a similar provision relating to affirmative action, to that of subsection 8(2) of the interim Constitution (referred to earlier). Subsection 15(2) reads as follows<sup>59</sup>:

Subsection (1) does not preclude any law, programme or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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<sup>58</sup> As quoted in "National Employment Equity Programmes - A Canadian Perspective on their Evolution and Implementation in the Private and Public Sectors", Jules Oliver, *Affirmative Action in the New South Africa*, published by the Centre for Development Studies at the University of the Western Cape, 1992, Cape Town, 88

<sup>59</sup> Ibid

This provision thus allows for employment equity legislation to be enacted, which we will turn to presently.

In June 1983, Judge Rosalie Silberman Abella was commissioned to look into "the most efficient, effective and equitable means of promoting employment opportunities, eliminating systematic discrimination and assisting all individuals to compete for employment opportunities on an equal basis."<sup>60</sup>

Oliver suggests that the report of Judge Abella's Commission was so cogently argued that the federal government of Canada enacted the Employment Equity Act in 1985, based in large part on her recommendations<sup>61</sup>. It is therefore useful to examine the philosophy underlying her recommendations:<sup>62</sup>

Equality in employment is not a concept that produces the same results for everyone. It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential. Sometimes equality means treating people the same, despite their differences, and sometimes it means treating them as equals by accommodating their differences.

There are four "designated groups" who are the primary focus of employment equity legislation in Canada. They are: women; Aboriginal peoples; disabled persons and visible minorities. Together they account for about 60 per cent of the Canadian population.<sup>63</sup>

Of interest is that Judge Abella's Commission proposed that the term "affirmative action" be replaced by "employment equity" to describe programmes of positive remedy for discrimination in the Canadian workplace. Her reasoning follows:<sup>64</sup>

Often the words themselves rather than the issues trigger intellectual resistance. Their use almost instantly produces a protective wall through which reason cannot easily penetrate. ... People generally have a sense that "affirmative action" refers to interventionist government policies, and that is enough to prompt a negative reaction from many. ... In devising their unique programmes, the Americans have called it affirmative action. In most people's minds, it has become associated with the imposition of quotas. In creating our own programme in Canada, we may not

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<sup>60</sup> Oliver 89

<sup>61</sup> Oliver 90

<sup>62</sup> Ibid

<sup>63</sup> Oliver 89-90

<sup>64</sup> Oliver 90

wish to use quotas.

Oliver mentions<sup>65</sup> that now both "quotas" and "affirmative action" are now nearly taboo in the lexicon of the federal public service.

Besides issues of the ability to enforce "draconian legislation", and the impracticality of imposing quotas, perhaps there has been the realisation amongst the drafters of the Green Paper, like those of the Canadian legislation, of the negative reaction that interventionist policies such as quotas induces. This may also reveal the reason for the conscientious avoidance of the term "affirmative action" in the Green Paper in preference for "employment equity". The best chance of employment equity legislation succeeding, I would argue, lies not so much in the threat of sanctions, but in the acceptance by employers of the moral and commercial value of equitable employment practices. Thus the use of antagonistic terminology and the negative perception it provokes should be minimised.

### **The Employment Equity Act**

Oliver describes the application of the Employment Equity Act (the Act) as follows<sup>66</sup>: The Act is administered by the Employment Equity Branch of the Department of Employment and Immigration (EIC). It applies to all federally regulated employers with 100 or more employees, in both the private and public sectors, except for the Public Service of Canada. This effectively covers around 375 companies and institutions employing more than 630,000 people.

Employers are responsible for the following<sup>67</sup>: Firstly, the identification and removal of artificial barriers to the hiring, promotion and training of women, Aboriginal peoples, visible minorities and persons with disabilities, and the taking of special measures for the elimination of discrimination in the workplace.

Secondly, working to achieve a representative workforce which reflects the demographic make up of the available labour force in the area. In other words, as Oliver puts it<sup>68</sup>, "... the employer's workforce should contain approximately the same proportions of the four designated groups, in each occupation, as are known to be available in the outside workforce." This recognises, I would reason, that employers are only able to employ as many of those from designated groups, with the requisite skills, that are available.

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<sup>65</sup> Ibid

<sup>66</sup> Oliver 91-92

<sup>67</sup> Oliver 91

<sup>68</sup> Ibid

Thirdly, the annual submission of a comprehensive report on their results; according to industrial sector, geographic location and employment status (ie full or part time.) The report must include the representation of members of the four designated groups in specific salary ranges, occupational groups, and by hirings, promotions and terminations. The fine for failing to report is up to \$50,000. The EIC is tasked with verifying the reports.

Fourthly, the preparation of an annual employment equity plan, with goals and timetables.

The above duties on employers, which Oliver lists, have a familiar echo in the proposals of the Green Paper. Another country with a similarly comprehensive system is Australia, and it is useful to examine its legislation. Albertyn lists<sup>69</sup> the eight-point plan for sex-based affirmative action for all private sector employers with more than 100 employers:

1. A policy statement on affirmative action must be developed and communicated to all employees.
2. A senior manager must be appointed to develop, implement and coordinate the affirmative action programme.
3. The trade union and all other employees must be consulted about the programme.
4. A statistical analysis and profile of the workplace must be reviewed.
5. All existing practices and policies must be reviewed.
6. The enterprise then sets its own objectives and goals.
7. There are no quotas
8. The programme must be monitored and evaluated. A public report must be prepared on the workforce profile and outline of the programme and a separate confidential report must be prepared on the details of the programme.

Further similarities to the Green Paper, in terms of the proposed incentives to encourage employment equity, can be found in Canadian Federal Contractors Programme (the Programme), relating to government tenders.<sup>70</sup> Oliver observes<sup>71</sup> that

<sup>69</sup> Quoted in "Shades of voluntarism and compulsion: towards effective implementation of affirmative action in South Africa" D Coldwell, South African Journal of Labour Relations Vol. 18 No. 3 September 1994, 58

<sup>70</sup> Government Gazette 43

the Programme was instituted in 1986 and applies to any company with 100 or more employees that wishes to bid for the supply of goods or services to the federal government worth \$200,000 or more. Such companies have to commit themselves to implementing employment equity and must certify their commitment as a condition of their bid. Successful bidders are subject to stricter scrutiny by the EIC. The coverage of the Programme has been large with 1,350 firms, representing one million employees, having signed certificates.

The EIC also offers a service to employers in the form of seminars, technical information, and published guides to employment equity.<sup>72</sup> There are 500 Canada Employment Centres across the country which have experienced consultants to offer advice and assistance on implementing employment equity plans.<sup>73</sup> Similar assistance will probably also be required in South Africa, where many companies will be embarking on employment equity programmes for the first time.

Oliver notes<sup>74</sup> that:

The government believes that one of the most effective mechanisms for enforcing the Employment Equity Act is public scrutiny. All reports from employers are publicly available. The Act requires that an annual report on employment equity be published and tabled in Parliament, and the report is distributed widely.

For the pressure of public sentiment to have similar effect in South Africa, people would have to become more conscious of the ethical and commercial desirability of employment equity.

Of related interest is the hiring policy of the Public Service Commission (the Commission). Oliver notes<sup>75</sup> that it is responsible for the recruitment, hiring and promotion of Canada's federal public servants which number some 218,000. The cornerstone of the Commission's staffing system is merit. Merit is understood to encompass two related concepts: "that a reasonable opportunity to be considered for employment should be available to all Canadians, and that selection should be based on demonstrated skills and abilities to do the job."<sup>76</sup>

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<sup>71</sup> Ibid

<sup>72</sup> Oliver 92

<sup>73</sup> Ibid

<sup>74</sup> Ibid

<sup>75</sup> Oliver 94

<sup>76</sup> Ibid

It is hoped that South Africa will adopt a similar policy of meritorious hiring practices in the civil service, least the disastrous inefficiencies of many post-independence African bureaucracies, where this attribute was ignored, afflict South Africa, .

To continue, Oliver sees the challenge in the public service, as learning how to extend equity beyond employment, so that they will have equity in employment.<sup>77</sup> She this explains as follows:<sup>78</sup>

[T]he challenge will be (sic) not only to attract and recruit talented workers from designated groups, but also to manage and value diversity within the workforce, and to see it as an integral aspect of sound human resource management. The Commission has been at pains to stress that employment equity is part of the merit system, which is itself dynamic.

### **Assessment**

In summation, Oliver points to a central precept of Canada's experience in national employment equity programmes, which has a key lessons for other countries. She observes the following:<sup>79</sup> "Employment equity can be achieved more effectively through a comprehensive, systems-based and results-oriented approach. It is imperative that this approach be actively supported through well-focused training and development tools for all employees, and be fully integrated in every aspect of human resource management."

Oliver also points to four minimum objectives which any mandatory programme, whether in the private or the public sector, will most likely require:<sup>80</sup>

- the equitable representation of designated groups, taking into account work-force availability, the evolving social and economic situation of the groups, and the organisations' operational goals.
- the identification and removal of systemic barriers in employment systems, policies, procedures and practices that have had an adverse effect on the employment and the career progression of the designated groups.
- the implementation of special measures to correct the effects of employment disadvantages and to promote the work-force participation of the designated groups, and

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<sup>77</sup> Oliver 95

<sup>78</sup> Ibid

<sup>79</sup> Oliver 98

<sup>80</sup> Ibid

- the training and development of managers, supervisors and employees in the skills required to manage and work effectively with a diverse workforce.

Finally, Oliver notes<sup>81</sup> that it is a slow and incremental process. The following tables indicate the progress reported.

Private Sector Companies and Large Crown Corporations<sup>82</sup>

	Beginning of 1988	End of 1989
Women	40,9%	42,55%
Aboriginal peoples	0,66%	0,79%
Disabled persons	1,59%	2,34%
Visible minorities	4,99%	6,68%

Public Service of Canada<sup>83</sup>

	Beginning of 1987	End of 1990
Women	42,4%	44,4%
Aboriginal peoples	1,8%	1,9%
Disabled persons	2,6%	3,1%
Visible minorities	2,7%	3,5%

Whilst encouraging in general, Oliver points out<sup>84</sup> that in only one group, namely visible minorities in the private sector, does their representation of 6,68 per cent exceed their representation in the general labour force, ie 6,3 per cent.

The implication for South Africa, is that increasing the representation of formerly disadvantaged groups is likely to be an equally slow process. This will be particularly so where economic expansion is not rapid, a fact which aided Malaysia's affirmative action programme, for instance. This reality throws into stark contrast the suggested targets which the Black Management Forum (BMF) advocates. Coldwell points out<sup>85</sup> that despite blacks counting for less than 3 per cent (in 1994) of managerial positions,

<sup>81</sup> Oliver 98

<sup>82</sup> Ibid

<sup>83</sup> Oliver 99

<sup>84</sup> Ibid

<sup>85</sup> Coldwell 58-59

the BMF objective is for 50 per cent of junior managers, 30 per cent of senior managers, 20 per cent of executive and 30 per cent of non-executive directors to be black by the year 2000.

Coldwell points out<sup>86</sup> that the BMF advocates "meritorious empowerment" through opportunity and development, with merit being assessed on fair, objective and non-culturally biased standards. This, according to Coldwell, suggests an ambiguity in the BMF's objectives; rapid quantitative affirmative action on the one hand, and qualitative meritorious empowerment on the other. These dual objectives, the author reasons, whilst laudable in what they set to achieve, are fundamentally incompatible.

Industrial relations consultant Larry Park is also quoted by Coldwell<sup>87</sup> as indicating that with formal sector labour turnover being between five and ten per cent per annum at different managerial levels, there simply will not be enough scope for such substantial progress with affirmative action to be made.

Further, South African Breweries, a company with significant resources and commitment to an affirmative action programme, has taken over 20 years to achieve a ratio of over 50 per cent black management. Whilst no-one would suggest that companies take 20 years to effect transformation, the fact is that affirmative action, if it is not to be 'tokenism' or 'window dressing', is not a 'quick-fix' process.

Oliver concludes<sup>88</sup> that Canada's challenge, as it moves towards the next century, is to ensure that employment equity is fully realised, a position I believe they are well poised to achieve. The learned author also points out that managing diversity is a management skill imperative of the 1990s. This is especially true in South Africa, where such skills will be vital, if South Africa wishes to transform her companies in order to become globally competitive.

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<sup>86</sup> Coldwell 59

<sup>87</sup> Ibid

<sup>88</sup> Oliver 99

## Chapter 4

### International Experiences

#### Malaysia

Mavis Puthucheary<sup>89</sup> believes that Malaysia offers an interesting comparison to South Africa since the target group for affirmative action policies is also the majority group. However, importantly, the non-target group in Malaysia have never been in a position of political power. The minorities in Malaysia, Chinese<sup>90</sup> and Indians<sup>91</sup>, benefited due to their being able to take advantage of economic opportunities within the system, and not through targeted public policies. Historical discrimination in Malaysia was therefore indirect, consisting of structural constraints on Malay participation in the modern economy rather than domination and exploitation of Malays by other groups.

Puthucheary<sup>92</sup> believes it is also important to understand the bases for introducing affirmative action programmes which are aimed at benefitting the majority group. Firstly, at the time of the drafting of the Constitution, the Malays did not form a distinct demographic majority of the population of Malaysia. Although constituting the largest single community, they were a little less than 50 percent of the population.<sup>93</sup> Therefore, constitutional guarantees assuring affirmative action for the economically disadvantaged were seen as an inherent part of the Constitution, which couldn't be changed in the future.

Secondly<sup>94</sup>, the argument for affirmative action was based not only on socio-economic grounds, but on political grounds as well. Malays had a 'special position' in the political system as the original people of the country, the 'sons of the soil'.

Thirdly<sup>95</sup>, since preferential policies favouring Malays had been introduced under the colonial regime, the argument was that any attempt to deny Malays these privileges would be tantamount to taking away something from this group.

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<sup>89</sup> Puthucheary M "Malaysia: Safeguarding the Malays and the interests of other communities." *Development and Democracy* 22

<sup>90</sup> Constituting 35 per cent of the population (Thompson 1992:5)

<sup>91</sup> Constituting 10 per cent of the population (Thompson 1992:5)

<sup>92</sup> Puthucheary 24

<sup>93</sup> Now approximately 54 per cent of the population (Thompson 1992:5)

<sup>94</sup> Puthucheary 24

<sup>95</sup> Ibid

In addition to the provisions in the Constitution providing for preferential policies for Malays, certain safeguards protecting the 'legitimate interests' of the other communities were provided for. Provisions in the Constitution gave assurances to non-Malays that they would not suffer any blatant discrimination, in the implementation of the policies. In establishing quotas for public service employment, or reserving scholarships, business permits or licences for Malays, these policies should be implemented in such a way that it "shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges enjoyed by him."<sup>96</sup>

### **Results of the policies**

Puthuachery<sup>97</sup> believes an assessment of the results of affirmative action depends on how success or failure is measured. If it is measured in terms of equality of results, she feels there is no doubt that the distribution of income, wealth and occupations among individuals reflects a more balanced ethnic mix. The affirmative action programmes have contributed to the establishment of a Malay business community, and a more ethnically balanced urban community has developed. By 1980 75 per cent of the students in institutions of higher learning were Malays. Ownership by Malays of share capital also increased considerably in absolute terms, increasing from less than 2 per cent in 1970 to about 18 per cent in 1990.<sup>98</sup> Thompson<sup>99</sup>, citing Plaut, accounts the ownership by Malays of corporate assets as having risen from a share of just under 35 per cent in 1970 to 66 per cent in 1990.

The most significant change over the 20 year period, Puthuachery contends, has been the reduction in the incidence of poverty. Rural poverty has fallen from 68.3 per cent of the population in 1970 to 46.1 per cent in 1980 and is estimated at about 21.8 per cent in 1990.<sup>100</sup>

Even more remarkable, the learned author believes<sup>101</sup>, was the fact that affirmative action programmes were implemented within a framework of over-all economic development of the country. Several 'favourable conditions' allowed this to happen. Practically the same multi-ethnic political party in power since 1969 ensured a high degree of political stability. Foreign investment, which was attracted by various tax

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<sup>96</sup> Puthuachery 26

<sup>97</sup> Puthuachery 29-30

<sup>98</sup> Puthuachery 29

<sup>99</sup> "Legislating Affirmative Action - Lessons From Developed and Developing Countries", Clive Thompson, Address to Symposium on Affirmative Action and Black Advancement convened by the Cape Town Chamber of Commerce, 12 August 1992, 8

<sup>100</sup> Puthuachery 29

<sup>101</sup> Ibid

exemption policies and other incentives, and a flexible approach by the government, contributed to high levels of economic growth. It is the high rates of economic growth, of some 6 to 8 per cent per annum, which resulted in a general increase in the level of income for all ethnic groups that Puthuchery feels has been the most important factor contributing to the success of the affirmative action programmes.

Whilst being in no doubt that the affirmative action provisions have contributed quite decisively to the improvement of the economic position of Malays, Thompson believes however that these changes have come about with a cost.<sup>102</sup> He quotes Plaut as follows:<sup>103</sup>

In reality, progress has been less impressive than ... statistics suggest. Many businesses continue to be controlled by Chinese or Indian owners operating through nominee companies owned by Malay front men. So complex are such arrangements that they are almost impossible to disentangle.

More importantly, the quotas have left an indelible anger and bitterness that now divides Malaysian society ...

...[E]ven within the Malay community, the policy has helped limit the wealth that it promised to all its people. An elite has grown fat on acting as front men for Chinese businessmen wishing to win government contracts and the licences necessary to conduct business. Income disparities are now greater within the Malay community than within any other economic group. The Malay poor are increasingly turning away from the ruling party ... .

Such has been the consequence of the unfocused application of affirmative action policies. An elite has developed with an interest in the preservation of the system of privilege. This is a portent South Africa should be wary of, particularly in relation to the granting of government tenders and other proposed incentives of the Green Paper.

### **Lessons for South Africa**

Jane Castle offers some typically insightful views on what South Africa might learn from Malaysia's experience:<sup>104</sup> Firstly, affirmative action policies which are based on racial or ethnic identity can result in violent race and conflict. Or as Phillips puts it<sup>105</sup>, "the Malaysian experience has shown that compensatory discrimination is counter

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<sup>102</sup> Thompson 8

<sup>103</sup> Ibid

<sup>104</sup> "Affirmative action in developing countries: lessons from Zimbabwe, Namibia and Malaysia", Jane Castle, *South African Journal of Labour Relations*, vol 19/1 Autumn 1995, 24

<sup>105</sup> Quoted in Thompson 9, and Castle 23

productive in the effect it has upon race relations: it encourages and feeds racial xenophobia." Castle adds<sup>106</sup> that in Malaysia, attempts at the creation of a more equal society economically have actually resulted in a socially more fragmented and contested one.

Secondly,<sup>107</sup> ethnically based targets and quotas do not guarantee redistribution of wealth to all those in the community at which they are aimed.

Thirdly,<sup>108</sup> it is difficult to eliminate affirmative action programmes once they have been legislated,<sup>109</sup> since racial or ethnic groups gain a vested interest in the maintenance of their privileges.

## India

Andre Beteille<sup>110</sup> describes the affirmative action programmes in India as follows: The intended beneficiaries of affirmative action programmes in India, constitute three groups, accounting for a quarter of the Indian population.<sup>111</sup> Firstly the Scheduled Tribes or 'Adivasis' are the smallest components of the backward classes numbering roughly 66 million person or 7.75 per cent of the population (1991 census). They constitute some 400-odd tribal communities in India whose backwardness is due to their relative isolation for decades.

The second main component is the Scheduled Castes, or untouchables (now ex-untouchables), Harijans or Dalits, numbering roughly 135 million persons, some 15,75 per cent of the population (1991 census). Traditionally they occupied the lowest positions in the economic hierarchy, and suffered social stigma, now abolished by the Indian Constitution.<sup>112</sup>

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<sup>106</sup> Castle 24

<sup>107</sup> Ibid

<sup>108</sup> Ibid

<sup>109</sup> Although California appears to be the exception. Various press reports reveal that recently, affirmative action legislation in the state was defeated through a ballot, although this is being challenged in court. Apparently many successful African-Americans voted to scrap the legislation, due to resentment at accusations that their success came about only as a result of affirmative action policy.

<sup>110</sup> Beteille A "India: Equal opportunity for all and special opportunities for some" *Development and Democracy* 5 *et seq*

<sup>111</sup> Hugo on the other hand, describes the intended beneficiaries of affirmative action in India as constituting over two-thirds of the population. (Hugo 1993:45) This anomaly might be explained by the difficulty in quantifying and defying the Other Backward Classes. Once again, the lack of focus in affirmative action legislation is problematic.

<sup>112</sup> Beteille 6

The third component are the Other Backward Classes (OBC) or the Socially and Educationally Backward Classes (SEBC), which are difficult to define or quantify, but basically refers to caste.<sup>113</sup>

The intended benefits of the affirmative action programmes for the backward classes in contemporary India amount to positive discrimination, which is generally described as a policy of reservations and quotas.<sup>114</sup>

Beteille's<sup>115</sup> evaluation of the success or failure of affirmative action programmes, like Puthuchery, is qualified by what is meant by success or failure. He feels it has been successful in altering the image that other people have of the untouchables and the tribals. Positive discrimination has brought about considerable changes in how individuals define their own personal horizon of possibilities, as seen in the contrast between the expectations and ambitions of younger untouchables and those of their parents. Beteille concludes, that

[w]ithout positive discrimination some economic inequality in India would have been more extreme for at least two or three generations after independence. By making it possible for disadvantaged Indians to live better in their own lifetimes, or at least, in the lifetimes of their children, I do believe that something was gained.<sup>116</sup>

However Beteille concedes that whilst the benefits of job reservation might be designated for a particular community, it is always individuals that are the beneficiaries.<sup>117</sup> Experience has shown that these beneficiaries are most likely to be the best off and not the worst-off members of the communities to which they belong and in whose name the quotas are made.

## Africa

### Afrikanerisation and Africanisation

The election victory of the South African National Party in 1948 saw the strengthening of the pro-white and particularly pro-Afrikaner policies initiated by the Pact government and its so-called 'civilised labour' system.<sup>118</sup> This, according to Hugo, was

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<sup>113</sup> Ibid

<sup>114</sup> Ibid

<sup>115</sup> Beteille 12 et seq

<sup>116</sup> Beteille 13

<sup>117</sup> Beteille 11

<sup>118</sup> Hugo 47

one of the earliest international versions of affirmative action. He adds that this nationalist fervour and self-assertion was also evident in the political imperative of affirmative policies in post-independence Africa where it has come under the rubric of Africanisation. The learned author cites Nyere's retrospective comment on immediate post-independence developments in Tanzania:<sup>119</sup>

[A] deliberate policy of Africanization of the public services was being pursued in the full realization that this was itself discriminatory. For before all citizens could be treated equally, it was necessary to rectify the position in which the nation's civil service was dominated by non-Africans, and to make it reflect in some measure the composition of the society.

For the most part, Africanisation did not rely on specific constitutional clauses, legislative enactments or court actions (such as in the United States, India and Malaysia.) In the vast majority of post-independent states, Africanisation "simply followed a course chartered by policy directives emanating at the discretion of the governments and with no recourse, in the form of judicable Bills of Rights, being available to aggrieved parties or individuals."<sup>120</sup> Zimbabwe and Namibia are the exceptions.

## Zimbabwe

The legal basis for Africanisation (or 'black advancement' - as is the preferred local term) in Zimbabwe is contained in the constitution which states that: "The President may give general directions of policy to the Public Service Commission [the body responsible for appointments and promotions in the public sector<sup>121</sup>] with the object of achieving a suitable representation of the various elements of the population in the public service and the prison service."<sup>122</sup>

The Public Service Commission was thus directed to:<sup>123</sup>

- recruit staff to all grades in the public service in such a manner as to bring about a balanced representation of the elements that make up Zimbabwe's population;
- give rapid advancement to suitably qualified Africans in appointments and

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<sup>119</sup> Ibid

<sup>120</sup> Hugo 48

<sup>121</sup> Castle 8

<sup>122</sup> Hugo 48

<sup>123</sup> Castle 8

promotions in the public service; and

- maintain efficiency and satisfy career aspirations of existing public servants in carrying out these directives.

The experience of Zimbabwe, and that of Namibia, is of interest to South Africa, given the similarities between the countries. Besides geographical location, they share a similar colonial legacy, and are comparable in the percentage of their white populations. They could thus give cues as to possible future outcomes in South Africa. Additionally, unlike the bulk of white officials in other parts of Africa, who were drawn from the ranks of their home country's colonial civil servants, whites in these two countries, as in South Africa, were a "permanent" population, at the time of political transition.

Hugo comments<sup>124</sup> that in Zimbabwe at the time of independence in 1980, whites (as in South Africa excluding the former 'homelands') occupied over 90 per cent of senior positions in the civil service, a situation which has been completely reversed within a decade. The Presidential Directive referred to above, did not produce policies which coerced whites to leave the civil service. Indeed whites in technical and skill intensive positions were encouraged to stay. The drain of whites from the civil service was caused rather by the broader process of emigration, which has decreased the white population by nearly two-thirds over the past two or three decades.

Nonetheless, efforts at Africanisation in Zimbabwe have been criticised, where according to Bennell and Strachan<sup>125</sup> "it seems clear that the efficiency and effectiveness of the civil service ... has been adversely affected", a conclusion, it is added, that has been echoed by various official commissions of enquiry.

Jane Castle adds that mismanagement, inefficiency, lack of interest and poor credibility characterise the civil service<sup>126</sup>. She cites Bennell and Strachan as listing the following weaknesses;<sup>127</sup>

very high vacancy rates, especially among technical personnel, little or no systematic on-the-job training for new recruits, and general incompetence and maladministration. Corruption at all levels of government has been widely reported ... . Allegations of tribalism and nepotism have also become commonplace although they are harder to substantiate. In particular, many Ndebele believe that they have been discriminated against by the Shona who

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<sup>124</sup> at Hugo 49

<sup>125</sup> Quoted in Hugo 50

<sup>126</sup> Castle 9

<sup>127</sup> Ibid

constitute over 80% of the population. But tribal divisions within the Shona have also strongly influenced recruitment and promotional decisions.

Whilst breeding inefficiency and corruption, Castle maintains<sup>128</sup> that the expansion of the civil service has created a 'petit bourgeois elite' which has contributed to a serious budget deficit. Adam and Moodley are quoted<sup>129</sup> as describing the Zimbabwean public service as a "pseudodemocratic patronage system ... characterised by high levels of corruption and little democratic accountability."

One might comment that the current land confiscation policy, under the guise of "Africanising" the land for the benefit of the landless, is in reality but another example of self-enrichment by the ruling elite.

Castle adds<sup>130</sup> however that due to economic structural adjustment programmes in the early 1990s, tied to loans from the International Monetary Fund/World Bank, cutbacks began in the civil service. Loxton reasons<sup>131</sup> that this has implications for the government's "increasingly fragile grip on power."

### Private Sector

At the time of independence, Castle points out<sup>132</sup> that the private sector did not face any affirmative action legislation, as the public sector did. This was apparently due to fears that this might cause an exodus of white skills from the country, as has occurred in Mozambique, and cause the destabilisation of an already fragile economy. Instead, it was hoped that the private sector would follow the example of the public sector, and institute voluntary affirmative action measures.

Legislation that *was* enacted, was the Labour Relations Act of 1985, aimed at eliminating discrimination against blacks and other disadvantaged groups, particularly women.<sup>133</sup> This gave the Ministry of Labour, Manpower Planning and Social Welfare, powers to investigate discriminatory practices. However, as Bennell and Strachan point out<sup>134</sup>, this focused on individual discrimination, and did not address the imbalances of race and gender which past and present practices effected on the workforce as a whole.

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<sup>128</sup> Castle 9

<sup>129</sup> Ibid

<sup>130</sup> Ibid

<sup>131</sup> Quoted in Castle 9

<sup>132</sup> Castle 9

<sup>133</sup> Ibid

<sup>134</sup> Quoted in Castle 9

Nonetheless, Castle reveals<sup>135</sup> that progress in the private sector has been significant. Between 1980 and 1987, the number of blacks in professional, technical, administrative and managerial posts increased eight-fold. However, blacks tend to hold junior and middle management posts, with few filling top-level positions. Gatherer and Erickson are cited<sup>136</sup> as observing that "the majority of black managers remain in public relations, personnel and marketing, with little progress being made on black occupational advancement in production and finance." Of interest, the experience of South African Breweries in South Africa has echoed this, with blacks tending to be advanced in the 'soft' executive functions. This demonstrates a common thread in affirmative action experiences trans-nationally.

Initially, as Strachan points out<sup>137</sup>, black occupational advancement was charged with being 'window-dressing'. "However, in-house training and development programmes in parastatal and private sector organisations have made a significant contribution to promotion on the basis of merit."<sup>138</sup> The converse has been true however, where ministerial and political appointments have been made to accelerate black advancement. The negative consequences of not focusing on skill or potential, as Bennell and Strachan note<sup>139</sup>, have been particularly costly to Air Zimbabwe and the National Railways of Zimbabwe.

Citing Gatherer and Erickson, and Bennell and Strachan, Castle describes<sup>140</sup> the sustained commitment by top management and their boards to developing black managerial expertise in-house, as the most significant contribution to black occupational advancement in the private sector. The following factors have been identified as contributing to this process:<sup>141</sup>

- recognition by top management that it is in the organisation's own long term interests to train black managers. Educated young white people tend to leave Zimbabwe, whereas black youths are more likely to remain;
- creation of clear career paths with comprehensive and detailed job descriptions;

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<sup>135</sup> Castle 9-10

<sup>136</sup> Castle 10

<sup>137</sup> Quoted in Castle 10

<sup>138</sup> Ibid

<sup>139</sup> Quoted in Castle 10

<sup>140</sup> Castle 11

<sup>141</sup> Ibid

- implementation of merit-based promotion criteria, rigorously enforced;
- development of management training programmes tailored to the needs of black graduates;
- early identification of individuals with high potential, and
- preparedness of experienced white managers to provide on-the-job training to junior black colleagues.

These recommendations are similar in nature to those made by other authors and institutions, such as South African Breweries, which is commented on further elsewhere in this paper.

### **Lessons for South Africa**

Castle again describes<sup>142</sup> several lessons for South Africa, which she feels that Zimbabwe's experience of affirmative action can teach. Firstly, legislation outlawing discriminatory recruitment and promotion, whilst helpful, is on its own insufficient. Castle believes that to more effectively counter racism, sexism, tribalism and nepotism a credible and vigorous agency may need to be established. Such a body would have the power to monitor and adjudicate on employment practices at all levels in the public and private sector. This agency would include representatives of the government, employers and workers, in order to establish its credibility and accessibility.

In sum, Castle seems to be proposing a general watchdog to oversee the affirmative action process. It is therefore interesting to examine the proposed institutional framework of the Green Paper. As listed previously, there is not one, but there are several bodies that are proposed to be established. Therefore the monitoring would be split up into different bodies. The Department of Labour will be responsible for ensuring compliance with legislation and codes of practice. The Directorate of Equal Opportunities will guide the process of policy formulation and implementation. The Labour Inspectorate in turn will undertake monitoring and enforcement, whilst the Employment Equity Advisory Council (EEAC) will render expert advice and further monitor progress.

South Africa, with its proposed legislation, thus seems well poised to monitor the affirmative action process quite effectively.

Secondly, Castle adds<sup>143</sup> that the failure of the Zimbabwean economy to expand has had a political and economic cost; with increasing unemployment and dissatisfaction

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<sup>142</sup> Castle 12-14

<sup>143</sup> Castle 12

with the government. Therefore in South Africa, affirmative action will have to be part of a broader strategy of economic reconstruction. One may interject here the experience of Malaysia, which by comparison was aided by high economic growth over two decades.

Thirdly, Castle observes<sup>144</sup> that the broadly targeted affirmative action policies in Zimbabwe have tended to favour already privileged sections of society. In general, black men have benefitted, and a powerful Shona elite has emerged. Little progress has been made in advancing the occupational status of black women, and specific legislation (such as Australia's - one might add) is probably needed to achieve this. In the main, attitudes towards women would have to change to facilitate their increased representation in the workforce, a situation likely to prevail in South Africa.

Fourthly, Castle highlights<sup>145</sup> the fact that training and developing managers takes time, regardless of their race or socio-economic background. Canada's experience echoes this sentiment. Yet the expectations of individuals and groups defies this. Management development is negatively effected by rapid 'job-hopping' in search of promotions and better salaries. Again, the experience of South African Breweries has borne this fact out. Castle believes that:<sup>146</sup>

If merit, rather than political accommodation is to guide future appointments and promotions in employment in South Africa, the solution may be to place black managers in positions of responsibility and influence, to give them adequate training and support, so that they may rise, and be seen to rise, on the basis of merit.

Fifthly, Castle notes<sup>147</sup> that there is increasing pressure from blacks in Zimbabwe for corporations to accommodate racial and cultural diversity. Additionally, there is mounting pressure for government policy to facilitate the ownership and development of black business. One might sight as an example the recent controversy over the appointment of a white person to head Anglo-American's operations in Zimbabwe, in conflict with demands for 'indigenisation' of the Zimbabwean economy.

Castle continues<sup>148</sup>, that similar demands are to likely to be made in South Africa, given the strength of black consciousness ideology. Black business organisations such as the National African Federated Chamber of Commerce (Nafcoc) and the

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<sup>144</sup> Castle 12-13

<sup>145</sup> Castle 13

<sup>146</sup> Ibid

<sup>147</sup> Castle 13-14

<sup>148</sup> Ibid

Black Managers Forum are already making such calls. Indeed, regards 'black economic empowerment' as the term has come to be known in South Africa, one has very recently learnt<sup>149</sup> that the government has proposed the creation of a National Empowerment Fund, to be launched in March 1997. The fund will own a proportion of the shares in major parastatals such as Telkom, Eskom, Denel, Transnet and Safcol. This will supposedly enable historically disadvantaged people to buy shares in the fund, at affordable prices.

Of further interest, regards the South African government's attitude towards black economic empowerment, are the comments made by Stella Sigcau, the minister for public enterprises, at a recent conference on the topic.<sup>150</sup> The Minister is reported as stating that "in the new era" management jobs would only go to those qualified for them, but that those who had potential would still be considered, provided plans were in place to upgrade their skills. "South Africa can no longer afford cosmetic changes. We need changes which come about because people can do the jobs they can deliver, (sic)" Sigcau said, and added that a process to nurture and develop potential would have to be put in place. The minister mentioned that her ministry had made "significant strides" in giving management opportunities to the historically disadvantaged, and that they now needed to be exposed to courses and training.

This is perhaps, one might reason, a sign of consolidation in the process on the part of government. In other words, the initial thrust of advancing previously disadvantaged people, has now been tempered in order to ensure that these appointees have the capacity to fulfil their functions.

Minister Sigcau reportedly cited<sup>151</sup> the example of Transnet, where the number of black managers had risen from three in 1991 to 192 in June 1996. Of these, 152 were male and 40 female. Transnet apparently appointed six black executive directors, including a black woman, in July 1996. These appointments were described as having set the tone for a new-look corporate South Africa.

Sigcau reportedly stated<sup>152</sup>: "But the key question is, have those people been empowered to deal with the challenge of their jobs?" She added that the main state-owned enterprises collectively employed more than 300,000 people, "many of whom are unskilled and poorly trained". Furthermore, the ministry had established a task team, under Dr Mkhathswa to perform a comprehensive audit of the "deficiencies

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<sup>149</sup> "Foreigners to get 49% of Sun Air", Jabulani Sikhakhane, Business Report, Tuesday, 11 February 1997, 1

<sup>150</sup> As reported in "SA 'cannot afford cosmetic change'", Jabulani Sikhakhane, Business Report, Tuesday 11 February 1997, 4

<sup>151</sup> Ibid

<sup>152</sup> Ibid

across the parastatals and to make recommendations for corrective action" - which would require significant investment in training and development over many years.

The above is an encouraging sign that the government is conscious of the need for the capacity-building of managerial appointees, which Castle has alluded to. Affirmative action appointments, if they are to be effective, need to be twinned with the necessary back-up of training and development. Empowerment is not just about putting black faces in visible positions, but truly affirming them through capacity building.

The final lesson for South Africa, Castle reasons<sup>153</sup>, is to be found in the statements of successful black executives in Zimbabwe. They point to their educational qualifications, achievements and experience as contributory factors to their success. Thus a sufficiently high standard of general education is required to provide a base for on-the-job training and the acquisition of valuable experience. Castle concludes that establishing broad access to a high standard of general education is probably the long-term key to successful black occupational advancement in South Africa.

However, possibly the most invidious legacy of apartheid, is the deprivation which decades of the 'Bantu Education' system has wrought. It has left South Africa with a massive shortage of trained and 'trainable' people. Whilst South Africa is in the process of reforming its education system, albeit in the midst of great controversy, the current shortage of skills has to be addressed. Therefore massive adult education, starting with literacy training, has to be undertaken. Unfortunately for those institutions wishing to implement affirmative action, much of these costs will have to be borne by them. Therefore a system of tax breaks or matching funds spent on education and training, should be very seriously considered.

## **Namibia**

Hugo describes Article 10 of the Namibian constitution as articulating the standard liberal prescription outlawing discrimination on the grounds of sex, race, colour, ethnic origin, religion or creed.<sup>154</sup> Article 23, however, provides that:<sup>155</sup>

Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic and educational imbalances in Namibian society arising out of past discriminatory laws or practices, or for

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<sup>153</sup> Castle 14

<sup>154</sup> Hugo 48

<sup>155</sup> Hugo 48-49

achieving a balanced structuring of the public service, the police force, the defence force and the prisons service.

Castle also notes<sup>156</sup> that Paragraph 3 of Article 23 takes special account of women:

In the enactment of legislation and the application of any policies and practices ... [it] ... shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and they need to be encouraged and enabled to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

This is a laudable recognition of the status of women in society, something which Zimbabwe has yet to effect.

Castle argues<sup>157</sup> that this legislation opens up the possibility for providing assistance to disadvantaged groups, determined by gender and socio-economic criteria rather than racial or ethnic criteria. She continues<sup>158</sup>: "An inadequate education, and poor living conditions, are recognised criteria for affirmative action, and it is acknowledged that not all people earn the right to assistance on the basis of their skin colour."

This interpretation of the operation of the legislation accords with the "Goldstone doctrine", discussed above.

Castle cites<sup>159</sup> a legislative programme drawn up in consultation with the International Labour Organisation which foresees an affirmative action programme governing both the private and public sectors of the economy. It requires the following:<sup>160</sup>

- action to eliminate, revise or amend discriminatory employment practices;
- provision of special training programmes in companies employing over 50 persons to ensure that employees in designated groups<sup>161</sup> may acquire skills and qualifications for their advancement;
- preferential recruitment or promotion of suitably qualified persons in

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<sup>156</sup> Castle 17

<sup>157</sup> Ibid

<sup>158</sup> Ibid

<sup>159</sup> Ibid

<sup>160</sup> Ibid

<sup>161</sup> Quoted in a footnote (28) as being "Those designated by the Commission on Affirmative Action in Employment with reference to the race, gender, or physical disability of individuals.", Castle, 31

designated groups to ensure their equitable representation in various positions of employment; and

- setting of numerical goals, timetables and objectives for affirmative action that employers intend to achieve.

Swanepoel remarks<sup>162</sup> that responsibility for action is thus placed squarely in the hands of management. Castle also describes<sup>163</sup> the functions of an independent Commission on Affirmative Action as being; the investigation of complaints about discriminatory employment practices, the monitoring of employer compliance with their obligations, and advising employers concerning the development and implementation of affirmative action programmes.

Castle notes<sup>164</sup> that the government has indicated its willingness to address the issue of women's rights and advancement, through the establishment of a Department of Women's Affairs in the Office of the President. However, specific constitutional provisions such as equal pay for equal work, maternity leave and health care are not enforceable by the Court.

Hugo observes<sup>165</sup> that the civil service in Namibia at independence, like Zimbabwe, was dominated by whites (in particular males). In contrast to Zimbabwe however, the government's stated goal of altering the existing racial profile was not assisted by any large exodus of whites. Article 141 of the Namibian constitution guaranteed the security of tenure of all civil servants in employment before independence<sup>166</sup>, as is the case in South Africa. Thus, Hugo observes further<sup>167</sup>, at least in terms of the approved civil service staff complement which it had inherited, the Namibian government had little scope for implementing affirmative action.

One advantage which Namibia did enjoy over Zimbabwe however, is that foreign aid has been made readily available to Namibia. Castle reasons<sup>168</sup> that this is probably because the South West African People's Organisation (Swapo) quickly abandoned its socialist ideology before independence.

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<sup>162</sup> Quoted in Castle 17

<sup>163</sup> Ibid

<sup>164</sup> Castle 17-18

<sup>165</sup> Hugo 49

<sup>166</sup> Ibid

<sup>167</sup> Ibid

<sup>168</sup> Castle 15

In the face of popular clamour for wage employment from its constituents, Hugo comments<sup>169</sup> that the new Swapo government simply created a number of new ministries with their concomitant bureaucratic personnel structures. Hugo mentions<sup>170</sup> Gawanas commenting that the filling of vacancies in these new structures was clearly governed by affirmative action considerations. Hugo also quotes<sup>171</sup> her viewpoint that affirmative action programmes

must be aimed at redressing imbalances by putting disadvantaged people in positions they would have been but for apartheid. Thus, ... the government, as an employer faced with two equally qualified applicants, one black person or female, one white person or male, might choose the black person or women... where a less well-qualified person is chosen in preference to a well qualified person, it should be sanctioned by very special and very circumscribed circumstances. The latter course is necessary in view of the various problems which present themselves: the question of the balance between the demand for equity and those (sic) of efficiency. Equity demands restitution and meeting the demands of the disadvantaged. Efficiency demands appointing people on the basis of merit so as not to result in economic efficiency.

Gawanas here highlights the inherent tension between a commitment to an equitable policy of affirmative action, and the imperative of efficiency that the principle of merit demands. This is discussed in greater depth elsewhere in this paper. Hugo comments<sup>172</sup> that Namibia's version of affirmative action, as in other parts of the world, has not escaped the criticism that revised job qualification standards have led to social costs in terms of lower standards of service delivery to society as a whole.

Hugo cites Staby<sup>173</sup> as pointing out that accusations of tribal nepotism and political patronage under the moral guise of affirmative action abound in Namibia. Therefore Zimbabwe's experience is unfortunately not unique.

Castle draws<sup>174</sup> an immediate parallel between the public sectors of Namibia and South Africa. In both countries, blacks were denied openings, and their education and training was neglected. This, the learned author observes<sup>175</sup>, has serious implications

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<sup>169</sup> Hugo 50

<sup>170</sup> Ibid

<sup>171</sup> Ibid

<sup>172</sup> at Hugo Ibid

<sup>173</sup> at Hugo 50

<sup>174</sup> Castle 18

<sup>175</sup> Ibid

for future levels of effectiveness and efficiency. She concludes:<sup>176</sup> "In both countries there will undoubtedly pressure on politicians to view the public service as a means of extending patronage, and also as a substitute for a social security system."

However the comments of Minister Sigcau described above are encouraging, and one hopes that the government would resist such pressure. In contrast to Zimbabwe and Namibia, one might observe that the African National Congress (ANC) as the governing party, does not owe its presence in government as much to a reliance on political patronage. Its grip on power seems quite secure, at least in terms of limited opposition strength at present. The government's ostensibly steadfast commitment to its economic plan and the fiscal discipline it is displaying, in the face of opposition from a major ally in the form of the Congress of South African Trade Unions (COSATU), seemingly demonstrates its ability to ward off such popular pressure.

### **Assessment of Africa's Experience**

From Hugo's quite negative appraisal<sup>177</sup>, it would seem that the focus on remedying the colonial legacy of institutionalised disadvantage has moved to a critique of the outcomes which have resulted, especially the explosion in government employment. The learned author observes that: "In most cases, once the goal has been achieved, the original affirmative action rationale of creating employment opportunities to produce racially or ethnically representative civil service staff profiles has, over the years, become one of simply using the civil service as an employment tool.

A further warning emanates from Leonard<sup>178</sup>, in an essay on South Africa's future, of a

staff employment machine [which] can easily take on a life of itself (sic) and ultimately threaten the quality of services to citizens which are the rationale for its existence. For example, if at a later point the state finds itself overextended financially, it will find it much easier to cut back on the benefits actually delivered to the population than to lay off staff. Thus majority rule Africa (sic) has found itself over the past fifteen years faced with expanding civil services providing less and less benefit to society.

Hugo also mentions Balogun who refers to the emergence of a "predatory civil service which collects taxes merely to pay its own salaries"<sup>179</sup> Examples of the post-

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<sup>176</sup> Ibid

<sup>177</sup> Hugo 50-51

<sup>178</sup> Quoted in Hugo 50-51

<sup>179</sup> Hugo 51

independence explosion in the size of the civil service are quoted as follows<sup>180</sup>:

In Tanzania the civil service grew from 65 708 in 1967 to 295 352 some 13 years later. In Zimbabwe civil service numbers (excluding teachers) jumped from 40 000 to 90 000 in the first nine years after independence while parastatals, which were also used as tools for Africanisation, have had to be massively subsidised from public funds to keep them from collapsing. In Malaysia too the civil service has quadrupled in size since independence.

Of great concern in South Africa therefore, is the continued increase in the number of public sector employees. An article in the Business Report<sup>181</sup> mentions that on an annual basis to September 1996; the total number of employees in the public sector rose 2.8 per cent, or 52 902 workers, to 1,928 million. The Business Report adds that the government stated in 1996 that a reduction of 1,25 million in the number of public servants could be expected over a three year period. The Business Report quotes an economist, Michiel Bester; the senior economist at Econometrix as saying, "What worries one is that we have heard all the talk of rationalising the civil service but we have not seen any results so far."

Whilst the available data can't attribute these increases to affirmative action appointments per se, it does highlight the worrisome potential that South Africa may follow the tendencies of other countries in Africa to allow the civil service to grow unchecked.

The experience of post-independence Africa has highlighted some obvious concerns which South Africa will be advised to head in its implementation of affirmative action. It would seem that even the most well meaning of policies, can produce quite unintended, but now not entirely unforeseen, results. Any process of social re-engineering is fraught with difficulties and obstacles, as Machiavelli, quoted at the start of this paper, might suggest. It is hoped that policy makers in South Africa will have the prudence and sagacity needed to negotiate these difficulties.

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<sup>180</sup> Ibid

<sup>181</sup> "Public service numbers on the increase", Francois Botha, Business Report, Friday, January 24 1997,

## Chapter 5

### The Practical Implementation of Affirmative Action

#### Affirmative Action in Local Government

In an interview with Mr G Sadie<sup>182</sup>, a consultant to the Greater Benoni City Council in Gauteng, I gained the following perspectives on the practical aspects of implementing affirmative action in a local government context.

The affirmative action process is still in the stage of development. After negotiations of the National Labour Relations Forum for Local Government, a non-statutory, interim body in the mould of NEDLAC, a document was produced at local level, the "Agreement on Affirmative Action and Equal Opportunity". The Agreement is informally binding for a period of 5 years.

In an attempt to make the process as inclusive as possible, the employer body - namely the Greater Benoni City Council; the City Councillors; as well as *all* unions, including the smallest, are represented on a Steering Committee. The Steering Committee was formed in May 1996, and had its first meeting on 6 June 1996. This is purely a consultative body, with the aim of formulating affirmative action policies and strategies. It still has to refer to the City Council for the final decision on agreements, since the City Council is ultimately accountable for affirmative action, and responsible for its success or failure.

The Steering Committee has in turn set up four sub-committees. They deal with the following issues:

- i) Human resource practices and procedures.
- ii) Database.
- iii) Labour market and community profile.
- iv) Training and development.

#### Human resource practices and procedures

This sub-committee deals with the redrafting and rectification of the existing human resource practices and procedures manual. Management has been in a process of generating a revitalised policy, and has workshopped with employees on issues such as selection and recruitment policy.

#### Database

At the end of 1994 the municipality of Benoni, and the former black local authorities of Wattville and Daveyton, amalgamated to form the City Council of Greater Benoni. With the demise of the black local authorities, there was a lack of reliable employee information and so the first task of the Database Sub-committee is to gather the

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<sup>182</sup> 14 January 1997 in Benoni

information needed to update employee records. Secondly, the Sub-committee is tasked with establishing the organisational profile, such as by race, gender, job level and designation; the vacancies budgeted for; identifying the number of black managers, and identifying those with managerial potential, in order to ultimately set realistic targets.

Of the all the sub-committees, the Database Sub-committee has probably achieved the most progress. It is at the data input stage, having sent out employee questionnaires, and has received an approximately 60% return on the forms. It is hoped that the process will be completed by the end of the 1997 calendar year, or in 18 months at the latest.

### **Labour market and community profile**

Linked to the data produced by the database, is the intention that the organisational profile ultimately reflects the demographics of the community it serves, to the extent that the labour market can supply qualified personnel. The difficulty is apparently in finding enough qualified black white collar staff, with the requisite experience and qualifications. Whilst black "general workers", i.e. those performing semi-skilled or unskilled labour, account for over 50% of the workforce, it is an unfortunate reality that there are very few black electrical or civil engineers prepared to work for local authorities, for instance. It would thus seem that longer time frames will be needed, in order for certain sectors of the workforce to reflect the community profile.

Encouragingly, it seems that the focus will not be on merely window dressing, but on sustainable affirmation of formerly disadvantaged groups. Therefore the time frame is likely to be flexible. Informally, at this stage, it seems that if whites are appointed as head of department, it is accepted that blacks will fill the assistant head positions. It is felt that this type of understudy would be useful preparation for managerial promotion.

### **Training and development**

This Sub-committee is tasked with determining whether existing training and development policies are appropriate, and comply with affirmative action aims. Its task is also broader in the sense that it will examine education and development, such as the literacy and basic skills training, study loans, as well as assessing qualifications under the new national qualifications system.

### **Assessment**

It is difficult to make an assessment of the affirmative action programme because it is still in the process of development. However the process is in motion, albeit slowly, though this is inevitable given its consultative nature, and the nature of local government politics. Encouraging is the fact that many of the key aspects of affirmative action are being taken cognisance of, such as the need for the establishment of a database and constant monitoring. There also seems to be a determination not to allow the affirmative action process be one of mere window dressing, but that the process results in the true affirmation of disadvantaged groups

taking place. It is hoped that other organisations and institutions adopt a similarly robust approach in the practical development and implementation of an affirmative action strategy.

## **Affirmative Action in the Corporate Sector**

### **South African Breweries**

The March 1996 edition of the Innes Labour Brief<sup>183</sup>, presents a case study of affirmative action at South African Breweries (SAB). Whilst every company's experience will be unique, this offers some interesting perspectives for the implementation of affirmative action in the corporate sector.

SAB started its affirmative action programme in 1971, and has had the advantage of using substantial resources in implementing the programme, during a period of solid financial growth. This 'equity' drive was launched with the intention of increasing the number of African, Asian and Coloured people - hereinafter referred to as blacks - on SAB's salaried staff. The progress of this initiative is cited in the table below.<sup>184</sup>

**Blacks as a proportion of total salaried staff 1971 - 1995**

YEAR	PERCENTAGE
1971	1
1978	13
1985	28
1993	48
1995	52

As can be seen from the above table, the progress has not been achieved in a simple linear fashion. Indeed, there were three phases in the evolution of the process.

### **Phase 1: Africanisation and black advancement (1971 - 1985)<sup>185</sup>**

The first step was the compilation of systematic reports on human resources, and based on this information, the company set its first targets for Africanisation. The success of this approach can be seen, in that by 1985 there was a substantial rise in the number of blacks in salaried employment, from 37 (one per cent of the total) to

<sup>183</sup> vol.7 no.3, pp.5-20

<sup>184</sup> Innes Labour Brief 6

<sup>185</sup> Ibid.

840 (28 per cent.) Notably, these increases were not achieved simply by the creation of token jobs for blacks. The growth in SAB's capacity due to increased product demand, meant that there was a real need for new positions in the organisation at that time.

Despite these improvements however, top management felt that Africanisation had still not enabled the profile of the company's staff to sufficiently reflect that of its market. Additionally, black appointments were restricted to the lower grades. Recommendations made to rectify these deficiencies and improve the policy, and which reflect current thinking on affirmative action, included the following:<sup>186</sup>

- set targets, numbers, jobs, etc.;
- make affirmative action a line management project which should be included in line managers' objectives with appropriate awards and punishments;
- identify target jobs and train blacks to fill them;
- put blacks into line jobs with authority and responsibility;
- have career plans for whites as well as blacks; and
- prioritise getting the company climate right to support the programme.

These recommendations became the cornerstones of SAB policy over the next phase of implementation.

## **Phase 2: The first Equity policy (1985-1992)**

Of note during this phase was that affirmative action, or Equity as it was called, was placed on par with SAB's other main business strategies: marketing; quality; unit costs; and people. Key points of the policy included the following:<sup>187</sup>

- The promotions and bonuses of individual managers depended as much on performance in Equity, as traditional areas such as sales and costs;
- Responsibility for the success of the Equity programme rested on line managers; the human resource department would play only a supportive role; and

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<sup>186</sup> Innes Labour Brief 7

<sup>187</sup> Innes Labour Brief 8

- Tokenism was rejected completely, and both whites and blacks had to be properly qualified, trained and tested for their jobs, with everyone expected to perform to the same required standard.

The Brief suggests<sup>188</sup> that one of the main reasons for the high level of success during this period was that the Equity programme was implemented while SAB's markets were expanding. Were the business environment not so favourable, it is reasoned further, the Equity initiative may not have achieved such positive outcomes.

However, it was found that the Equity programme lost much of its impetus, and the following criticisms were raised:<sup>189</sup>

- target setting had been too 'loose';
- despite the appointment of blacks to executive positions, their spread across disciplines was unsatisfactory, with most in human resources and sales/distribution, and few in production.
- the turnover of black managers was too high;
- most black appointments were recruited externally rather than promoted internally;
- the programme had not been introduced or monitored systematically enough;

These criticisms, as well as other aspects garnered from a survey, were in turn incorporated into the next phase.

### **Phase 3: Equity II (1992 - the present)**

The new chairman of SAB, Graham Mackay, who also believed in championing the policy from the top, in launching Equity II, "recognised the need to tighten up on discipline and monitoring so as to stamp out the syndrome that sought to put affirmative action on the back burner."<sup>190</sup>

The Brief states that,<sup>191</sup> "...Equity II took a number of significant steps beyond the traditional Equity focus on head counting, developing additional foci aimed at eradicating racial discrimination, encouraging human dignity and promoting black

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<sup>188</sup> Innes Labour Brief 9

<sup>189</sup> Innes Labour Brief 10

<sup>190</sup> Ibid

<sup>191</sup> Innes Labour Brief 11

owned businesses."

The main components of Equity II are summarised as follows:<sup>192</sup>

- Setting head count targets overall and at separate levels.
- Ensure all work practices and facilities are equitable.
- A commitment to eradicate social prejudices and attitudes by encouraging human dignity and eliminating racist practices and language

### **Targets<sup>193</sup>**

Eligible internal black candidates would be targeted for earmarked posts and provided with the necessary training - but without being promised the jobs. Where necessary, whites would be moved sideways, often gaining experience overseas, due to the international expansion.

### **Value sharing<sup>194</sup>**

Through interaction, a set of ten shared values were identified and a code of behaviour was adopted by the board. After 'human dignity' was identified as one of the most important shared values, audits of all the company facilities were introduced, and the union invited to participate in making the changes. A video has been made which all employees are expected to watch. Its purpose is to facilitate changes in attitude and provide a supportive environment for the implementation of Equity.

### **Commercial Equity<sup>195</sup>**

This new initiative is aimed at promoting black business activity, such as the owner-drivers scheme (where over 100 former employees have been enabled to lease or buy their own delivery trucks.) During the financial year end February 1995, SAB spent R130 million on Commercial Equity, and expected to spend over R160 million in 1996.

### **The merit principle**

The Brief states<sup>196</sup> that in general top management believes that head count targets have been achieved without loss of efficiency and with due regard for the merit

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<sup>192</sup> Ibid

<sup>193</sup> Ibid

<sup>194</sup> Innes Labour Brief 12

<sup>195</sup> Innes Labour Brief 12-13

<sup>196</sup> Innes Labour Brief 13

principle. It continues<sup>197</sup>,

Inevitably, this means longer than ideal lead times between taking the decision that a particular position should be occupied by a black person and a suitable incumbent being trained and gaining the necessary experience. Personal career planning and appropriate training are thus crucial to the success of the process and are strongly emphasised within the company.

## **Future Challenges**

Despite consistent recognition as being among the top three companies in affirmative action (by the UCT Breakwater Monitor), SAB has identified key shortcomings that still need to be addressed:<sup>198</sup>

### **Senior managers**

The Brief notes<sup>199</sup> that there seems to be a glass ceiling preventing black employees from penetrating the senior management levels of the company. The problem ostensibly arises from the requirement for university graduates at the higher levels. Thus the company will have to either put employees through university degrees at company expense or drop this requirement (which is unlikely, as this would lead to a drop in standards.)

### **The shop floor<sup>200</sup>**

Less emphasis has been placed on affirmative action at lower levels of the organisation. The has begun to address this problem by focusing on developing career paths and training opportunities for employees in operational positions.

### **Worker involvement<sup>201</sup>**

From evaluations at the end of 1993 It was discovered that there was an unsatisfactory level of awareness of the Equity programme, and a lack of understanding of its goals on the shop floor. There is now a recognition of the need, not only to promote affirmative action on the shop floor, and for greater consultation with unions, but the identification and development of talent among staff.

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<sup>197</sup> Ibid

<sup>198</sup> Innes Labour Brief 13

<sup>199</sup> Ibid

<sup>200</sup> Innes Labour Brief 14

<sup>201</sup> Ibid

**Consultation<sup>202</sup>**

Rather surprisingly, given SAB's good record of affirmative action, especially in comparison to most companies in South Africa, recent surveys have disclosed dissatisfaction among black salaried staff with the progress of affirmative action. Problems they cite include: subtle forms of discrimination; being thrown in the deep end and allowed to sink or swim; not having the same authority as whites; social barriers to career advancement; and the predominance of a white male culture in the organisation. One possibility is to establish a discussion forum representative of all racial and gender groups in SAB to analyze the existing Equity policy and programme and to propose changes to top management. However that holds the danger that executive management may not feel it needs to drive the process and thus could become less committed. Nonetheless, the manpower coordinating committee of the board commits substantial time to both human resources and affirmative action.

**Line positions<sup>203</sup>**

By putting more blacks into these positions, the buffer zone of conservative white resistance could be broken. However it has been difficult to fill senior positions in line management within the company, but SAB is determined to find solutions to this deficiency, even if more lead time becomes necessary between selecting candidates for a position and placing them there.

**Internal Talent<sup>204</sup>**

Blacks within the company have expressed frustration at the appointment of blacks from outside the company for senior positions, instead of promotion from within. However all vacancies are advertised internally first. The extension of career path discussions to all employees, including those on the shop floor, show signs of addressing the problem. Blacks have also questioned the validity of psychometric testing, but SAB has validated the content and procedure with some refinement.

**The gender issue<sup>205</sup>**

Historically, SAB's Equity drive has deliberately focused on race rather than gender. SAB is now turning its attention to affirmative action for women, though similar problems to those experienced in the early stage of affirmative action for blacks have been identified. These are for example, an unsystematic approach, lacking in clear objectives and vague targets. However SAB's latest Three Year Business Plan for 1996 sets specific targets for female employees by grade.

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<sup>202</sup> Innes Labour Brief 15-16

<sup>203</sup> Innes Labour Brief 16

<sup>204</sup> Innes Labour Brief 16-17

<sup>205</sup> Innes Labour Brief 17

**Conclusion**

It seems as if SAB, despite difficulties, is well positioned, and has the commitment, to cope with the challenges which the implementation of affirmative action presents. SAB's experience with affirmative action is a useful example of success and failure in affirmative action policy, and its experience is a useful indicator of how other companies may practically develop and implement their affirmative action strategy.

## Chapter 6

### Summation

#### The Controversy of Affirmative Action

Faundez<sup>206</sup> contends that affirmative action is controversial issue because it is seen as a challenge to the liberal principle of equality. It discriminates on the grounds of race, favouring one group against another. Those who are the "victims" of affirmative action, feel particularly aggrieved at suffering at the hands of discriminatory policies. This has been the experience in Malaysia, particularly before 1969, where affirmative action was the source of much racial tension. India has too suffered such resentment on the part of non-target groups.

In a report in the Sunday Times Business Times<sup>207</sup>, on an annual socio-economic environment study, conducted by the University of South Africa's Bureau of Market Research, 62 per cent of top businessman contend that affirmative action is having a negative impact on productivity. Only 12 per cent dispute this. The report quotes one industrialist commenting on this issue<sup>208</sup>,

Official pressure on organisations to boost black recruitment, training and development appears to be ineffective unless, and until government itself delivers the goods. This implies the establishment of an effective formal education system, the reduction of crime and the implementation of a macro-economic policy that promotes economic growth.

Why then, are affirmative action programmes implemented? As has been demonstrated, it has brought formally marginalised groups into the main stream economy, and reduced levels of poverty. And in the example of Malaysia in the 70's through 90's, actually reduced racial tensions since all race groups benefited from the economic progress of all the country's people. As the famous preamble to the International Labour Organisation's Philadelphia Declaration alludes to, poverty anywhere, is a threat to prosperity anywhere. Socio-economic advancement is thus the potential bounty of affirmative action.

However, is there perhaps a means of promoting the advantages of affirmative action whilst reducing the negative consequences and perceptions thereof?

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<sup>206</sup> Faundez "Promoting affirmative action" 1187

<sup>207</sup> Robertson D "Outlook poor unless State wakes up fast" , January 19 1997, 4

<sup>208</sup> Ibid

## Merit Principle

Faundez<sup>209</sup> states the following

Perhaps the most controversial of all affirmative action measures is the hiring of persons who do not have the requisite skills or qualifications to do a particular job. This measure is unacceptable for several reasons. First, because it is economically inefficient and could well endanger the health and safety of a large number of persons. Second, because it generally involves excluding an otherwise qualified person, thus giving credibility to the allegation of reverse discrimination. And thirdly, because it is generally counter-productive as the individual who benefits from such 'token' appointment is often the target of open hostility and isolation among colleagues.

Appointing or promoting unqualified persons is thus rejected by Faundez because it contravenes the *merit principle* which requires that the best qualified be chosen. This is an issue that promoters of affirmative action in other jurisdictions have grappled with.

In the United States case of *United Steelworkers of America v Weber* 443 United States 193 (1979), the Supreme Court upheld a voluntary affirmative action programme which involved preferential treatment in favour of blacks. However, the court's approval of the programme was circumscribed narrowly. Faundez<sup>210</sup> interprets the factors the Supreme Court considered as an attempt to reconcile affirmative action with the *merit principle*. The plan was acceptable to the court, he contends, in so far as it is flexible, is not an absolute bar to employment of persons who are not in the target group and it has limited duration. He argues therefore that affirmative action is a temporary and limited departure from the *merit principle* in order to eliminate racial imbalance in the workforce.

The Australian Affirmative Action (Equal Opportunities for Women) Act 1986 contains a strong reaffirmation of the *merit principle*. Section 3(4) of the Act reads as follows: 'Nothing in the Act shall require the relevant employer to take action incomparable with the principle that employment matters should be dealt with on the basis of merit.' This ostensibly excludes the notion of preferential treatment. Inevitably, the section has prompted debate on the definition of merit.<sup>211</sup>

Namibia's constitutional provisions on affirmative action circumvent the problem of reconciling preferential treatment with merit, by using the notion of 'suitably qualified persons'. Faundez describes the approach as follows,

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<sup>209</sup> Faundez "Promoting affirmative action" 1190-91

<sup>210</sup> Faundez "Promoting affirmative action" 1191-1192

<sup>211</sup> Faundez "Promoting affirmative action" 1192

Employers are required to give preferential treatment only to suitably qualified persons in designated groups. Since suitably qualified persons are not necessarily the best among the applicants for a job or a promotion, employers will be able to comply with their affirmative action obligations, without breaching the minimum standards required for the job. In addition, employers are also required to review the standards upon which they make employment decisions to ensure fair treatment of all candidates.

### **Assessment**

In order to secure the benefits of affirmative action, I would argue that the right "kind" of affirmative action needs to be applied. It is for this reason that I reject a quota system, and instead argue for a flexible target system, so that the *merit principle* remains a critical criterion in hiring and promotion. As has often been practised in India, mere job reservation is the lazy way out. It does not focus sufficiently on truly affirming disadvantaged people, by actively developing their skills and abilities to equip them for the job.

Besides economic inefficiency, the danger, as Faundez has pointed out above, in not focusing on ensuring suitably qualified persons are hired and promoted, is that prejudicial racial stereotypes can be reinforced, and resentment against affirmative action appointments engendered. The whole process of affirmation is undermined where work colleagues, and prospective affirmative action candidates, lose respect for persons in 'token' positions.

However, it is necessary to ensure that merit is not used as a guise for racism in denying appointments to previously disadvantaged groups. Thus an approach similar to that of Namibia, as endorsed by the International Labour Organisation, where 'suitably qualified persons' are considered in promotion and hiring, may provide the most effective means of achieving affirmative action, without a derogation of the principle of merit.

### **A Critique of Quotas**

The ostensible rationale for quotas is that they are necessary for there to be meaningful improvement in the representation of designated groups in the workforce. According to Blumrosen,<sup>212</sup> "[m]ilder medicine does not work."

However Coldwell describes several criticisms levelled at legislation which imposes quotas:<sup>213</sup> Firstly, it coerces rather than encourages management to implement affirmative action. This prompts management to implement affirmative action quantitatively rather than qualitatively. The imposition of quotas invariably results in

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<sup>212</sup> "Quotas, common sense, and law in labor relations: Three dimensions of equal opportunity.", AW Blumrosen, Rutgers Law Review, Vol. 27, 1974, 676

<sup>213</sup> Coldwell 59

the creation of token positions for black employees, who are used simply as 'window dressing' in order to meet quota requirements. This leaves insufficient resources for real people development.

The net outcome of quota legislation in the United States in the days of President Johnston, Coldwell maintains<sup>214</sup>, was one of defiance among employers and hostility to the beneficiaries of affirmative action. More recently, he points out, there has been a dis-owning of the significance of affirmative actions in engendering upliftment by its latter-day recipients. In sum, the essential problem with such coercive legislation, as Coldwell observes,<sup>215</sup> "is that it impedes efficient management in widely varying organisational circumstances and leads to ineffective affirmative action programmes being implemented."

A Financial Mail report states<sup>216</sup> that: "Quota-driven appointments are not affordable and do nothing for the morale or prospects of those filling them." It also cites<sup>217</sup> University of Cape Town economics professor Brian Kantor as stating that, the more that the employment policies of large organisations are driven by racial quotas, rather than a search for truly able people, the more inefficient they will become.

The experience of India for one, should leave no one in doubt about the undesirability of quotas. It has led to what one might describe as "entrenched inefficiency", and a self-perpetuating system of patronage, or as Hugo might put it, "a system of power-driven permanent quotas and preferential entitlements."<sup>218</sup>

The problem with such a situation, is that affirmative action no longer acts as a temporary expedient. The consequence of this, as Hugo adds<sup>219</sup>, is that the brightest and best of the non-beneficiaries simply leave, at great national cost in terms of the loss of skills and expertise. The possibility exists of a backlash from those that remain, or between tribally affiliated groups, as has been the case in Kenya and Nigeria, amongst other countries, "where the spoils of affirmative action have become the source of permanent contestation and conflict."<sup>220</sup>

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<sup>214</sup> Ibid

<sup>215</sup> Coldwell 60

<sup>216</sup> "Dangerous Exclusions", Financial Mail, 12 May 1995, 22

<sup>217</sup> "Dangerous Exclusions" 26

<sup>218</sup> Hugo 53

<sup>219</sup> Ibid

<sup>220</sup> Ibid

Hugo describes<sup>221</sup> the bitterness which has been engendered amongst the middle classes in India who are the victims of quota preferences, and the absurdity of expectations among the masses which the state is unable to meet. He quotes Menski's illuminating comments in this regard, that India's 'special care' policies;<sup>222</sup>

have clearly moved into troubled waters, thus promising too much to too many people, raising expectations in the process which, if not fulfilled, are turning dreams of benefits into nightmares of communal riots. It is better to have actions programmes that focus on deserving individuals rather than whole groups of beneficiaries. This will enable more focused attention and yet, at the same time, avoid the stigma of racial quotas. For example, grant systems that help all poor students, irrespective of ethnic status would seem an appropriate mechanism ...

Another alternative to quotas and job reservation, is the setting of flexible targets. This allows for a more adaptable approach which recognises the reality of the job market, and which does not undermine managerial prerogative. In certain occupations for instance, there is a general lack of qualified personnel, never mind sufficient numbers of previously disadvantaged groups, and by setting targets, one can take a long term view of the situation. Such an approach is more realistic in that it recognises such realities as staff turnover, especially prevalent in senior management positions. The use of targets therefore incorporates a more holistic approach to recruitment and promotion.

Regarding the fear of non-implementation of affirmative action by companies, this could be costly for them in terms of fines and failure to secure government tenders, as the Green Paper alludes to. Companies would need to explain their failure to meet targets, for example, a lack of suitably qualified candidates or staff turnover. However they might also need to demonstrate that the qualifications stipulated for a specific job, are really needed.

Whilst there are those who may criticise even targets as being too rigid, the alternative of a purely voluntary implementation of affirmative action does not provide sufficient compulsion. With few exceptions, such as South African Breweries, South African companies have been tardy in implementing affirmative action. Furthermore, some companies may be unfairly disadvantaged in the short term, due to their having to incur extra costs in training and development. It thus seems that the setting of realistic targets might provide the best medium between compulsion and flexibility.

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<sup>221</sup> Hugo 45

<sup>222</sup> Ibid

## Conclusion

In conclusion, affirmative action will undoubtedly play an important role in the transformation of South African society to one where the principles of equity and justice prevail. It will have a significant role in addressing the vast inequalities of wealth, and reducing poverty. If South Africa can learn the lessons from the experiences of affirmative action, both positive and negative, of the rest of the world, it will play this role successfully. If the correct programmes of affirmative action are applied, the benefits will be felt in the majority of South African's "own lifetimes, or at the very least, in the lifetimes of their children..."<sup>223</sup> This is a worthy objective indeed.

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