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**A CRITIQUE OF THE CONCEPT OF DISADVANTAGE IN
RELATION TO THE IDENTIFICATION OF AFFIRMATIVE
ACTION BENEFICIARIES:**

RACE AS PROXY FOR DISADVANTAGE

By
Stephen Charles

Supervisor:

Prof Alan Rycroft

Dissertation presented for the approval of Senate in part
fulfilment of the requirements for the degree of **Master of
Philosophy** in the Department of Commercial Law

FEBRUARY 2013



PLAGIARISM DECLARATION

I hereby declare that I have read and understood the regulations governing the submission of Masters of Philosophy dissertation, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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DEDICATIONS

This work is dedicated to my wife, Michelle and children (Erin and Stephen) for their support and patience throughout my years of study. This degree is for the family.

University of Cape Town

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Chapter One

INTRODUCTION

1.1 Introduction

Policy makers have often grappled with the intricate issue of identifying affirmative action beneficiaries. The selection of affirmative action beneficiaries are at times done according to criteria which often create resentment and tension among groups.¹ It is imperative to keep in mind that selection criteria are dependent on the outcomes – the redress program wishes to achieve.²

Affirmative action beneficiaries usually include ethnic groups, national or racial minorities or majorities, aboriginal people, women, people with disabilities and war veterans.³ The above description highlights the point that historical disadvantage or current disadvantage is necessary to guarantee benefits under such a redress initiative.⁴

The pertinent question that arises, is how one may possibly or should identify disadvantage? It is acknowledged that a correlation between race, discrimination, disadvantage and inequality, exist. Interrogating these multifarious concepts in isolation is complex. Adding to this complexity is the fact that these concepts at times does not stand in isolation, but intersect.⁵ In the United States and South Africa opposition to affirmative action argues that too much emphasis is placed on race in the identification process of affirmative action beneficiaries, resulting in tension and resentment among groups.⁶ These tensions culminated in many court contestations, specifically by white

¹ M Sithole *et al* 'Affirmative action in South Africa: A panacea for addressing the imbalances of the past?' 2005 AIB-SE (USA) Annual Meeting, Charleston, SC 310 at 314.

² To compensate for past wrongs; bring about diversity, block past and current discrimination and to bring about integration by eliminating segregation, to mention a few.

³ J Faundez *Affirmative action international perspectives* 1 (ed) (1994) at 34.

⁴ K Adam 'Affirmative action and popular perceptions: The South African case' (2000) 37:2 *Society* 48 at 50.

⁵ J Amoah 'Constructing Equality: Identity and intersectionality in Canadian and South African Jurisprudence' (2004) LLM dissertation at University of Cape Town, Cape Town at 12.

⁶ J Pretorius 'Affirmative Action' in Pretorius J L *et al Employment Equity Law* (2011) at 5-6.

males.⁷ Affirmative action is controversial, because it is viewed as a political contest of who gets what, when and how.⁸

The race-based approach to affirmative action in South Africa does not really contribute to the constitutional ideal of non-racialism.⁹ Racism is thus seen as one of the unintended consequences of affirmative action.¹⁰ This unintended consequence impacts negatively on the legislative intent to ultimately bring about diversity.¹¹ Although the Employment Equity Act¹² indicates that other identifiers of disadvantage exist, race is still predominantly preferred over disability and gender as in South Africa.¹³

This dissertation attempts to answer the following question: Could race as selection criteria be the only appropriate identifier to determine disadvantage? Put differently, are there alternative ways to demarcate the beneficiary group, other than utilising race? It is argued that the race-based approach to affirmative action has many draw backs. One drawback is that it does not contribute to social cohesion and unification of racial groups in South Africa.¹⁴ This is not just a South African phenomenon and it is said that in other jurisdictions, the race-based approach leads to racial divisiveness.¹⁵

Inequality exists along two trajectories, namely socio-economic inequality and status-based inequality. Policymakers follow an approach of linking inequality and discrimination to disadvantage. This approach is specifically followed to select the most appropriate redress measure suitable to the specific context. Discrimination based on race or other status criteria is closely correlated with socio-economic disadvantage.¹⁶ Relevant to establishing group and individual socio-economic status in society, is the historical context in which it exists.¹⁷ Socio-economic inequalities may be remedied by state

⁷ A Rycroft 'Obstacles to employment equity?: The role of judges and arbitrators in the interpretation and implementation of affirmative action policies (1999) 20 *ILJ* 1411 at 1414.

⁸ J Kellough *Understanding Affirmative Action: Politics Discrimination and the Search for Justice* (2006) at 5.

⁹ Constitution of the Republic of South Africa Act 108 of 1996 s 1(b).

¹⁰ N Alexander 'Affirmative action and the perpetuation of racial identities in post-apartheid South Africa' 2007 *Transformation* 92 at 92.

¹¹ Employment Equity Act 55 of 1998 preamble.

¹² Section 1; female, black and disabled. *Ibid.*

¹³ Adam (n 4) at 52; O Dupper 'Affirmative Action: Who, how and how long?' (2008) 24 *SAJHR* 422 at 427.

¹⁴ *Ibid.*

¹⁵ C Thomas 'Affirmative action goals and timetables. Too tough? Not tough enough!' 1987 *Yale Law and Policy Review* 403 at 411.

¹⁶ S Fredman 'Redistribution and recognition: reconciling inequalities' (2007) 23 *SAJHR* 214 at 214-218.

¹⁷ Amoah (n 5) at 8.

intervention in the form of the welfare state and status-based inequality,¹⁸ by legal intervention.¹⁹

In conclusion, we will investigate if an alternative approach by focusing on alternative criteria to identify disadvantage, exist. How may disadvantage be determined differently? A proposed alternative could be a class-based approach to affirmative action or putting it differently, using socio-economic status to determine who will benefit from redress programs. With this model, disadvantage is based on the class or socio-economic status of the prospective beneficiary. Without being naïve and unrealistic in believing that the implementation of such a model will be without its drawbacks, practical difficulties in using this approach will not be ruled out.

The purpose of this research is not to provide the answer to the dilemmas of the race-based approach, but to stimulate debate among policymakers and prompt academics to investigate alternative approaches to affirmative action. With almost similar conditions of racial segregation and discrimination,²⁰ South Africa and the United States of America will be contrasted. The United States of America has been implementing affirmative action for more than 40 years and although it does not have an explicit clause in its constitution promoting affirmative action, it does prohibit discrimination. The debate around affirmative action in the United States of America is relevant to the global arena for three specific reasons:²¹

- The United States had been the leading force in development of affirmative action programs.
- Their approach to affirmative action has impacted largely on the development of affirmative action programs internationally.
- The highly developed review system in the United States allowed the Supreme Court to decide if the principle of affirmative action could be reconciled with the constitutional guarantee of equality.

Attempts to use socio-economic status as ground to identify disadvantage was made since the late nineties, but was not as effective as proponents wanted it to be. Currently the

¹⁸ Inequality based on group status, such as race disability or gender.

¹⁹ Fredman (n 16) .

²⁰ T Deane 'An historical overview of affirmative action in the United States of America' (2009) 15:2 *Fundamina* 75 at 75-76.

²¹ Faundez (n 3) at 17.

United States still grapples with the question of whether race-based measures should be used or not.

Globally, the study of inequality indicates a correlation between racism, discrimination and disadvantage. Inequality portrays itself as ‘unequal and unfair treatment of certain groups through economic marginalisation, bias in the criminal justice system, denial of cultural rights or control of ancestral land and unequal access to education, jobs and other opportunities.’²² Equality on the other hand may be viewed as ‘the interaction between members in society, where all have access to advantages and opportunities’.²³ Equality is also deemed to be a crucial building block in establishing a democratic society.²⁴

A general perception exists that there is a nexus between a person’s skin colour and his or her socio-economic status.²⁵ It is said, the lighter the individual’s skin colour, the higher will his or her social status be.²⁶ This societal stratification based on race, is still prevalent in the South African context and statistical data implies that poverty is concentrated among the black population, particularly the African component of this group.²⁷ So if a correlation between colour or race and poverty exist, could one substitute the one for the other and have the same results when identifying disadvantage in South Africa? Globally, inequality and discrimination in employment is still rife and concerted efforts are necessary to bring about equality between various groups. To rid society of discrimination and achieve equality in the workplace, one needs to identify what needs to be eliminated and how it should be done.²⁸

In South Africa, the legacy of apartheid left disparate socio-economic realities based on race. Prior to 1994, race determined ‘occupation, place of residence, education, choice of

²² Global rights partners for justice ‘Affirmative action: A global perspective (2005) at vi Available at http://www.globalrights.org/site/DocServer/AffirmativeAction_GlobalPerspective.pdf?docID=2623 [Accessed 19 December 2012].

²³ Amoah (n 5).

²⁴ Equal Rights Trust ‘The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality’ available at <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Nondiscrimination,%20Formal%20and%20Substantive%20Equality.pdf> [Accessed 26 June 2012].

²⁵ Sithole *et al* (n 1) at 310.

²⁶ M Tomei ‘Discrimination and equality at work: A review of concepts’ (2003) 142: 4 *International Labour Review* 401 at 408. ‘This has led to some analyst to conclude that, in Brazil, money whitens and poverty darkens.’

²⁷ Adam (n 13); C Qunta ‘*Who’s afraid of affirmative action: A survival guide for black professionals*’ 1ed (1995) at 18.

²⁸ Tomei (n 26) at 401.

partner, freedom of movement, and use of facilities and amenities.’²⁹ The South African constitution has specifically embraced affirmative action to bring about social change³⁰ and to address the imbalances caused by the past discrimination.³¹

1.2 The research question

Post-1994, redress measures enjoyed a vast amount of attention in South Africa. The Constitution,³² and in particular section 9, known as the equality clause, highlights measures to redress disadvantage caused by discrimination.³³ This section also calls for legislative and other measures to be implemented to protect or advance persons or categories of persons, disadvantaged by unfair discrimination.³⁴

Courts made it quite clear that there is no need to prove disadvantage in order to be eligible for affirmative action benefits.³⁵ The broad stroke of the group-based approach is applied, affording a person benefits if he or she belongs to the designated group. All members of the designated group are theoretically deemed to be disadvantaged.³⁶

The Employment Equity Act is the specific legislative measure mentioned in the Constitution, to protect or advance persons disadvantaged by unfair discrimination. Ironically, however, no mention of disadvantage is made in this Act. This Act defines the beneficiary group as the designated group.³⁷ Another factor to be considered for eligibility for affirmative action benefits is having suitable qualifications.³⁸

Through investigation, this research will endeavour to answer the following questions:

- Is there an over-emphasis of race when affirmative action beneficiaries are identified?

²⁹ M McGregor ‘Judicial notice: Discrimination and disadvantage in the context of affirmative action of South African workplaces’ 2011 *De Jure* 111 at 112-113.

³⁰ N Smith ‘Affirmative action under the new Constitution’ 1995 *SAJHR* 84 at 91.; South African Constitution (n 9) s 9 (2).

³¹ Sithole *et al* (n 25).

³² Act 108 of 1996.

³³ These measures refer to affirmative action.

³⁴ Smith (n 30).

³⁵ M McGregor ‘Actual past discrimination or group membership as a requirement to benefit from affirmative action: A comparison between South African and American case law’ (2004) 29 *Journal for Juridical Science* 122 at 139. *George v Liberty Life Association of SA Ltd* [1996] 8 *BLLR* 985 (IC) at 1005.

³⁶ Pretorius (n 6) at 13.

³⁷ Section 1, Act 55 of 1998.

³⁸ Section 20(3- 5).

- Is there an alternative means to identify disadvantage, other than race?

From time to time comparison to the way in which the United States deals with disadvantage will be made.

In conclusion alternatives for the identification of disadvantage and the viability for application in the South African context will also be investigated. The use of race as proxy for disadvantage is problematic, because of the tension it creates between the different racial groups. This is evidenced by the various court contestations against affirmative action, especially by members of minority groups.³⁹

1.3 Rationale and aim of the research

Prior to 1994, the majority of the black South African population actively opposed apartheid, but ironically a small minority were passively accepting the *status quo* maintained by the oppressive government. The minority were only doing so to enjoy privileges under the apartheid system.⁴⁰ As a coloured student, during the late eighties and early nineties, I found myself in the transitional zone, from the old oppressive regime to the new democracy. This was an interesting era and my keen interest in Sociology and Politics, stimulated much curiosity and led me to be critical of many contemporary topical societal issues.

After the democratic elections in 1994, the focus shifted from opposing, to alignment with the government.⁴¹ The development of redress measures to benefit the disadvantaged masses started to take preference over many other projects. During the late nineties my interest in Labour Law ignited and specifically in the area of discrimination law. Recently in the United States of America, the trend has moved from not having to prove disadvantage to a situation where actual disadvantage will be a determining factor when affirmative action benefits are afforded.⁴²

³⁹ Whites in the South African context.

⁴⁰ It was more the Coloured and Indian groups who were treated better than the Blacks within the African group. These two groups were often seen at times to collaborate with the oppressive state. The collaboration was out of free will, but with the motive of receiving better benefits under the system as others.

⁴¹ This was after the first democratic elections in 1994, where the ANC won the majority votes.

⁴² McGregor (n 29).

Critical and contentious issues of over and under-inclusion will also be highlighted and how this could be addressed by looking at disadvantage differently. In comparing the United States of America with South Africa, one would be able to learn from their application of affirmative action and also highlight the pitfalls which should be avoided.

With this as backdrop, the current application of affirmative action with specific reference to the employment sphere in South Africa will be investigated, and exploration of adjustments of existing approaches that may work in our context, will be embarked upon. Secondary to this primary objective, an investigation, if race still stands as proxy for disadvantage will be interrogated. In a racially divided society, this is a crucial topic. Alternative ways of identifying disadvantage, among others, utilising class or socio-economic status as proxy, will be investigated.

1.4 Motivation of the research question

How may comparative disadvantage be infused into the application of the designated group mechanism in the Employment Equity Act and other relevant legislation?

In the South African context there are specific pointers as per the Employment Equity Act as to who will qualify for affirmative action benefits. At the moment, race still takes preference over the other criteria such as gender and disability and one might be able to safely say that there is an overemphasis on race. This will also be explored in case law later.

On the other hand, the substantive notion of equality allows for race and contextual influences to be taken into account when beneficiaries for affirmative action benefits are demarcated. It is also further acknowledged that all members of the designated group should be afforded benefits under affirmative action, if they were disadvantaged due to unfair discrimination.⁴³ The South African Constitution notes that disadvantage caused by unfair discrimination is the criteria to be used to identify affirmative action beneficiaries. It states that measures will be taken, to 'advance persons, or categories of persons.'⁴⁴

⁴³ J L Pretorius 'Fairness in transformation: A critique of the Constitutional Court's affirmative action jurisprudence' (2010) 26 *SAJHR* 536 at 541-561.

⁴⁴ Smith (n 30).

The identification of beneficiaries will highlight three main issues. Firstly, members of the disadvantaged group, who share similar histories with the advantaged group, who qualify for benefits are under spotlight.⁴⁵ Members of the beneficiary group, who are currently socio-economically on par with the previously advantaged group, may also be included under this highlighted issue. This is a contentious issue which will be elaborated under the concept of over-inclusion, in this research. Secondly, disputes arose if non-citizens should qualify for benefits under affirmative action.⁴⁶ Lastly the issue of over- and under-inclusiveness of affirmative action measures are also heavily contested and could affect its validity.⁴⁷ The focus of this research will be on the first and the last issues raised above and in the process, proposals to follow a more nuanced approach in determining disadvantage will be forwarded.

A suggested approach to be followed would be to rank or grade the intended beneficiaries by further refining the current beneficiary group. The beneficiary group will be defined more precisely in the process. However, is it really necessary to define the group so neatly? This issue will be discussed later in the *van Heerden* case. Some beneficiaries might be afforded benefits even if they are not currently in a disadvantaged position or even affected by past discrimination.⁴⁸ In *George v Liberty life Association of SA Ltd*, Landman J, made it clear that the Constitution recognises that within the disadvantaged racial group ‘there may be and indeed are persons who have had opportunities and who have not been disadvantaged to the extent of their fellows.’⁴⁹

Over-inclusiveness is the phenomenon where not only persons or categories of persons disadvantaged by unfair discrimination will benefit from affirmative action programs, but also persons not belonging to those groups. In *van Heerden v Minister of Finance*, the Constitutional Court argued that ‘windfall cases’ will exist as long as the majority of the beneficiaries are disadvantaged by unfair discrimination.⁵⁰ To show that actual disadvantage was suffered is not necessary in the South African context. Similarly in the

⁴⁵ For example; Tokyo Sexwale who is married to a white woman, their offspring would be deemed as members of the disadvantaged group, although their socio-economic circumstances does not equate to the conditions of poverty suffered by the majority of the disadvantaged group.

⁴⁶ *Auf der Heyde v University of Cape Town* [2000] 8 BLLR 877 (LC).

⁴⁷ Pretorius (n 6) at 12.

⁴⁸ Tomei (n 26) at 412.

⁴⁹ *George v Liberty Life Association of SA Ltd* (n 35).

⁵⁰ *Minister of Finance & another v Van Heerden* (2004) 25 ILJ 1593 (CC) at para 39.

United States of America, in the case of *City of Richmond v JA Croson Co*,⁵¹ the court indicated that beneficiaries of affirmative action need not be the actual victims of discrimination.

Under-inclusiveness is when the measure only benefits some of the groups it is supposed to reach when judged against the purpose of protecting and advancing persons or categories of persons, disadvantaged by unfair discrimination.⁵² The question arising from these circumstances is whether an employer can be selective in choosing only one or some of the designated groups?⁵³ Under-inclusion may also exist where a person is part of the designated group, but the person will never benefit from affirmative action measures. Affirmative action has qualifying criteria where the person might be part of the designated group (race), but the suitable qualifications are lacking to receive benefits. Will affirmative action reach those who are the poorest of the poor and who have not even been afforded an opportunity to enter the formal education system?

The Employment Equity Act however, only targets suitably qualified people from the designated group.⁵⁴ Can the two concepts – disadvantaged and designated group, be fused to create a more distinctive group? Who will benefit from affirmative action? What is meant by fusing the two concepts is that criteria such as race, gender and disability should not be discarded in identifying beneficiaries, but the focus should shift from group identity features, to the identification of actual disadvantage.

The complex nature of disadvantage and inequality in the South African context led to the Constitution leaving the description of beneficiaries to receive redress, vague. The Constitution also does not clearly articulate what disadvantage is. The nature of the unfair discrimination is also not elaborated upon.⁵⁵ In case law, it is acknowledged that there are criteria other than race, gender and disability, which could be used to identify disadvantage. In the landmark case of *Minister of Finance v van Heerden*, the following significant categories of gender, class as well as other levels and forms of social differentiation and systematic social differentiation which still persist, are highlighted.⁵⁶

The South African Constitution makes no mention that race should be attached to the

⁵¹ 488 US 469 (1989), 109 SCt 706.

⁵² Pretorius (n 6) at 15.

⁵³ Smith (n 30) at 92-93.

⁵⁴ Act 55 of 1998 s 15(1).

⁵⁵ McGregor (n 29) at 115.

⁵⁶ *van Heerden* (n 50) at para 27.

identification of affirmative action beneficiaries. The substantive notion of equality on the other hand, underlines the acknowledgement of disadvantage, and is attached to group status and also includes criteria such as race.

Fundamental in addressing inequality is the establishment of the equality clause in the South African Constitution. However, there are no clear cut solutions for the vexing equality problems faced by South African communities. The Employment Equity Act does not deem the application of affirmative action to be unfair discrimination,⁵⁷ but this specific measure causes much tension between groups and is perceived as discriminatory by the non-designated group. There is no clear guidance as to how these matters should be dealt with. It is left to the courts⁵⁸ to decide and this has in turn resulted in a multitude of court contestations.

Another important piece of legislation enacted in accordance with s 9(4) of the South African Constitution,⁵⁹ is the Promotion of Equality and Prevention of Unfair Discrimination Act⁶⁰ (PEPUDA). The preamble of PEPUDA makes it clear that the consolidation of democracy requires the eradication of social and economic inequalities which were caused by colonialist, apartheid and patriarchy.⁶¹ Although PEPUDA has a wider application, it will give meaning to terms in the Employment Equity Act.⁶² Socio-economic status should be included as a prohibited ground in relation to discrimination.⁶³

PEPUDA defines socio-economic status to 'include social or economic conditions or perceived conditions of a person who is disadvantaged by poverty, low employment status or lack of or low level educational qualifications.'⁶⁴ PEPUDA is also obligated to give effect to the letter and purpose of the Constitution;

Section (2) (b) (iii)

'The values of non-racialism and non-sexism contained in s (1) of the Constitution' and

⁵⁷ Section 6(2).

⁵⁸ Pretorius (n 6) at 3.

⁵⁹ '...National legislation must be enacted to prevent or prohibit unfair discrimination.'

⁶⁰ Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁶¹ Preamble. Ibid.

⁶² O. Dupper *et al Essential Employment Discrimination Law* Juta (2004) 2.

⁶³ Section 34(1)(a).

⁶⁴ Section 1.

Section (2) (g)

‘to set out measures to advance persons or categories of persons disadvantaged by unfair discrimination’

The Constitutional Court in *Van Heerden* notes, that other forms of disadvantage do exist and require redress. The concepts of over- and under-inclusion become relevant in the identification of disadvantage. One could argue that the possibility exists that designated group could include those who are not in need of redress. In this process vulnerable individuals who do not stand a chance of enjoying benefits under affirmative action are excluded. Although a group approach is favoured in South Africa, the Constitution is open to an individualised approach. Section 9(2) mentions ‘persons or categories of persons disadvantaged by unfair discrimination.’ It is argued that measures helping the individual will help the group as a whole.⁶⁵ The identification of disadvantage for individual victims is not without its drawbacks, but will ensure that the real victims are compensated for current disadvantages suffered. The approach in this research will be based on the identification of individual disadvantage by measuring a person’s socio-economic status, a practice which is applied in India, by further re-categorising the beneficiary group by excluding the creamy layer.⁶⁶

The exploration of notions of equality will be dealt with in Chapter Two. The relevance of this is crucial to indicate the relationship between inequality, discrimination and disadvantage. This is fundamental in our understanding of how we arrived at the place of inequality and will assist us in identifying what it is that one needs to address. Chapter Three will deal with the specifics of affirmative action and four approaches will be highlighted. Chapter Four will look at case law to establish if disadvantage was clearly articulated when beneficiaries for redress are identified. Chapter Five will focus on an alternative to the race-based approach.

⁶⁵ Smith (n 30) at 89-90.

⁶⁶ S Fredman ‘Facing the future: Substantive equality under spotlight’ in O Dupper & C Garbers ‘*Equality in the workplace reflections of South Africa and beyond*’ 1 (ed) (2009) at 23.

Chapter Two

THE CONCEPT OF EQUALITY

2.1 Trajectories of equality and impact on redress measures

This chapter will by no means attempt to provide an extensive discussion of equality, but it will endeavour to highlight the interrelatedness of equality and socio-economic rights. The concept of equality and in particular the notions of formal and substantive equality, as well as equal opportunity, become critical concepts in the grasping of the understanding of affirmative action, in its context. It is argued that affirmative action is a means to bring about greater social equality. Therefore, the notion of equality is important when one wishes to devise policies or understand affirmative action's implementation. The notion favoured in South Africa will be discussed and a more extensive exploration of the Constitution and the Employment Equity Act, will give us a better understanding of the concepts of disadvantage and the designated group.

The tension between proponents and opponents of affirmative action lies in their different conceptions of equality. For example, one camp favours group rights while the other proposes that individual rights should take preference when beneficiaries for social benefits are identified.⁶⁷ A crucial element of equality is that it has the capacity to transform societies, which could be achieved through substantive equality. In the South African context, inequality is viewed to be a complex and multi-faceted phenomenon and is rooted in remnants of colonialism and apartheid. A correlation exists between the group-based inequalities, social and economic disadvantage, based on multiple criteria such as race, class and gender, just to name a few.⁶⁸

Inequality could be addressed in the sphere of policy or law, and is reflected in the two views of inequality, namely; socio-economic⁶⁹ and status-based inequality.⁷⁰ Social inequalities are evident where a particular group is marginalised, stigmatised or

⁶⁷ Faundez (n 3) at 1-3.

⁶⁸ C Albertyn 'Constitutional equality in South Africa' in O Dupper & Christoph Garbers *'Equality in the workplace reflections of South Africa and beyond'* 1 (ed) (2009) at 75.

⁶⁹ '...socio-economic equality within the welfare state can be understood as aiming at redistribution, to correct economic injustices in terms of access of individuals to resources.'

⁷⁰ Inequality based on criteria such as a person's race, gender or disability. These are the specific criteria highlighted by the Employment Equity Act to identify affirmative action beneficiaries.

denigrated, while other groups are privileged. Economic inequalities are manifested in unequal access to basic needs, opportunities and material resources. The two spheres are not really separate and in many cases, status-based inequality results in socio-economic inequality.⁷¹

With the above as foundation, one could argue that, state interventions should bring about socio-economic change and redistribution of wealth. Legal interventions through justiciable constitutional equality guarantees or anti-discrimination laws are needed, when status-based inequality is the key focus to be corrected.⁷² A good example of the correlation between the two types of approaches to inequality is, in South Africa where state intervention addresses the housing issue, in the form of the welfare state, which will directly also address socio-economic issues of poverty among Black and Coloured communities.⁷³

Affirmative action measures may be viewed as a status-based measure instituted by a constitutional imperative and a legal intervention. In utilizing the status group as the identifier of beneficiaries, the accompanied socio-economic inequality caused by past discrimination will also be addressed in the process. Focusing on social initiatives driven by the welfare state, race-based inequalities will be addressed by taking criteria such as socio-economic status into account. Inequality based on one's affiliation to a particular group, is closely linked to socio-economic disadvantage and therefore socio-economic interventions will primarily target groups affected by discrimination.⁷⁴ Socio-economic issues which were normally addressed by the welfare state are now receiving much attention with an approach focusing on a rights based influence.⁷⁵ American courts were however, reluctant to reformulate socio-economic inequality as a status-based wrong.⁷⁶

There is also a school of thought where it is acknowledged that status-based inequalities, for example, racial inequalities, are the root causes of socio-economic disadvantage. This chapter will focus on the fundamental traits of the notions of equality and how it impacts on the achievement of the goal to reach a more egalitarian society.

⁷¹ Albertyn (n 68) at 76.

⁷² Fredman (n 16) 214-216.

⁷³ K Lang *Poverty and discrimination* (2007) at 3; W Darity *et al* 'Who is eligible? Should Affirmative action be group- or class-based?' (2011) 70:1 *American Journal of Economics and Sociology* 238 at 240.

⁷⁴ Fredman (n 16) at 214-217.

⁷⁵ *Ibid.*

⁷⁶ Fredman (n 16) at 229.

2.2 Notions of equality and the South African approach

‘For inequality is injustice. From inequality and injustice flow oppression and oppression has no place in the society which we are trying to mould for the future.’⁷⁷

It is acknowledged that equality does not exist in a vacuum, but in a social context which takes past social experiences, present realities of those less fortunate and our future aspirations to create an egalitarian society, into account.⁷⁸ Equality is a comparative concept, which requires that people be treated similarly, but in certain instances may warrant differential treatment.⁷⁹ In order to gain a better understanding of the practical implementation of affirmative action, it is relevant to elaborate on the three notions of equality. The meaning of equality could differ depending on the context in which it is discussed.⁸⁰ Elaboration on the notions of formal equality, equality of opportunity and substantive equality is relevant for the purpose of this research.

Formal equality views the use of race, sex or disability as discriminatory, even in situations where it is used to identify individuals, in need of redress.⁸¹ This perspective views affirmative action as reverse discrimination.⁸² Also known as a symmetrical view of equality, this notion argues that it is in order for a disadvantaged group to challenge affirmative action as a violation of the principle of equality.⁸³ All members of society are deemed to be equal bearers of rights. Society could rid itself from inequality by extending the same rights and privileges to all, in a neutral manner and no regard is given to socio-economic differences between groups. Formal equality is procedural in nature and has no remedial intent at all.⁸⁴ This model also treats like-cases alike⁸⁵ and does not identify

⁷⁷ C L'heureux-Dubt ‘Making a difference: the Pursuit of equality and a compassionate justice’ 1997 *SAJHR* 335 at 335.

⁷⁸ *Ibid* at 337.

⁷⁹ *Ibid* at 352.

⁸⁰ Faundez (n 3).

⁸¹ S Fredman ‘Providing equality: substantive equality and the positive duty to provide’ (2005) 21 *SAJHR* 163 at 164.

⁸² S Fredman ‘Reversing discrimination’ (1997) 113 *Law Quarterly Review* 575 at 576.

⁸³ C Albertyn *et al* ‘Substantive equality, social rights and women: a comparative perspective’ (2007) 23 *SAJHR* 209 at 209.

⁸⁴ M Fineman ‘Equality across legal cultures: the role for international human rights’ (2004) 27 *Thomas Jefferson Law Review* 1 at 2.

⁸⁵ C Cooper ‘The boundaries of equality in labour law’ (2004) 25 *ILJ* 813 at 817.

instances when it is justified to treat unequal cases differently.⁸⁶ Individual rights are favoured as opposed to group rights.⁸⁷ The principle of individual merit, over group status is also favoured and merit is viewed as a function of disadvantage rather than an objective characteristic.⁸⁸ With this approach, the state acts as a neutral force between its citizens, favouring no one above any other.

A critique to this approach would be that without consideration of the social context and circumstances, equal treatment could perpetuate and even exacerbate existing inequalities.⁸⁹ Formal equality does not recognise deeply entrenched patterns of rooted group disadvantage and therefore ignores the existence of structural or systemic inequality in societies.⁹⁰ Equality is also viewed as a relative concept under the notion of formal equality, which means that it could be attained by treating everyone equally bad or by removing benefits to bring all in line with the worse-off.⁹¹ This could be positive in the sense that it prevents those distinctions on the basis of status affiliations, such as race and sex. A scenario where formal equality application could be useful is in situations where equal pay for equal work equal is challenged.⁹²

Equality of opportunity is a hybrid of the two approaches, formal and substantive equality, using arguments from both, to allow positive action with strict limits. The consideration of distributive factors is crucial for the attainment of equality.⁹³ This notion argues that equality cannot be achieved if role-players start the race at different starting points⁹⁴ and departs from the principle of individualism. On the other hand, it also acknowledges that the individual's chances are jeopardised by structural discrimination based on group characteristics. This notion allows for preferential treatment based on race, sex and even disability, until the purpose of equalising the starting point is met. When the starting point is equal, individualism will reassert itself when the point of neutrality and symmetry is reached. A strong reliance is also placed on merit, which is detrimental in

⁸⁶ Faundez (n 3) at 3.

⁸⁷ Fredman (n 16) at 233.

⁸⁸ Fredman (n 66) at 16.

⁸⁹ Fredman (n 81) at 163.

⁹⁰ Cooper (n 85).

⁹¹ Fredman (n 88).

⁹² Fineman (n 84).

⁹³ Fredman (n 82) 576-579.

⁹⁴ S Medjuck 'Taking Equality into the 21st Century: Commentary' (2001) 12 *National Journal of Constitutional Law* 49 at 49-50; Equal Rights Trust 'The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality' at 3. Available at <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Nondiscrimination,%20Formal%20and%20Substantive%20Equality.pdf> [Accessed 26 June 2012].

our understanding of disadvantage. This approach disregards historical factors impacting negatively on an individual's life chances.

It is argued that when individuals enjoy equality of opportunity, the issue of institutional discrimination had been overcome and they should be treated on the basis of their individual qualities and not on race or other status-based criteria.⁹⁵ Human rights will allow for individuals with lesser qualifications belonging to a certain group, to receive preferential treatment for jobs and this would be in line with the fair play principle, taking into account that individuals may compete on a fair footing.⁹⁶ A practical application of this approach would be when obstacles in the recruitment process are removed. The one drawback is that this does not guarantee that the disadvantaged groups would be in a position to take advantage of the available opportunities.⁹⁷ When males and females with the same qualifications compete for an employment opportunity, the females should be favoured if they are underrepresented at this grade. This policy would be a temporary measure and once the goal of representative females had been reached, the individual merit principle would return.⁹⁸ A critique of this model is that it is merely procedural and the outcomes are not necessarily guaranteed.⁹⁹ By increasing the requirements for an entry level job would still exclude poorly qualified black employees, posing barriers to the employment of these employees.¹⁰⁰

This model is applied in the European Union countries, where specific measures are in place to ensure positive action, preventing current and compensate for past discrimination, as well as promoting equality.¹⁰¹ In *Kalanke*,¹⁰² the Court inquired into the policy of preferring a woman over an equally qualified man. This preferential treatment was done in grades where the underrepresentation of woman exists. When a man with equal qualifications as the female candidate brought the case before the Labour Court (Bundesarbeitgericht), claiming that he was discriminated against on the grounds of sex, it was struck down.

⁹⁵ Fredman (n 82) at 579.

⁹⁶ Medjuck (n 94) at 51.

⁹⁷ Fredman (n 81) at 167.

⁹⁸ O Dupper 'Affirmative Action and Substantive Equality: The South African Experience' 2002 *SAMLJ* 275 at 279.

⁹⁹ J Waldron in S Guest and A Milne *Equality and Discrimination* (1985) at 97.

¹⁰⁰ Fredman (n 82) at 580.

¹⁰¹ Council Directive 2000/78/EC of 27 November 2000, (the Employment Directive), Article 7. <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0078:EN:HTML> [Accessed 13 July 2012].

¹⁰² Case C-450/93 *Kalanke v. Freie Hansestadt Bremen* [1995] E.C.R. I-3051; [1996] I.C.R. 314 (E.C.J).

One could conclude that equal opportunity acknowledges the shortcomings of formal equality by disregarding historical factors, resulting in current disadvantage, but alternatively alters it by fusing it with substantive equality principles.¹⁰³

The above models do not bring about real equality and alternatively a substantive model or an asymmetrical approach to equality will be discussed below. Asymmetry refers to the situation where different groups are treated differently in a social context, to address the differences between them.¹⁰⁴ In these circumstances it is fundamental to acknowledge that equality will be breached not only in situations where individuals in similar situations are treated differently, but also where there is a disregard to treat differently, individuals whose situations are significantly different.¹⁰⁵

The removal of barriers to employment and equal treatment of individuals or groups are not enough to eliminate discrimination in society.¹⁰⁶ An individual's historical context and social status should be taken into account when preferential treatment is allowed for the affording of benefits.¹⁰⁷ Substantive equality does not view discrimination to be standing in isolation, but connects it with disadvantage. This disadvantage is a complex phenomenon and intersections between social, economic, political and educational roots exist.¹⁰⁸

Substantive equality is also known as equality of outcomes or results¹⁰⁹ and is summarised as follows by Albertyn:

‘The call for ‘substantive’ equality emerges from particular understandings of inequality as rooted in political, social and economic cleavages between groups, rather than the result of arbitrary or irrational action. It acknowledges the complexity of inequality, its systemic nature and its entrenchment in

¹⁰³ Equal Rights Trust ‘The Ideas of Equality and Non-Discrimination: Formal and Substantive Equality’ at 4. Available at <http://www.equalrightstrust.org/ertdocumentbank/The%20Ideas%20of%20Equality%20and%20Nondiscrimination,%20Formal%20and%20Substantive%20Equality.pdf> [Accessed 13 July 2012].

¹⁰⁴ *Prinsloo v Van der Linde* (1997) 6 BCLR 759 (CC) at para 2.

¹⁰⁵ S Jagwanth ‘Advancing women’s rights: The first decade of democracy’ 2005 *Acta Juridica* 131 at 133.

¹⁰⁶ Tomei (n 26) at 409.

¹⁰⁷ McGreggor (n 29) at 113.

¹⁰⁸ Faundez (n 3).

¹⁰⁹ Dupper (n 98) at 280.

social values and behaviours, the institutions of society, the economic system and power relations.’¹¹⁰

This approach is a shift from equality of opportunity (fair play) to equality of results (fair share).¹¹¹ Group status such as race, colour, gender or any group characteristic becomes irrelevant and the focus shifts to the disadvantage which could be multifarious and could include social and economic inequality.¹¹² It is important to note at this juncture that the South African Constitution prescribes to a substantive notion of equality.¹¹³ In the *van Heerden* case, Mosenke J highlights what substantive equality should mean in the South African context:

‘This substantive notion of equality recognizes that besides uneven race, class and gender attributes of our society, there are other levels and forms of social differentiation and systematic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of new patterns of disadvantage. It is therefore incumbent on courts to scrutinize in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or adds to group disadvantages in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but 'situation-sensitive' approach is indispensable, because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.’¹¹⁴

The above acknowledgement of contextual factors refers to the transformative role which substantive equality could and should play in bringing about equality, by rooting out systemic inequality. The substantive approach does not endeavour to eliminate group differences, but uses the individual status of race as the dominant norm of disadvantage. In these circumstances, the state cannot take a neutral position, for such a stance will be regarded as support to societal discrimination and therefore the state has a positive duty to intervene and eradicate discrimination. The results of this measure will ultimately bring about a more egalitarian society.¹¹⁵ Substantive equality does not disregard the categorisation by race or gender or on status grounds as Fredman terms it, but endeavours to find supplemental criteria to identify who should benefit from redress measures.¹¹⁶

¹¹⁰ C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* 253 at 254.

¹¹¹ *Medjuck* (n 94) at 50.

¹¹² *Fredman* (n 81) at 166.

¹¹³ *Cooper* (n 85) at 816.

¹¹⁴ *van Heerden* (n 56).

¹¹⁵ *Fredman* (n 16).

¹¹⁶ *Fredman* (n 112).

There is strong support for this approach, but in the South African context where institutionalised racial discrimination was the order of the day prior to 1994, this is not easy. In many instances, race still acts as the identifying criteria for disadvantage. Put differently, it acts as proxy for disadvantage and is the main reason for conflict between the beneficiaries and non-beneficiaries. The difference between formal and substantive equality may be described as follows:

‘A formal approach to equality assumes that inequality is aberrant and it can be eradicated simply by treating all individuals exactly the same way. A substantive approach to equality, on the other hand, does not presuppose a just social order. It accepts that past patterns of discrimination have left their scars upon the present. Treating all people in a formally equal way now is not going to change the patterns of the past, for that inequality needs to be redressed and not simply removed. This means that those who were deprived of resources in the past are entitled to an ‘unequal’ share of resources at present.’¹¹⁷

Substantive equality has four main aims:¹¹⁸

- Firstly, substantive equality should break the cycle of discrimination against subaltern groups and should focus on disadvantage;
- Secondly, it should redress stigma, stereotyping, humiliation and violence because of membership of the subaltern group;
- Thirdly, identity should be affirmed positively; and
- Finally, it should facilitate full participation in society.

In South Africa, the focus is on groups to receive redress for the legacy of systemic discrimination they suffered under apartheid. Economic disadvantage is disproportionately concentrated among groups experiencing status-based discrimination.¹¹⁹ This disproportionate socio-economic disadvantage is mainly concentrated in the African and Coloured sectors of the South African population.¹²⁰

In summary, a substantive approach acknowledges moral differences between groups, based on race, sex and even disability. These differences between the groups are mostly

¹¹⁷ Kentridge J ‘Equality’ in Chaskalson *et al* (eds) *Constitutional law of South Africa* (1998) at para 14.2.

¹¹⁸ Fredman (n 97).

¹¹⁹ Fredman (n 16) at 218.

¹²⁰ Explanatory Memorandum to the Employment Equity Bill GN 1840 GG18481 of 01 December 1997 at 6.

caused by historical and current disadvantage.¹²¹ Substantive equality also acknowledges that a nexus between status and disadvantage exists, where status is not at issue, but rather the accompanying disadvantage linked to status. The focus then shifts from status to the accompanying disadvantage. In this context, status refers to a person's race, gender, disability or other prohibited ground and disadvantage refers to socio-economic disadvantage. Substantive equality is also seen as the vehicle to address status and socio-economic disadvantage simultaneously.¹²²

At this juncture it would be meaningful to give an account of inequality by means of statistical evidence. The distribution of wealth experienced between the various groups in South Africa is relevant in the discussion of inequality. Information below gives evidence of the socio-economic circumstances of Blacks prior to 1994,¹²³ but it also compares the circumstances of blacks and whites to highlight the level of inequality.

- 51 percent of the Black population are not housed in formal housing.
- Over 70 percent commute more than two and a half hours per day.
- 40 percent of unemployment increases pressures on the employed and dilutes income.
- 65 percent of Blacks experience problems with water, electricity and sewerage.
- 70 percent have no electricity.
- 63 percent of Blacks have no access to recreational facilities.
- 59 percent of Blacks cannot afford rent increases.
- The average Black has four and half square meters of living space.
- An average of four black people live in a house.
- The average living space in hostels is below three square meters per person.
- 50 - 75 percent of Black families have single parents- predominantly mothers.
- 65 percent of Black families live below the poverty line.
- Per capita land availability: White: Black = 27:1
- Per capita household income: White: Black = 10: 1
- Per capita education expenditure: White: Black = 6,5 : 1

¹²¹ Fineman (n 84) at 4-6.

¹²² Fredman (n 66) at 15.

¹²³ The new government inheritance: Moods and realities in Black living areas- 1990. Statistics from SAIRR; SASS cited in, C Nel *Transformation without sacrifice: Urgency of social, economic and organizational justice in South Africa* (2010) at 108-109.

- Two percent of all assets are owned by Blacks.
 - The lowest 40 percent of the population earns less than 10 percent of the income.
- The South African Gini-coefficient¹²⁴ is one of the worst in the world at approximately 0.63.

In spite of government intervention after the 1994 elections, the legacy of apartheid still lingers.¹²⁵ The playing field is far from equal and it is argued that the ‘normalisation of society cannot be left to market forces’ and therefore government intervention is required.¹²⁶ The data below¹²⁷ is an example of how income¹²⁸ is distributed between different population groups and it is evident that the gap between the different racial groups increased tremendously from 1970 to 2000.

Table 1: Total and per capita income, 1970-2000

	1970	1975	1980	1985	1990	1995	2000
Blacks	R 3 134	R 4 479	R 5 107	R 5 423	R 6 008	R 6 704	R 7 283
Coloureds	R 8 184	R 8 630	R 8 822	R 9 855	R 11 404	R 12 722	R 14 126
Indians	R 9 595	R 11 244	R 13 296	R 15 113	R 17 637	R 20 592	R 23 938
Whites	R39 217	R 44 242	R 46 670	R 48 370	R 51 951	R 53 840	R 62 360

The gini-coefficient in 2001 for the population was around 0.77.¹²⁹ This figure indicates that South Africa is very unequal in the distribution of resources and reflects an increase

¹²⁴ ‘Gini-coefficient of inequality: This is the most commonly used measure of inequality. The coefficient varies between 0, which reflects complete equality and 1, which indicates complete inequality (one person has all the income or consumption, all others have none). Graphically, the Gini coefficient can be easily represented by the area between the Lorenz curve and the line of equality.’

A Coudouel et al ‘Poverty Measurement and Analysis’ (2002) at 48 available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPA/0,,contentM K:20238991~menuPK:492138~pagePK:148956~piPK:216618~theSitePK:430367,00.html>

[Accessed 13 July 2012].

¹²⁵ Nel (n 123) at 86.

¹²⁶ Ibid at 49.

¹²⁷ S Van der berg ‘Current poverty and income distribution in the context of South African history’ Stellenbosch Economic Working Papers (2010) 1 at 9 available at www.ekon.sun.ac.za/wpapers/2010/wp222010/wp-22-2010.pdf [Accessed 13 July 2012].

¹²⁸ Ibid ‘The income of any group can be considered to consist of wages (the product of the average wage and the number employed) plus income from assets (i.e. income from the other factors of production, capital, land and entrepreneurship) plus income from social grants (transfers).’

¹²⁹ Human Sciences Research Council ‘Poverty in South Africa’ (2004) fact sheet 1.

in inequality from 1994 to 2001, which indicates that efforts to stabilise inequality has not succeeded. Racial inequality with relation to income distribution is specifically high in South Africa. This inequality is a result of the discrimination caused by apartheid which resulted in unequal access to opportunities based on race. It is also acknowledged that there is a relationship between inequality and poverty, although poverty declined since the colonial era, inequality actually increased.¹³⁰

Formal equality and equal opportunity may only endeavour to rectify inequality in the South African context, but are far from sufficient. The substantive approach focusing on groups and taking contextual circumstances and historical factors into consideration is needed to rid the South African society of discrimination and to bring about an egalitarian society. To further this substantive approach, contextual factors need acknowledgement, but criteria to identify disadvantage could be done differently.

In concluding this section on equality, it is important to understand that equality is the equal sense of self-worth, treating people with equal concern, equal respect and equal consideration. Those values underlie equality and this is often the values we offend when we discriminate.¹³¹

2.3 Section 9(2) of the Bill Of Rights – Concept of disadvantage

Noted elsewhere in this research, the South African Constitution subscribes to a substantive notion of equality, taking factors into account such as context, history, social status and impact on individuals, when disadvantage is determined. It is also further noted that the beneficiaries of affirmative action are left vague in the Constitution, acknowledging that various factors, other than race, could be considered when disadvantage is calculated to delineate affirmative action beneficiaries. Other factors could include socio-economic status, rural residence and school attended, etc. A quick glance at history will give us insight into how we arrived at this juncture in South Africa.

http://www.sarpn.org/documents/d0000990/P1096-Fact_Sheet_No_1_Poverty.pdf

[Accessed 13 July 2012].

¹³⁰ Van der berg (n 127) at 3-4.

¹³¹ L'heureux-Dubt (n 77) at 352.

As a result of colonialism and oppressive apartheid legislation, directed mainly at certain race groups, people were excluded and discriminated against, which led to disadvantage. If one wishes to establish disadvantage, one should ask the following question: what factors influenced the current state of disadvantage an individual or a group experiences currently? The substantive notion of equality acknowledges these various factors impacting on a person's current state of disadvantage. In the South African context, one could safely make the deduction that an individual's racial affiliation automatically links a person to disadvantage.

It is also important to focus on impact, because this turns the focus from the group¹³² to actual disadvantage suffered by this group. The disadvantage could be caused by past or current discrimination. We will now turn to; how would disadvantage be viewed under the South African Constitution. South Africa distinguishes itself from other countries due to the fact that it has a constitutional clause promoting affirmative action.¹³³

'Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.'¹³⁴

The Constitutional Court specifically noted the following, with regards to embracing substantive equality:¹³⁵

'[I]t is necessary to comment on the nature of substantive equality, a contested expression which is not found in either of our Constitutions. Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has on-going negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.'

¹³² The group factors could be issues of status such as race which is always contentions and controversial causing much conflict as indicated by court contestations internationally.

¹³³ O Dupper 'Affirmative Action; A Commentary' in Paul Benjamin and Clive Thompson (eds) *South African Labour Law* 2010 at 4.

¹³⁴ Act 108 of 1996 (n 34).

¹³⁵ *National Coalition for Gay & Lesbian Equality & another v Minister of Justice & others* 1998 (12) BCLR 1517 (CC) at 1546.

If one were to dissect the affirmative action clause, the first section focuses on equality that includes ‘the full and equal enjoyment of all rights and freedoms’¹³⁶ and that affirmative action is not an exception to equality, but a vehicle to achieve equality.¹³⁷ The second part of the equality clause focuses on ‘legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination, may be taken.’¹³⁸ The following discussion will now address issues around disadvantage according to the South African Constitution.

Should individual disadvantage be a prerequisite when one wishes to afford affirmative action benefits? Reference is made to individuals and categories of persons, but it is important to see disadvantaged individuals as part of the group who had been discriminated against and to implement measures which will help the individual and will directly benefit the group.¹³⁹ The substantive notion underpinned by the Constitution, takes systemic patterns of group inequality into consideration and it will therefore not be necessary to indicate individual disadvantage.¹⁴⁰ Showing individual disadvantage was never the intention of the Constitution, because this would hamper the purpose of s 9(2) and has further drawbacks as noted by Rycroft:

‘[T]o have to prove historical discrimination is an unnecessary and wasteful experience. It exacerbates conflict and division. It focuses on the wrongs of the past, rather than the hopes of the future. To apply that to an individual job applicant is to promote a generally unhealthy social ethic: the endeavour to prove oneself a victim. That should not be the focus of an affirmative action enquiry.’¹⁴¹

Secondly, the question whether the persons benefiting from affirmative action should be personally disadvantaged by unfair discrimination comes under spotlight. It is argued that the target group for affirmative action need not show that they had been personally discriminated against. The South African Constitution left the identification of affirmative action beneficiaries vague for a specific reason, as ‘persons or categories of persons disadvantaged by unfair discrimination’.¹⁴² From this description of beneficiaries, they could be individuals or groups of people. It is acknowledged that inequality in South

¹³⁶ Act 108 of 1996 (n 34).

¹³⁷ Dupper (n 98) at 276-277.

¹³⁸ Act 108 of 1996 (n 34).

¹³⁹ Smith (n 30) at 89-90.

¹⁴⁰ N Smith ‘Affirmative action: Its origin and point’ (1992) *SAHJR* 234 at 243; Dupper (n 98) at 286.

¹⁴¹ Rycroft (n 7) at 1425.

¹⁴² Act 108 of 1996 (n 34).

Africa may take on complex forms and affirmative action measures may be shaped to include various groups. However, it is never a prerequisite that they should be personally disadvantaged by unfair discrimination. There are various factors which could impact on the disadvantaged state of an individual or group. Factors could include criteria such as rural-urban status, gender, class, and regional and cultural divides.¹⁴³ This multifaceted nature of disadvantage is one of the factors I will later use to indicate that other influences on disadvantage could be useful in the identification of disadvantage. ‘Race is not the only factor to be considered when s 9(2) speaks of disadvantage, other criteria could include class, gender and ‘other levels and forms of social differentiation and systemic under privilege which still persist’.¹⁴⁴ The Constitutional Court acknowledged that it is not necessary to define the group in need of redress to exacting standards.

‘...often it is difficult, impractical or undesirable to devise a legislative scheme with ‘pure’ differentiation demarcating precisely the affected classes. Within each class, favoured or otherwise, there may indeed be exceptional or ‘hard cases’ or windfall beneficiaries.’¹⁴⁵

The court held that for legal efficacy of affirmative action, it is to assess if the majority of the favoured class was disadvantaged by unfair discrimination.¹⁴⁶ Therefore, there would be no requirement that each individual in this group should be disadvantaged by unfair discrimination.

2.4 Section 6(2) of the Employment Equity Act - Concept of designated groups

The Employment Equity Act supports the Constitution in its purpose to achieve equity in the workplace.¹⁴⁷ This does not mean the workplace is the only domain where affirmative action is applied, but for the purposes of this research, it will be the focus. The mandate of the Constitution is to protect or advance persons or categories of persons disadvantaged by unfair discrimination. However, the Employment Equity Act looks at

¹⁴³ Dupper (n 98).

¹⁴⁴ *van Heerden* (n 56).

¹⁴⁵ *Ibid.*

¹⁴⁶ *van Heerden* (n 50) at para 40.

¹⁴⁷ Section 2.

further defining beneficiaries not by disadvantage, but by race gender and disability.¹⁴⁸
 The purpose of the Employment Equity Act is stipulated as follows:¹⁴⁹

‘To achieve equity in the workplace by-

- a) Promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- b) Implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure equitable representation in all occupational levels in the workforce.’

This Act is designed to apply affirmative action in a rational manner and highlights four different key areas to aid implementation.

- The Act identifies who has the duty to implement affirmative action and who will receive benefits.¹⁵⁰
- The Act prescribes which affirmative action measures must be implemented and which may be implemented.¹⁵¹
- Procedures to aid implementation are provided through plans to implement affirmative action is prescribed.¹⁵²
- Enforcement mechanisms are also provided.¹⁵³

This Act also places an obligation on ‘designated employers’ to take measures to address disadvantage experienced by the ‘designated groups.’¹⁵⁴ Equity will be achieved by the promotion of equal opportunity and fair treatment through the elimination of discrimination¹⁵⁵ and secondly by the implementation of affirmative action.¹⁵⁶ The Employment Equity Act does not deem affirmative action to be unfair discrimination, if it is applied consistently with this Act.¹⁵⁷ This Act is also very specific with regards to who will apply affirmative action and identifies ‘designated employers’ who have more than 50 employees in their employ or have less than 50 employees, but exceed a prescribed annual turnover of a small business as per schedule 4 of the Employment Equity Act. Municipalities, organs of the state and any employer bound by a collective agreement, are also bound to apply Chapter III of the Employment Equity Act. Designated employers

¹⁴⁸ Rycroft (n 7) at 1413.

¹⁴⁹ Act 55 of 1998 (n 147).

¹⁵⁰ Section 13.

¹⁵¹ Section 15.

¹⁵² Section 16-26.

¹⁵³ Section 34-50 and s 53.

¹⁵⁴ Dupper (n 133) at 7.

¹⁵⁵ Act 55 of 1998 s 2(a).

¹⁵⁶ Section 2(b).

¹⁵⁷ Section 6(a).

must ensure that members of the ‘designated group’¹⁵⁸ should be equitably represented in all occupational levels and categories.¹⁵⁹

Opposed to the vague statement in the South African Constitution, indicating that beneficiaries may be persons or categories of persons disadvantaged by unfair discrimination, the Employment Equity Act is specific by narrowing it down to only two relevant criteria to be met. Section 15(1) indicates that a person should be suitably qualified and from the designated group. Section 20 further expands on the term, ‘suitably qualified’ and gives four operative definitions of who could be eligible for affirmative action benefits.

The Employment Equity Act identifies the designated group to be of a certain race, gender¹⁶⁰ and disability.¹⁶¹ Under race, the black group is further subdivided into African, Coloured and Indian. This categorisation typifies the same racial categories used to classify people under the apartheid system.¹⁶² This in itself is problematic, and it is argued that this does not contribute to the establishment of a non-racial society. This phenomenon is referred to as one of the great paradoxes of the constitutional transition.¹⁶³ In 2008, the High Court decided that people of Chinese descent that were classified as Coloured will also be included in the term black.¹⁶⁴ People with disabilities are defined as ‘people who have a long term physical or mental impairment which substantially limits their prospects of entry into, or advancement in employment’.¹⁶⁵

A suitably qualified person will have one or a combination of the criteria listed below.¹⁶⁶

- formal qualification;
- prior learning;
- relevant experience; and
- capacity to acquire, within a reasonable time, the ability to do the job.

The use of race as the identifier is contentious and controversial and needs to be reassessed. By this, it is not meant that race should just be discarded, but as Dupper

¹⁵⁸ Act 55 of 1998 (n 12).

¹⁵⁹ Section 15(1) and s 2(b).

¹⁶⁰ Women of all races are favoured.

¹⁶¹ Act 55 of 1998 (n34).

¹⁶² Population Registration Act 30 of 1950 s 1(iii) and (xv).

¹⁶³ H Botha ‘Equality, Plurality and Structural Power’ (2009) 25 *SAJHR* 1 at 1.

¹⁶⁴ *Chinese Association v Minister of Labour and others* Case No: 59251/2007; 18 June 2008.

¹⁶⁵ Act 55 of 1998 (n 12).

¹⁶⁶ Section 20(3).

argues, that the racial lines which demarcated the route along which discrimination took place, will be around for some time to come. Racial groups which were created by the original unjust practice of racial discrimination will have to be the same criteria to be used for the identification of beneficiaries.¹⁶⁷

The Constitution and the Employment Equity Act has two different conceptions of who should qualify for affirmative action benefits. The Constitution mentions no race and also mentions disadvantage, but no elaboration on what disadvantage is and how one would be able to identify disadvantage is made. The Employment Equity Act distinctly demarcates the beneficiaries as those of a particular race, gender or disability. In the South African context it is not uncommon to link disadvantage with race. The following chapter will investigate what affirmative action would mean in different context. Various approaches to affirmative action will also be investigated.

¹⁶⁷ O Dupper 'In defence of Affirmative Action in South Africa' (2004) 121 *SALJ* 187 at 213.

Chapter Three

AFFIRMATIVE ACTION AS REDRESS MEASURE

3.1 Introduction

The focus of this chapter will be to explore the underlying rationale for affirmative action and the applicable model for South Africa and the United States of America, respectively. Affirmative action may assume different meanings, depending on the context in which it operates, but it ultimately aims to redress inequalities caused by discrimination. If the focus is to achieve equality, it would be useful to establish: equality of what; and what needs to be done to achieve that equality. To establish the issues or problems which will be addressed by affirmative action is pertinent in the assessment phase. In one's endeavour to answer this question, it would be useful to distinguish between inter-racial and intra-racial inequality. Chapter two gave an overview of the income variations between various racial groups which could be regarded as an indicator of inter-racial inequality. The statistics are significant, because it give an idea of the magnitude of inequality.

Intra-racial inequality refers to the variances of income or wealth within a particular group and is an indicator of different classes within a group. Malaysia for example reflects one tenth of income inequality among races (inter racial inequality) and the nine tenths of income inequality is intra-racial (inequality within one particular race).¹⁶⁸ Could this be the issue in South Africa? If it is found that our inequalities are more concentrated in the intra-racial domain, one should possibly look at an alternative to the group based approach. The group based approach actually widens the inequality gap between wealthy and not so wealthy individuals of the same group. There were and still is significant economic growth among the black middle class in South Africa, resulting in higher income causing the inequality within the group to increase. It is evident that although inequality indicated by means of the gini coefficient, is high between racial groups, poverty is actually declining. Refer to table 2. The concern now is the rise of the intra-racial inequality for all groups. For blacks it could be attributed to affirmative action and

¹⁶⁸ D Nesiah 'Discrimination with reason? The policy of reservations in the United States, India and Malaysia' (2000) at 6.

black economic empowerment. For whites the loss of privilege in the democracy. The table below show evidence of intra- and inter group inequality.¹⁶⁹

Table 2: Trends in poverty and income distribution

	Approximate time period	
	1994-2000	2000-2006
Aggregate inequality	Rising strongly	Little change
Inequality between groups	Declining	Declining
Inequality within groups	Rising strongly	Rising
Poverty headcount	Rising moderately	Declining strongly

One could use the strong rise in intra-racial inequality as a possible motivation to look at a more nuanced approach in the identification of affirmative action beneficiaries. Depending on one's views of the causes and consequences of inequality, the questions of what and how could be answered. The formulation and implementation of policies will be informed by one's understanding of what discrimination and equality is. Discrimination may be described as follows:¹⁷⁰

‘It refers to a difference in treatment based on the personal characteristics of an individual such as race or sex, irrespective of whether that individual's profile matches the requirements of a particular job.

Differential treatment will place individuals in a disadvantaged position and limit his or her chances of opportunities in relation to other members of society. In South Africa, years of systemic discrimination against blacks, excluded this group from opportunities which were exclusively reserved for whites. After the identification of what should be rectified, the how question should be addressed and contestations are rife in this area. Many viewpoints of how affirmative action should be applied exist, but one should be mindful of the context and should be cautious to adopt programmes from one particular context and blindly emulate them in another. It is argued that the concept of affirmative action originated in the United States of America.

¹⁶⁹ Van der berg (n 127) at 5-15.

¹⁷⁰ Tomei (n 26) at 401- 402.

Globally, the application of affirmative action differs, depending on the context in which it is applied and the particular histories of the group or groups requiring redress. The following definitions will give clarification of various approaches, underlying rationales and the objectives affirmative action needs to address.

3.2 Definitions of affirmative action

‘Affirmative action is preferential access to social resources for persons who are members of groups which have been previously disadvantaged by adverse discrimination.’¹⁷¹

‘Affirmative action involves treating a sub-class or a group of people differently in order to improve their chances of obtaining a particular good or to ensure that they obtain a proportion of certain goods.’¹⁷²

‘Affirmative action is referred to as any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions, either through “outreach” (targeting the group for publicity and invitations to participate) or “preference” (using group membership, or proxies, as criteria for selecting participants in the opportunity).’¹⁷³

‘Affirmative action denotes the deliberate use of race- or gender-conscious criteria for the specific purpose of benefiting a group which has previously been disadvantaged on grounds of race or gender. Its aims range from providing a specific remedy for invidious discrimination to the more general purpose of increasing the participation of groups which are visibly under-represented in important public spheres such as education, politics or employment.’¹⁷⁴

The above definitions indicate differential treatment of a sub-group. Emphasis is placed on group characteristics, which is mainly opposed by opponents of affirmative action. The criteria of race, gender and disability are used as identifiers and are seen as explicit

¹⁷¹ Smith (n 140) at 234.

¹⁷² Faundez (n 86).

¹⁷³ E Anderson *The imperative of integration* (2010) at 135.

¹⁷⁴ Fredman (n 82) at 575.

and regarded as unchangeable. However, what about the factors such as socio-economic status which are not immediately detectible and which could change over time?¹⁷⁵

In many jurisdictions it was assumed that instituting anti-discrimination laws will rid society of discrimination against members of certain racial- or ethnic groups. It, however, became evident that anti-discrimination laws alone were not sufficient to equalize opportunities amongst disadvantaged groups. Therefore, one could argue that these laws will not eradicate intra-group inequality. Countries have specific histories and therefore require different redress measures. The contextual factors have an influence on the model of affirmative action which will be applied.

Affirmative action may have different goals which are dependent on history and context. Some of the goals might include the following:¹⁷⁶

- The elimination of present discrimination;
- To remedy past discrimination;
- To equalize opportunities; and
- To embrace and promote diversity.

3.3 Models of affirmative action

There are four distinct models of affirmative action discussed by Elizabeth Anderson.¹⁷⁷ Each of these models has a specific rationale dependent upon the time frame they focus on. These models may be backward-, present- or forward-looking. Proponents of affirmative action normally use these models as justification and justice which will demand an end to discrimination suffered by disadvantaged minority groups and women. Affirmative action is viewed as a means to compensate for past and current discrimination, the promotion of integration and diversity in organisations and societies.¹⁷⁸

¹⁷⁵ Tomei (n 26) at 407.

¹⁷⁶ Global rights partners for justice (n 22) at 14.

¹⁷⁷ Anderson (n 173) at 135-154.

¹⁷⁸ Kellough (n 8) at 76.

3.3.1 The compensatory model

This model wishes to compensate or remedy the effects of the past. It aims at restoring justice by reversing the wrongs of the past and has a backward looking rationale.¹⁷⁹ Fundamental to this approach, is Justice Blackmun's opinion in *United Steelworkers of America v Weber*,¹⁸⁰ where affirmative action was upheld and the following issue of importance was noted.

'Given this legislative history, we cannot agree with the respondent that Congress intended to prohibit the private sector from taking effective steps to accomplish the goal that Congress, designed Title VII to achieve. The very statutory words intended as a spur or catalyst to cause "employers and unions to self-examine and to self-evaluate their employment practices and to endeavour to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." cannot be interpreted as an absolute prohibition against all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges.'

The purpose of the compensatory model to restore or repair effects of past discrimination raises the following issues:

- Who will the practitioners of affirmative action be?
- Who will the targeted group be and what criteria will be relevant in selecting them?
- How much weight will be allocated to group preferences?
- Who should bear the cost of affirmative action?
- The meaning and relevance of race to the purpose of affirmative action.
- The compensatory model is based on notions of justice and it presupposes an account of the causes of race-based injustice.

The issues noted above, led to much debate between opponents and proponents of affirmative action. Central to the compensatory model is its individualistic approach which argues that a person wronged by discrimination should be identified for reparations by his or her perpetrator and will imply the following:¹⁸¹

¹⁷⁹ Anderson (n 173) 135-137; A Wax 'Race wrongs and remedies: group justice in the 21st century' (2009). 130; E Anderson 'Integration, affirmative action, and strict scrutiny' (2002) 77:5 *New York University Law Review* 1195 at 1197.

¹⁸⁰ 99 SCt 2721 at 2727-2728.

¹⁸¹ Anderson (n 173) at 137-138.

- The agents who should practice affirmative action are those who had previously engaged in racial discrimination;
- The beneficiaries are targeted by virtue of being the victims of past racial discrimination by the agents;
- They should be compensated for the extent of the harm they suffered.
- The agents who engaged in the discrimination should bear the cost.
- Membership to a minority group or some instances majority disadvantaged group,¹⁸² serves as an accurate proxy for the morally relevant characteristic of being victimised by racial discrimination.
- Past racial discrimination is the main cause of current race-based injustice.

It is claimed that affirmative action does not neatly fit into the compensatory model.¹⁸³ Practitioners of affirmative action are not always those who discriminated against victims and no attempt is made to identify the real victims of their own discrimination. The broad application of race is still used as a proxy for disadvantage. In these circumstances, the compensatory model is viewed as reverse discrimination, because it uses the same irrelevant characteristic of race to give preference to a certain group. The counter argument of the above is that preferential treatment for the purposes of affirmative action is for reparations of past injustices and not based on a morally irrelevant characteristic.¹⁸⁴ The focus should therefore be on the disadvantage suffered and not the characteristic used to identify those who suffered the disadvantage. Faundez summarizes the application of affirmation action as follows:

‘[I]f it is decided to apply affirmative action measures as a form of reparation to benefit members of a group who have been discriminated on the account of their race, the differential treatment is not based on an irrelevant characteristic, but on the fact that members of that group were treated unfairly because of their race.’¹⁸⁵

The compensatory model does not measure the damages suffered by the victims. It is also argued that race is not a perfect proxy for disadvantage because of its over- and under-inclusivity. In the United States and South Africa, this model argues that since blacks have suffered unfair discrimination and are therefore disadvantaged, they will be entitled to compensation. A redistribution of opportunity is necessary for those who were

¹⁸² As in the South African case.

¹⁸³ J Nickel ‘Should reparations be to groups or individuals?’ (1974) 34:5 *Analysis* 154-160; A Vallis ‘The Libertarian Case for Affirmative Action’ (1999) 25: 2 *Social Theory and Practice* 299 at 299.

¹⁸⁴ Nickel at 154.

¹⁸⁵ Faundez (n 3) at 4-5.

excluded in the past if the aim is to have an egalitarian society¹⁸⁶ and in this context, affirmative action is seen as restitution of historical justice.¹⁸⁷ The aim would be to put blacks in the position they would have been, if discrimination never occurred.¹⁸⁸

Although the compensatory model has an individualistic outlook, it should rather focus on groups and not on individuals.¹⁸⁹ Affirmative action, as a means to compensate for past wrongs, is not owed to groups who do not have moral status to justify differential treatment, but to individuals who had been victims of past discrimination. It is claimed that administrative efficacy hampers the application of the group approach. Case by case adjudication¹⁹⁰ will be costly and difficult, or at times impossible to identify the real victims and therefore hampers the individualistic approach.

There is a correlation between being black and being a victim of discrimination and disadvantage.¹⁹¹ In cases where institutionalised discrimination against blacks is observed, it would be relevant to use race for the purposes of reparations.¹⁹² The drawback of the group focus is that, it promotes a divisive conception of society, undermining the democratic aspirations of cohesion and diversity created under a common identity.¹⁹³

It would not be wrong to disseminate the cost of injustice to be shared by society. This model can be viewed as a kind of rough justice.¹⁹⁴ In situations where the wrongdoing against a group is so immense that there is little or no chance for the compensation to exceed the damage caused by discrimination, it would be justified to compensate groups for disadvantage suffered by past discrimination. This approach also justifies the issue of under-inclusion, where programs would only include blacks and other disadvantaged groups. The compensatory model only focuses on discrimination which appeared in the past and disregard current discriminatory practices.¹⁹⁵

¹⁸⁶ S Krislov 'The Negro in federal employment: The quest for equal opportunity' (1967) 77.

¹⁸⁷ Kellough (n 8) at 76-77.

¹⁸⁸ Wax (n 179) at 131.

¹⁸⁹ P Taylor 'Reverse discrimination and Compensatory Justice' (1973) 33:6 *Analysis* 177 at 177-182.

¹⁹⁰ Anderson (n 173) at 139.

¹⁹¹ Wax (n 179) at 15.

¹⁹² Nickel (n 183) at 155-157.

¹⁹³ Anderson (n 173) at 138.

¹⁹⁴ A Vermeule 'Reparations as rough justice' (2005) John M. Olin Law & Economics Working Paper no. 260 Forthcoming in *Nomos* 50: Transitional Justice at 3.

¹⁹⁵ Anderson (n 173) at 140.

3.3.2 The diversity model

The diversity model, also known as the utilitarian approach, has a forward looking rationale. It is a racial inclusion policy, because its outcome is to achieve racial diversity by endeavouring to include historically marginalised racial groups.¹⁹⁶ A new approach, termed instrumental affirmative action was developed. The focus of this approach does not purely rely on race-based criteria.¹⁹⁷ This instrumental approach will include rationales such as diversity and integration. The diversity model argument is based on the need for institutions to become more diverse. The following elements of importance need consideration with reference to this model:¹⁹⁸

- ‘The institutions eligible to practice affirmative action are those whose mission would profit from a greater diversity of ideas brought by participants.
- The targeted beneficiaries should be members of any group that would contribute to the epistemic diversity of the institution.
- The weight given to preferences for including members from any group should be proportional to the degree to the diversity of ideas they bring, and inversely proportional to the degree to which they are already represented.
- Those who should bear the cost of the affirmative action are those whose perspectives and ideas are already well represented in the institution.
- Race is presumed relevant to diversity because it is viewed as proxy for possession of ideas distinct from well represented groups.
- Individuals are targeted by affirmative action not to remedy injustice, but to advance the mission of the institutions that practice it.’

The diversity model also proposes that a more diverse body of individuals will enhance productivity,¹⁹⁹ because the service which will be delivered could be produced more effectively by a heterogeneous workforce.²⁰⁰ It is argued that racial, ethnic and gender identities have different socialisation experiences inherent to them and will therefore lead to diverse perspectives, which will aid in the successful execution of organizational tasks. A diverse workforce will bring along diverse perspectives and ingenious ways to deal

¹⁹⁶ D Lipson ‘Where’s the Justice? Affirmative Action’s Severed Civil Rights Roots in the Age of Diversity’ (2008) 6:4 *Perspectives on Politics* 691 at 691-693.

¹⁹⁷ P Frymer and J Skrentny ‘The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America’ (2004) 36 *Connecticut Law Review* 677 at 691. ‘Instrumental affirmative action is more likely to emphasize economics, community and social stability. And unlike traditional affirmative action law, its logic is based on considerations of the present or future, ignoring historical discrimination and in turn, ignoring structural power differences.’

¹⁹⁸ Anderson (n 173) at 141.

¹⁹⁹ S Harwood ‘Affirmative action is justified: A reply to Newton’ (1990) *Contemporary Philosophy* at 14-17.

²⁰⁰ Faundez (n 3) at 7.

with obstacles. Diverse people in organisations will also build strength within organisations, especially when organisations are confronted with complex issues to resolve.

The advantages of a diverse workforce include the following:²⁰¹

- Diverse groups can over time develop to levels where their effectiveness may exceed homogenous groups.
- Race, sex and ethnic groups may create a diversity of information and perspectives which could be ultimately beneficial to the organisation.
- In educational institutions diversity will enhance the educational experience of all students.²⁰²
- The integration of employees will also enhance the core democratic values in society.²⁰³
- The members of the preferred group are also not stigmatised, because they bring valuable features which add to the epistemic diversity of the organisation.

Numerous studies have highlighted the advantages of having a diverse workforce, but one should not be naive and ignore the drawbacks they may pose.

The drawbacks of a diverse group in the workforce include the following:²⁰⁴

- Newly formed diverse groups may hamper group interaction processes and effectiveness.²⁰⁵
- The rationale of the model does not fit the scope.
- When separated from justice, this model may not account for the special weight given to race compared to other dimensions.
- This model also promotes racial myths such as stigmatisation. The focus is on how different individuals (American blacks) are from others. It correlates racial groups with cultural groups which also causes idea that people believe that diversity presented by race is a matter of racially distinct characters. In this

²⁰¹ Kellough (n 8) at 78-79.

²⁰² *Regents of the University of California v Bakke*, 438 US (1978).

²⁰³ Kellough (n 8) at 80.

²⁰⁴ Anderson (n 173) at 142-144.

²⁰⁵ E Warren *et al* 'Cultural diversity's impact on integration processes and performance: Comparing homogeneous and diverse task groups' (1993) 36:3 *Academy of Management Journal* 590 at 602.

context it is important to understand that race group is a social category made on the basis of social inequality by means of group dynamics.

- The diversity model also raises serious questions in terms of justification of racial preferences in terms of institutional goals.

The more advantaged individuals with the best education, will be the most favoured in a designated group. This implies that these individuals should be qualified and opposed to the compensatory model where a broad sweep was exercised to determine beneficiaries. Merit becomes important when applying the diversity model²⁰⁶ and is a factor to be considered when beneficiaries are identified. In the United States there had been a shift from the old corrective approach as underlined by the compensatory model to the utilitarian approach, which emphasises diversity. It is important to understand that the shift has moved from the individualistic approach to repair historical injustice to certain groups. Discrimination which led to disadvantage is an important element to be present for beneficiaries to qualify for benefits. For reasons noted above, individuals had no need to show disadvantage or that they suffered as a result of discrimination. Just belonging to a historically marginalised group automatically gave them the right to affirmative action benefits. The *Grutter v Bollinger*²⁰⁷ case dealing with University of Michigan Law School admission and Michigan's Proposal 2 on the November 2006 ballot, shifted the focus from a rights-based angle to one highlighting the benefits of institutions to become more diverse.²⁰⁸

The diversity rationale is best suited for educational institutions to bring about greater diversity in the student body which will give rise to a diversity of perspectives when individuals are confronted with complex issues and could also be beneficial in preparation of graduates for the diverse societies they will be working in.²⁰⁹ The diversity model does not link race just merely to skin colour, as in the case with the compensatory model, but sees race as ethnicity and culture.

Race should not be seen as something we should get beyond or overcome, but involves the identification of differences which should not be ignored and peoples' race becomes

²⁰⁶ Anderson (n 173) at 142.

²⁰⁷ *Grutter v Bollinger* 539 U.S. 306 (2003).

²⁰⁸ Michigan Compiled Law Service (MCLS) Const. Art. I, § 26 (2007) (Chapter 1: Constitution of the State of Michigan, Article I, Declaration of Rights, § 26. Affirmative action programs.)

²⁰⁹ Anderson (n 206); Kellough (n 201).

relevant to their identity and the affording of benefits.²¹⁰ A drawback of the diversity model is that it focuses on diversifying institutions and forgets about the individuals who suffered from past discrimination.

3.3.3 The integrative model

The premise of this model rests on the assumption that societies are highly segregated and it works negatively against socio-economic opportunities for disadvantaged racial groups, causing racial stigmatisation and discrimination. This is also regarded as inconsistent with a democratic society and will require integration which will reduce racial prejudice and promote a greater social harmony or a fully democratic society.²¹¹

Segregation caused by racial discrimination resulted in a multiplicity of injustices to particular groups which included:²¹²

- Racial stigmatisation;
- Stereotyping, prejudice and discrimination;
- Undermines democracy by fostering divisive politics; and
- Blacks' deprivation of opportunities.

Unlike the compensatory model, the integrative model is proactive and dismantles current barriers by allowing the disadvantaged race group to advance. It uses race to undo continuing causes of race-based disadvantage and is forward-looking.²¹³ The integration of various races enhances core democratic values by enabling members of society to participate in all aspects of society. This inclusivity is crucial to attain a democratic and a social coherent society.²¹⁴ In context, integration does not refer to assimilation, but to effective participation and interaction in terms of equality by members of different races.²¹⁵

The focus is not to eradicate discrimination which caused the segregation, but rather to focus on targeting the segregation. It would be a good point of departure to start with government bureaucracies in applying integration, because it will aid in furthering the

²¹⁰ R Kahlenberg *'The remedy: Class, race and affirmative action'* (1996) at 33-34.

²¹¹ -Ibid (n 210) at 64; Anderson (n 173) at 148.

²¹² Anderson (n 173) at 112.

²¹³ Ibid (n 181).

²¹⁴ Kellough (n 203). Anderson (n 173) at 148.

²¹⁵ Anderson (n 173) at 112 - 113.

interests of the diverse society they actually serve.²¹⁶ The principle of representative bureaucracy holds that people makes decisions based on personal values and perceptions. These values and perceptions are inherent to a certain race or ethnic group because of their socialisation experiences. This will lead to the representation of all relevant parties in the decision-making process²¹⁷ and this may be equally true for the private sector.

The integration model has the following underlying assumptions:²¹⁸

- Any organisation that promotes racial integration would be eligible to practice affirmative action.
- Individuals who are best positioned to act as agents of racial integration will be targeted.
- Weight to preferences will be dependent on how much integration is needed for positive effects to be achieved.
- All citizens in society bear the cost of integration, because the duty to promote the justice of social arrangements and integration is instrumental to justice.
- Race does not act as a proxy for some relevant characteristic, but is a relevant factor in achieving the goal of integration of the affirmative action program.
- Racial segregation and stigmatisation is the causes of the unjust race-based disadvantage. Affirmative action in this context is seen as a tool to dismantle the causes of unjust race based disadvantage.

Bullet one above highlights that any organisation who promotes racial integration can apply affirmative action. This clears the issue of scope which is at question when the compensation model is applied. The integrative model differs from the diversity model, because it has multiple roles to play.

Black professionals would normally locate themselves in these needy areas providing crucial professional services to segregated communities.²¹⁹ In the area of government contracting, affirmative action will allow for business owners of disadvantaged segregated groups to acquire social, cultural and human capital, increase employment

²¹⁶ Krislov (n 186) at 5.

²¹⁷ Saltzstein 'Representative Bureaucracy and Bureaucratic Responsibility' cited in Kellough (n 8) at 81.

²¹⁸ Anderson (n 173) at 148-149.

²¹⁹ J Cantor *et al* 'Physician Service to the underserved: Implications to affirmative action in medical education' (1996) *Inquiry* 33 at 167-180.

opportunities for groups suffering from high unemployment and provide beneficiaries with the experience to work with racially diverse clients.²²⁰

The *Griggs v Duke Power Company*²²¹ case is a movement from the compensatory to the integrative rationale. The focus in this case was on barriers for minorities which have a disparate impact on them.²²² In other instances, advertising by word of mouth illustrated a locking effect on job opportunities for certain racial groups and worked against an integrated society. Therefore, the need to remove barriers to employment becomes imperative. This may be achieved by the integrative model.

3.3.4 The discrimination blocking model

The application of strict anti-discrimination laws will not necessarily stop discrimination. Moreover, bringing about an egalitarian society could be tortuously slow. The discrimination blocking model, places the onus on the victims to come to the fore and make individual cases in order to rectify discriminating behaviour. This is problematic, because victims will not always be willing to come to the fore to initiate the action. It is also suggested that affirmative action may play a more proactive role in bringing about change in societal stigmatisation and stereotyping of the disadvantaged groups and therefore prevent discrimination. Time tables and goals are necessitated in this model, because it brings about results much quicker.²²³ The model also focuses on the eradication of past or current discrimination against disadvantaged groups and stereotypical stigmatising by the advantaged groups or habits that favour groups who were previously advantaged. The following is fundamental to this model.²²⁴

- Any institution where there is still discrimination would be eligible to practice affirmative action;
- The beneficiaries are qualified members of the disadvantaged group who would not be able to gain access to opportunities if it was not for affirmative action;

²²⁰ Anderson (n 173) at 149.

²²¹ 401 U.S. 424 (1971).

²²² *Grigg v Duke Power Company* (n 221) at 431-432.

²²³ Kellough (n 8) at 81-82.

²²⁴ Anderson (n 173) at 144-145.

- Only tie-breaking²²⁵ preferences are allowed for members of the disadvantaged group;
- The cost to the innocent is small due to the fact that racial preferences which override meritocratic criteria are not present;
- Race is treated merely as the identifier for those who would be victims of discrimination; and
- Current discrimination is fundamental to the unjust race-based disadvantage.

The question, why discrimination persisted after the implementation of anti-discrimination legislation needs to be answered. It was discovered that widespread resistance from recalcitrant whites still occurred and the anti-discrimination laws were expected to have the outcome which was evident of the non-discriminatory process.²²⁶ To ensure that discrimination is stopped, group blind policies which are incorporated in the affirmative action policies may be implemented.²²⁷

3.4 Affirmative action approaches in the two jurisdictions

3.4.1 Introduction

The United States and South Africa share similarities and differences with regards to context and history. These factors impact on the manner in which affirmative action is applied in the two jurisdictions.²²⁸ Both jurisdictions are similar in the fact that they both have Africans who suffered discrimination and other ethnic minorities such as Native Indians, Hispanics, Asian Americans, Coloureds and Indians. Secondly the struggle for freedom, justice and equality in both countries illustrates how the legal system was used as a tool to oppress blacks.

²²⁵ If two candidates have the same qualifications, preference will be given to the one from a designated race/category. D Benatar 'Justice, diversity and racial preference: a critique of affirmative action' (2008) 125:2 *The South African Law Journal* 274 at 277.

²²⁶ *United States v Paradise* 480 U.S. 149 (1987). In this case quotas were permitted to remedy discrimination in state trooper promotions.

²²⁷ J Kang and Mahzarin Banaji 'Fair measures: A behavioral realist revision of affirmative action' (2006) 94 *California Law Review* 1063 at 1092-1096.

²²⁸ F. Michael Higginbotham 'Affirmative action in the United States and South Africa: Lessons from the other side' (1999) 13:2 *Temp. Int'l & Comp. L.J.* 187 at 188-190; K Adam 'The Politics of Redress: South African Style Affirmative Action' (1997) 35:2 *The Journal of Modern African Studies* 231 at 238.

In the United States, affirmative action beneficiaries are the minority, but in South Africa it constitutes the majority. Another difference refer to the fact that secure economic and political power of the white majority in the United States did not lead to the accommodation of the demands of the minorities, which resulted in the erosion of white power. In South Africa, however, the white minority has considerable economic power as opposed to the political power which is concentrated in the hands on the black majority.

3.4.2 Affirmative action model applied in South Africa

It is crucial to understand how we arrived at this place we find ourselves at today. An important point of departure is 1994, when the first democratic election took place and the black majority took political control of the country. This was also the start of addressing the consequences of colonial subjugation and oppression under the apartheid system.

The country's population is made up of various groups from different parts of the world impacting on South African history. Each group had a distinct role and labour function to perform. The function each group performed influenced their social stance in society and was transferred from generation to generation for many decades, and is almost similar to the caste system in India. The four main groups in South Africa originated from the following areas of the world. The white Afrikaans-speaking people are descendants from Europe who came to work as soldiers or merchants for the East Indian Dutch Company. The current Indian population descended from India, to mainly to provide labour on the sugar plantations. Black indigenous groups were integrated in the colonial capitalist system to provide labour. Lastly, the coloured population consists of Aboriginal Khoi, San, amaXhosa as well as African and East Indian slaves. The social formation of the South African society is said to be structured as a racial caste system, where class, language and other social indicators were not as salient as race.²²⁹

The above social packaging and class stratification was further reinforced by legislation aimed at discriminating against people of colour,²³⁰ which led to disadvantage,

²²⁹ N Alexander 'Prospects for a non-racial future in South Africa' in Hamilton et al (eds) *'Beyond Racism Race and Equality in Brazil, South Africa and the United States'* (2001) 472.

²³⁰ Population registration Act of 1950; Reservation of separate amenities act of 1953; Mines and works act of 1911; Native building workers act of 1951; Native labour act of 1953; Industrial Conciliation Act of 1956. The noted acts are a few of the discriminatory acts impacting negatively on the majority of the South African population.

manifested in the data provided in chapter two. The racial-caste social system shaped our understanding of the ruling white capitalist class and the skilled white workers and other white wage earners accumulating massive economic advantages at the expense of the majority of rural and urban black population.²³¹ In the light of this historical backdrop, affirmative action is viewed as a strategy aimed at remedying disadvantage caused by historical discrimination, which mostly excluded the majority²³² of the population from economic participation.

The South African Constitution deems affirmative action as a fundamental right and a redress measure,²³³ but this does not barricade it against contestation by especially white males.²³⁴ Other statutes²³⁵ were also enacted to aid in bringing about redistribution of economic, social, cultural and political power and resources, which was necessary to address the effects of capitalism and apartheid.²³⁶

The previously advantaged group had and still has mixed feelings towards the use of affirmative action. Statistical evidence supports this notion:

- 61 percent proposed that individuals should be eligible for jobs based on merit; and
- 38 percent were in favour of special measures for people who are disadvantaged due to past discrimination.²³⁷

Affirmative action is also labelled as ‘reverse discrimination’ and is perceived by whites in this manner. This led to a mass exodus of white skilled professionals.²³⁸ The reverse discrimination argument against affirmative action argues that the same ground which was used as criteria for discrimination is now used as criteria to identify the beneficiaries.²³⁹ This opposition to affirmative action opens up the potential to undermine

²³¹ The black population referring to all those who are not white as the Employment Equity Act, African, Indian and Coloured. Alexander (n 229) at 482-483; Deane (n 20) at 76.

²³² Adam (n 228) at 233.

²³³ South African Constitution (n 34)

²³⁴ Rycroft (n 7)

²³⁵ Public Services Act 103 of 1994; Skills Development Act 97 of 1998; Skills Development Levies Act 9 of 1999.

²³⁶ Alexander (n 10) at 93.

²³⁷ R W Johnson and L Schlemmer (eds.), *Launching Democracy in South Africa* (New Haven and London, (1996) at 370.

²³⁸ Adam (n 228) at 232.

²³⁹ Faundez (n 3) at 4.

reconciliation and divide South Africa even further. As mentioned elsewhere in this thesis, this divisive spinoff is one of the unintended consequences of affirmative action. The question that one could raise now- is if affirmative action could be viewed differently in order to minimise the detrimental divisive effect? The biggest conundrum to solve is to revisit the manner in which intended affirmative action beneficiaries are selected. It is trite that disadvantage runs along racial cleavages in South Africa and it would be inevitable to identify the bulk of the black population as being disadvantaged. The South African history of discrimination regards it as appropriate for the state and employers to implement affirmative action as a means to address systemic discrimination.²⁴⁰

The preamble of the Employment Equity Act²⁴¹ states:

Recognising

- that as a result of apartheid and other discriminatory laws and practices there are disparities in employment occupation and income within the national labour market; and
- that those disparities creates such grounded disadvantages for certain categories of people that they cannot redressed simply by repealing discriminating laws,

Therefore in order to-

- promote the constitutional right to equality and the exercise of true democracy;
- eliminate unfair discrimination in employment;
- ensure the implementation of employment equity to redress the effects of discrimination;
- achieve a diverse workforce, broadly represented of our people;
- promote economic development and the efficiency in the workforce; and
- give effect to the obligations of the Republic as member of the International Labour Organisation.

The preamble of the Employment Equity Act makes it clear that because of historic events of discrimination against people which caused disadvantage, affirmative action will be its focal point. Research conducted in 1995, indicated that whites held 85 to 95 percent of senior management government offices and professions.²⁴² These figures are a clear indication that discrimination has left disparities in employment and various occupations. The mere banning of discrimination and legislating anti-discrimination laws

²⁴⁰ Dupper (n 98) at 275.

²⁴¹ Act 55 of 1998 preamble.

²⁴² Breakwater Monitor Report (Cape Town), December 1995 at 14.

would not rectify these disparities in the South African society. An important building block of a democratic society is to ensure that equality is achieved in society.²⁴³

In practice, affirmative action has to reconcile the principle of merit, standards and equal opportunities for the previously disadvantaged under-represented masses. This issue causes major tension between groups, because the white males would promote the merit principle and the previously disadvantaged group – which is predominantly black, would promote equal opportunity.²⁴⁴

The focus is representivity as per the Employment Equity Act, and South African organisations are under huge pressure to adhere to the requirements of implementing affirmative action.²⁴⁵ Section 53(4) of the Employment Equity Act makes it clear that, state contracts may be cancelled or any offer to conclude contracts may be rejected if the Act is not adhered to. In South Africa, diversity is also one of affirmative action's goals²⁴⁶ and during the late nineties, huge emphasis was placed on the application of diversity programs in organisations.

The identification of beneficiaries is one of the more controversial issues relating to affirmative action. Issues of over- and under-inclusion are specifically causing the tensions among groups. Legislation and academic opinion gives clear guidance as to who will qualify for affirmative action benefits. In chapter two the following guidelines are specified for the identification of beneficiaries, as noted in the South African Constitution and the Employment Equity Act.

‘Affirmative action is measures designed to ensure that suitably qualified employees from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.’²⁴⁷

²⁴³ Kahlenberg (n 211); Anderson (n 211).

²⁴⁴ Adam (n 228) at 234.

²⁴⁵ D Innes, ‘ANC Human Resources Policy: an overview’, in *The Innes Labour Brief* (Johannesburg), 3, 3, 1992 28. ‘It is very likely that, in future, companies seeking government contracts or support in any form would be expected to have coherent affirmative action strategies in place and working effectively. It is also possible that tax rebates or similar incentives may be provided to companies which show proof of progress in this sphere. In this context, it is likely that a future government would call for disclosure of internal information on what is being done to promote the disadvantaged within organizations.’ Act 55 of 1998 s 53.

²⁴⁶ Act 55 of 1998 s 15(2) (b).

²⁴⁷ Section 15(1).

In practice, affirmative action is actually a program which favours the black middle class and it perpetuates the class inequality in our society.²⁴⁸ This in itself is problematic, because affirmative will then never reach its intended beneficiaries, those in need of redress, the poor. Could one then possibly look at an alternative approach to include this excluded group?

3.4.3 Affirmative action model applied in the United States of America

In 1619, the first blacks arrived in the United States as slaves. Slavery may be linked to the segregation of people. It shaped legal, racist practices and enslavement and also enforced racial prejudices.²⁴⁹ The black slaves engaged in work, which were primarily domestic and agricultural in nature.²⁵⁰ During the 1700s, massive resistance from slaves occurred, which led to the establishment of free zones where slavery was abolished. Slavery was still prevalent in the southern and some northern regions. Free zones were established in the north where slaves could settle and escape the harsh treatment, under slavery. The north and south were divided over the issue of slavery, resulting in great tensions between the states.²⁵¹ The concept of separate, but equal treatment was condoned in the south and became known as Jim Crowism. Under Jim Crowism, blacks were relegated to the status of second class citizens²⁵² which legitimised anti-black racism.²⁵³ Jim Crowism resulted in a situation where certain jobs were reserved for blacks²⁵⁴ and certain high-level jobs for whites.²⁵⁵ The Thirteenth Amendment which abolished slavery was ratified in 1865. The Fourteenth Amendment which was ratified in 1866 included the equal protection clause and the Fifteenth amendment which was ratified in 1870 gave voting rights to blacks. Despite the abolition of slavery and establishment of social rights of blacks, it left them uneducated, poor and politically powerless.²⁵⁶

²⁴⁸ Alexander (n 10) at 94-95.

²⁴⁹ NJ Smelser, WJ Wilson, and F Mitchell (eds.) *America Becoming: Racial Trends and their Consequences* (2001) at 40.

²⁵⁰ H Hill *Black Labour and the American Legal System* (1977) at 376.

²⁵¹ Deane (n 20) at 77.

²⁵² For example, railways and streetcars, public waiting rooms, restaurants, boarding houses, theatres and public parks were segregated; and separate schools, hospitals and other public institutions, generally of inferior quality, were designated for blacks. See Woodward 'The Strange Career of Jim Crow' (1996) at 54.

²⁵³ S Kennedy *Jim Crow Guide: The Way it Was* (1990) at 117.

²⁵⁴ Semi-skilled and higher level unskilled employment.

²⁵⁵ AW Blumrosen *Black Employment and the Law* (1971) 167.

²⁵⁶ Deane (n 20) at 79.

In contrast to the South African context, the American Constitution does not explicitly mandate affirmative action,²⁵⁷ but the application of affirmative action may be voluntary, court ordered or achieved through state assistance, boycotts and political pressures. The most tension is concentrated among those who use the constitutional protection of ‘equal protection of the law’ seated in the Fourteenth Amendment of the American Constitution.²⁵⁸ This amendment’s purpose was to make former slaves citizens of the United States, as well as the state in which they were residing. It barred the states from denying any person the equal protection of the law. The framework for legal equality was established, but the achievement of equality was but merely a dream.²⁵⁹ Even before the civil rights movement took off, efforts at affirmative action were already in progress.²⁶⁰

The legal birth of affirmative action is actually with the enactment of the Civil Rights Act of 1964²⁶¹ and especially seated in Title VII of this Act. In this section, there is a specific prohibition of discrimination on the basis of race, colour, religion, national origin and sex in federal, state and local governments and in the private sector. In this context, affirmative action refers to efforts to increase the representation of the disadvantaged groups in various institutions and occupations.²⁶²

In the Title VII, the equal opportunity clause notes the following:²⁶³

It shall be an unlawful employment practice for an employer:

- to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, colour, religion, sex, or national origin; or
- to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect

²⁵⁷ Faundez (n 3) at 27-28.

²⁵⁸ Smit (n 140) at 236.

²⁵⁹ Section 1, also known as the ‘equal protection clause’. Note that the same limitation applies to the Federal Government under the ‘due process of law’ clause contained in the Fifth Amendment ratified in 1791.

²⁶⁰ The Public Works Administration was created in June 1933 by the National Industrial Recovery Act. It was created by Title II of the National Industrial Recovery Act of 1933, officially known as the Act of June 16, 1933 (Ch 90, 48 Stat 195, formerly codified at 15 USC s 703).

²⁶¹ 42 USC 2000e-2. Subsequently amended by the *Civil Rights Act* of 1972 and the *Civil Rights Act* of 1991.

²⁶² Adam (n 232).

²⁶³ Section 703(a). Similar prohibitions exist for discrimination in unions (section 703(c)).

his status as an employee, because of such individual's race, colour, religion, sex, or national origin.

Title VII, however, is not as explicit as South Africa's Employment Equity Act, but gives courts the authority to impose affirmative action duties upon employers when found that an employer had engaged intentionally in an unlawful employment practice.²⁶⁴

- ... enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate ...
- No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or suspended or discharged for any reason other than discrimination on account of race, colour, religion, sex, or national origin ...

During the Civil Rights era, black communities started to defy racial segregation and discrimination and eventually forced the United States government to promulgate affirmative action measures. It was eventually thought that anti-discrimination legislation would rid society of discrimination, disadvantage and inequality,²⁶⁵ but it was soon discovered that more than this was required. Executive order 10952²⁶⁶ was passed in 1961 by President Kennedy and created the Equal Employment Opportunity Commission.²⁶⁷ This order placed an obligation on contractors to take affirmative action to ensure that race, creed, colour, or national origin did not play a part in their treatment of job applicants or employees²⁶⁸ and the focus of this legislation was to end discrimination in employment. The Civil Rights Act however, broadened the scope of anti-discrimination legislation by prohibiting discrimination in public accommodation, public conveyances, theatres and restaurants. It authorized the government to withhold federal funds from schools that had not yet desegregated.²⁶⁹

²⁶⁴ Section 706(g). Section 705 of Title VII also established the Equal Employment Opportunity Commission (EEOC), an independent federal agency which administers and enforces equal employment opportunity laws.

²⁶⁵ Global rights partners for justice (n 176).

²⁶⁶ 23 Federal Register (FR) 639 (1961).

²⁶⁷ The Equal Opportunity Commission mandated that projects which were financed with federal funds, "take affirmative action" to ensure that hiring and employment practices are free of racial bias.

²⁶⁸ Executive Order 10952 (n 266) -.

²⁶⁹ *Brown v Board of Education*, 347 U.S. 483 (1954) at 495.

Very crucial to affirmative action in the United States, was the creation of executive order 11246,²⁷⁰ introduced in 1965 by President Lyndon Johnson. This legislation was enacted to rid society of persistent discrimination in spite of anti-discrimination legislation and shifted the move from weak affirmative action²⁷¹ to a more proactive approach. It is still used today.²⁷² Specific amendments²⁷³ were made to executive order 11246, to ensure that discrimination on the basis of race, colour, sex or national origin by certain federal government contractors, were prohibited.

Affirmative action initiatives was ‘not just equality as a right and a theory, but equality as a fact and equality as a result’ and President Johnson emphasized the need to see social reality as a means of measuring whether opportunity was real rather than simply theoretical.²⁷⁴ President Johnson made the well renowned speech which reads as follows:

You do not take a person who for years has been hobbled by chains and liberate him, and bring him to the starting line of a race and then say, ‘you are free to compete with all the others, and still justly believe you have been completely fair.’²⁷⁵

How is discrimination issues viewed in light of affirmative action? The US Supreme Court has given pointers to guide practioners as to how affirmative action should be applied in line with the constitutional imperative of equality.

Firstly, affirmative action initiatives should be developed to address past discrimination or to improve educational diversity²⁷⁶ and this is applicable to the states²⁷⁷ as well as to the federal government.²⁷⁸ Secondly the beneficiaries do not explicitly have to be Black Americans only, but the use of quotas or set asides should be avoided.²⁷⁹ When race-

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

²⁷¹ This would refer to the Equal opportunity approach by ignoring entrenched disadvantage caused by past and present discrimination.

²⁷² Deane (n 20) at 84-85.

²⁷³ Executive Order 11246 was amended by Executive Order 11375 (32 FR 14303 CFR 3 (1967) and Executive Order 12086 (43 FR 46501 CFR 3 (1978)).

²⁷⁴ Deane (n 20) at 85.

²⁷⁵ Public papers of the Presidents: Lyndon B Johnson, vol.2, 1965 (Washington DC: Government Printing Office, 1966), 636.

²⁷⁶ U. S. Constitution 14th amendment.

²⁷⁷ J Powel ‘*Transformative action: A strategy for ending racial hierarchy and achieving true democracy in Beyond racism: Race and inequality in Brazil, South Africa and the united states*’ at 391; *Grutter v Bollinger*, 539 U.S. 306 (2003).

²⁷⁸ *City of Richmond v J A Croson Co* 488 U.S. 469, 498 (1989).

²⁷⁹ *Adarand Construction, Inc. v Pena* 515 U.S. 200,217 (1995).

‘As long as the mechanism is drawn on the basis of race, ethnic status or sex, with

specific measures are applied, they should be viewed through the microscope of 'strict scrutiny' to ensure that the measures are narrowly tailored to meet compelling governmental interests.²⁸⁰ The programs should not cause disruptions or burden the majority group.²⁸¹ Finally, affirmative action should have been assessed frequently and have an end date.²⁸²

The above chapter gives the broad application of affirmative action in United States and South Africa. It is evident that the South African approach is still centred on the group based approach favouring the groups for redress instead of individuals. The substantive notion which acknowledges history and current context warrants it to use race as proxy for disadvantage. Race should not be the focal point but the accompanying disadvantage. Representivity is also a goal to be achieved by affirmative action in South Africa. The application of affirmative action is not without contestation and chapter four will assess case law to give a more in-depth account of the practical application and consequences of affirmative action.

the objective being a result oriented approach rather than a nondiscriminatory procedure, the concept will fall within the issue being addressed, irrespective of whether the term used is labeled "set aside," "goal," "preference," or "quota.

Justice Powell commented that labels such as goals, quotas, or set asides were nothing more than semantic distinctions. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 288-89 (1978). 6. 3 C.F.R. S 339.

²⁸⁰ Global rights partners for justice (n 22) at 15.

²⁸¹ *Adarand Construction, Inc. v. Peña* (n 279); *Grutter v. Bollinger* (n 276); *Regents of the University of California v. Bakke*, 438 US (1978); Powell (n 279) 389-390.

²⁸² *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 280-281 (1985); Powell (n 281).

Chapter Four

THEMES IN AFFIRMATIVE ACTION DISPUTES

4.1 Introduction

Courts have set precedents, to assist in dealing with affirmative action issues. Legislation and precedents are not without contest and some writers argue that, because of the over-emphasis of criteria such as race, there should be an alternative to the pure race-based approach to affirmative action. Tensions between equal treatment and substantive equality²⁸³ exist and courts have the specific role to balance them.

Opponents of affirmative action deem the advancement of people or categories of people, based on the same criteria used to discriminate against them, as discrimination. Another factor adding to the difficulty in the assessment of equality is the fact that courts vary in their scrutiny of affirmative action. This, in itself, poses difficulties in the application of an approach which will be uniformly acceptable. The standard mechanism applied to test the validity of a redress measure, is the one of proportionality. The varied levels of scrutiny are linked to the diverse interpretations which courts share on the meaning of equality.²⁸⁴

4.2 Levels of scrutiny in the two jurisdictions

The approaches to the manner in which affirmative action cases are dealt with in the two jurisdictions will be compared. In order to understand the approaches in the Supreme Court of the United States and the Constitutional Court in South Africa, it is imperative to be cognizant of the similarities and differences, the historical and legal backdrop against which such measures were developed.

²⁸³ H Collins 'Discrimination, equality and social inclusion' (2003) *Modern Law Review* 16 at 17.

²⁸⁴ Fredman (n 66) at 24-25.

The United States developed two main tests namely: the traditional²⁸⁵ and the strict scrutiny test.²⁸⁶ The traditional test upholds the classification based on race, if it is rationally related to a 'legitimate government interest'. This concept is interpreted by the courts to serve a conceivable legislative purpose. The strict scrutiny test is only upheld, when it is established that it is necessary. The classification is also deemed to be of importance only, if it is narrowly tailored and no alternative is available to achieve the state interest.²⁸⁷ In essence, the test is to establish if the measure will achieve substantive equality. The measure should also not be a disproportionate violation of the equal treatment principle.²⁸⁸ The strict scrutiny principle is highlighted in *Adarand Construction v Pen* case and the following should be noted:

'All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analysed by the reviewing court under strict scrutiny; in other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest.'²⁸⁹

The United States' courts indicated that it is not only necessary to satisfy the criteria of a compelling state interest for affirmative action measures to be justified, but also a demonstration of a pressing social need. It is also not sufficient to indicate that the means is reasonably related to the end, but instead, it should be narrowly tailored to that end. Two important factors are important under the strict scrutiny principle. Firstly, the compelling interest should be focusing on remedying the effects of past intentional discrimination.²⁹⁰ Secondly, the promotion of diversity is also a compelling government interest. The principle of promoting diversity was highlighted by Powell J, in the *Bakke*²⁹¹ case and further extended on in the *Grutter* case, where the use of race was justified, because it furthered the legitimate aim of diversity in education.²⁹² In the *Grutter* case,

²⁸⁵ Faundez (n 3) at 19; 'The traditional test is mainly used in matters concerning economic and social regulations and is characterized by extreme judicial deference to the legislature.'

²⁸⁶ 'This test is applied when the legislature intentionally discriminates on the basis of race or national origin.' Ibid.

²⁸⁷ Ibid.

²⁸⁸ Kahlenberg (n 210) at 18.

²⁸⁹ *Adarand Construction, Inc. v Pena* (n 279) at 227.

²⁹⁰ *Parents involved in Community Schools v Seattle School Dist No 1* 127 SCt 2738 (2007) 2752.

²⁹¹ *Regents of the University of California v Bakke* (n 279).

²⁹² *Grutter v Bollinger* (n 277) at 328.

the principle of a narrowly tailored program²⁹³ was emphasised. The redress program should be flexible enough to ensure that each applicant is evaluated as an individual and not in a way that makes race the defining feature of the application.

The South African Courts were not very receptive to the principle of narrow tailoring, but instead went beyond the checking for only ameliorative purposes of a redress measure. The standard of reasonableness over rationality was embraced and Mosenke J, noted in *Van Heerden*, that the remedial measure must be ‘reasonably capable of attaining the desired outcome’, namely to protect or advance individuals or categories of persons who have been disadvantaged by unfair discrimination. Remedial measures should exclude measures which are arbitrary, capricious or displaying naked preference, or are not reasonably likely to achieve the end of advancing or benefiting the interests of those who have been disadvantaged by unfair discrimination.²⁹⁴ Mosenke also stated that the Constitution does not ‘postulate a standard of necessity between the legislative choice and the governmental objective’. The means should be designed to protect or advance and it is sufficient if the measure carries a reasonable likelihood of meeting the end.²⁹⁵

In this chapter, case law dealing with matters relating to affirmative action will be explored. The objective is not to give extensive coverage of all themes related to affirmative action, but to discuss relevant South African cases, highlighting a few themes of relative importance. Not much emphasis will be placed on American case law, but where applicable, comparison with regards to differences and similarities will be done. One should also acknowledge that contextual differences between the two countries do exist and it will be wrong to haphazardly apply foreign equality jurisprudence to the unique South African context.

The following themes will be discussed.

- Tension between the right to equality and the advancement of people who had been disadvantaged based on past discrimination.
- The understanding of disadvantaged people.

²⁹³ ‘Narrow tailoring does not require exhaustion of every conceivable race –neutral alternative or mandate that a university choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups.’ *Grutter v Bollinger* (n 292).

²⁹⁴ *van Heerden* (n 50) at 38-40.

²⁹⁵ *Ibid* at 41.

- Affirmative action discrimination cannot constitute a fair basis for dismissing as opposed to appointing an employee.
- Affirmative action cannot hamper or restrict service delivery or efficiency. This is discussed in the context of the public service.
- Can an affirmative action plan act as a defence against discrimination?

4.3 A walk through themes dealing with affirmative action disputes

The Explanatory Memorandum of the Employment Equity Act acknowledged that the redress of injustices caused by discrimination will not be remedied by the prohibition of unfair discrimination.²⁹⁶ The constitutional commitment to affirmative action²⁹⁷ is not sufficient to barricade it against legal onslaught from discontented non beneficiaries.²⁹⁸ These tensions are normally revealed when affirmative action is viewed as a derogation of the right to equality. The first and only case dealing with affirmative action which ever reached the Constitutional Court, *Van Heerden v Minister of Finance*²⁹⁹ addresses multiple issues related to affirmative action in South Africa.

This particular case deals with an application to set the finding of the High Court aside, by declaring that restitutionary measures are not an infringement on the right to equality and unfair discrimination. The claimant is Mister Frederick van Heerden, Member of Parliament, prior to the 1994 elections. An exclusive closed pension fund (CPF) was formed for all office bearers who were officials prior to the 1994 elections. A new fund was then established in 1998, the political office bearers fund, to take care of the retirement needs of the office bearers who joined parliament after the 1994 elections. The fund was applied retrospectively to 1994 and had three categories. This took the form of enhanced employer contributions calculated on a particular scale. These differentiated

²⁹⁶ Explanatory Memorandum to the Employment Equity Act (n 120) at 5. 'Apartheid has left behind a legacy of inequality. In the labour market the disparity in the distribution of jobs, occupations and incomes reveals the effects of discrimination against black people, women and people with disabilities. These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies, programmes and positive action designed to redress the imbalances of the past are therefore needed'

²⁹⁷ South African Constitution (n 34).

²⁹⁸ K Naff and O Dupper 'Footprints Through the Courts: Comparing Judicial Responses to Affirmative Action Litigation in South Africa and the United States' (2009) 25:2 *The International Journal of Comparative Labour Law and Industrial Relations* 157 at 173.

²⁹⁹ *van Heerden* (n 50).

contributions were challenged by van Heerden, as constituting unfair discrimination against the non-beneficiary group. The question the court had to resolve in this instance was; if the scheme was constitutionally permissible as a positive or an affirmative action measure under section 9(2) of the Constitution. The *van Heerden* judgment made it clear that restitutionary measures were not in conflict with the right to equality as stipulated in s 9(1) of the Constitution, but is part of the achievement of equality. Differentiation is allowed if it is utilised to protect or advance persons disadvantaged by unfair discrimination.³⁰⁰ A threefold approach had been designed to determine if a measure falls within s 9(2) of the Constitution.

Firstly, does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination? It was established that not all new members of the Parliament after 1994 were excluded from parliamentary participation as a result of past apartheid legislation. The qualifying measure would be, if the overwhelming majority belonged to the group who were disadvantaged by past discrimination. A precise demarcation of the affected group is also not required, but the distinction should be measured against the majority and not the minority of people to which it applies.³⁰¹

Secondly, the question should be answered if the measure is designed to protect or advance persons or categories of persons highlighted by satisfying the first yardstick. This yardstick is directed at reaching a future outcome and it is said that the measure should at least have the likelihood to attain the desired outcome. There is no requirement that the measure should take from those who were advantaged and give to the beneficiary class to advance or protect this group.³⁰²

Thirdly, does the measure promote the achievement of equality? To test this, the measure should be gauged in the context of the broader society. It is also acknowledged that the achievement of equality might come at a cost to the previously advantaged class. The achievement of equality should also keep the constitutional commitment to a non-racial, non-sexist society, in which each person can be recognised as a human being, in mind.³⁰³ The third yardstick had been satisfied once it was able to establish that there was a clear and rational consideration of the constitutional imperative for restitution and the needs of

³⁰⁰ paras 28-32.

³⁰¹ paras 38-39.

³⁰² paras 41- 43.

³⁰³ para 44.

the members.³⁰⁴ The Constitutional Court used rationality as a standard for establishing whether the measure promoted equality.

Prior to the *van Heerden* case, the *Public Servants Association of SA & Others v Minister of Justice & Others*,³⁰⁵ had to address a similar issue where applicants launched an application against the respondent for filling positions by reserving it for people based on race, gender and disability.

This case dealt with the issue, if affirmative action is a reasonable limitation on the prohibition against unfair discrimination? The *van Heerden* case rejected the strict scrutiny standard followed in the *Public Servants Association of SA* case and established a new standard for legitimate and constitutional restitutionary measures and favoured rationality over reasonableness. Swart J noted that restitutionary measures should not be separated from equality, but should nonetheless be treated as an exception.³⁰⁶ The *Public Servants Association* case devised the following qualifications for constitutionally mandated affirmative action measures:

- The affirmative action measure must be designed to achieve the adequate advancement of previously disadvantaged people.
- There must be a causal connection between the designed measures and the objectives and further the measures adopted must not exceed what is adequate.
- The goal and the means employed must be subject to review.
- Due consideration must be given to the rights of community members outside the designated beneficiaries.
- The promotion of representation cannot be at the expense of efficiency.³⁰⁷

Another relevant theme would be the court's focus on whom previous disadvantaged people are. This standard is set in *George v Liberty Life Association of Africa Ltd*³⁰⁸ where an employee was aggrieved for not being considered for an available post. The employer appointed a person from the previously disadvantaged group. This was done to be in line with the employer's affirmative action plan. With this case, the tension of not

³⁰⁴ para 52.

³⁰⁵ *Public Servants Association of SA & Others v Minister of Justice & Others* (1997) 18 ILJ 241(T).

³⁰⁶ *Ibid* at 295.

³⁰⁷ *Ibid* at 306-308.

³⁰⁸ (1996) 17 ILJ 571 (IC).

being discriminated against and the right to receive preferential treatment in employment, is illustrated. It was confirmed by the recruitment consultant that an affirmative action candidate should be favoured in this context.³⁰⁹ The interim Constitution was applicable and a definite path was highlighted in this case.

‘The section commences with a statement of principle, namely that there shall be equality before the law and equal protection. Then it goes on to state that this means that there shall be no unfair discrimination.’³¹⁰

It is also made it clear that s 8 3(a) of the interim constitution does not create a right to the advancement of the disadvantaged, but it rather creates a right to be a beneficiary of restitutionary measures.³¹¹ Mr. George’s angle was to declare the practice of restitutionary measures an unfair labour practice, because it infringes upon the employee’s right not to be discriminated against. The court did not find these measures to be discriminatory or an unfair labour practice, because correction of disadvantage due discrimination was necessary in the circumstances.³¹² Affirmative action is viewed as an exception to the universal norm of non-discrimination, but consideration should be given not to exceed the parameters and the duration of the exception. In the assessment of who the affirmative action beneficiaries are, one should understand what the purpose of the measure is. In *George v Liberty life*, it is noted that affirmative action is;

‘...primarily a means of ensuring that the previously disadvantaged are assisted in overcoming their disadvantages so that society can be normalized.’³¹³

One could argue from the reading of the above extract that the focus should shift to the disadvantaged group in the context. It is trite that disadvantage in the South African context, can be closely correlated with race and gender. It is also acknowledged that not all in these race and gender categories are equally disadvantaged.³¹⁴ A shift from a purely

³⁰⁹ at 578-580.

³¹⁰ at 586.

³¹¹ Ibid.

³¹² at 591.

³¹³ at 593.

³¹⁴ ‘As a means of combating discrimination, law works through the creation of protected classes; this may result in only rough justice, since not all members of a class are equally placed. One of the main criticisms of affirmative action in the United States has been that it has primarily benefited middle-class women and black people who were well able to look after their own interests and less deserving assistance than those trapped in the underclass. The creation of privileged classes benefiting from quota hiring has been intended to secure equal treatment for individuals in the long run, but as it is never possible to define the classes so exactly that only the most deserving benefit, the short-run results may be open to criticism.’ M Banton *Discrimination* (1994).

race-based focus is proposed in the *George v Liberty Life* case. Acknowledgement is given to an employer who favours candidates for the candidate's personal experience based on historical discrimination as opposed to a person who did not suffer discrimination.³¹⁵

In *McInnes v Technikon Natal*,³¹⁶ the court had to establish if affirmative action could constitute a fair reason for dismissal as opposed to appointing a person. This person was employed on contract by Natal Technikon as a marketing manager and later as a *locum* on a one-year contract, which was renewed from time to time. She applied for the post she was occupying on a temporary basis, when it became a permanent opportunity and was short listed for an interview. Although the majority of the panel supported her appointment, the vice principal referred the recommendation back in the light of the technikon's affirmative action policy. Another candidate got the position and the employee's contract came to an end. The initial claim was one of an unfair dismissal and the alternative claim was that the employee was discriminated against based on her race and or sex. It was accepted as common cause that the applicant did not get the post, based on her race.³¹⁷ The employee would still be employed if she was black. The non-employment of the employee was the result of the application of the employer's affirmative action policy which was confirmed by the employer. In this situation, the employer had the onus to prove that by preferring the black male, it in actual fact advanced persons or groups of persons, disadvantaged by discrimination³¹⁸

The affirmative action and recruitment policies were outlined and found not to be discriminatory at all, but to promote the addressing of disadvantage based on past discrimination. The black candidate was in an advantaged position if one should give regard to the application of the technikon's policies, but it should importantly be balanced against the institutions' need to provide the highest standard of tertiary service to its students. The appointment of Mr Mpanza was definitely in line with their recruitment policy.³¹⁹ Penzhorn J evaluated the recruitment and affirmative action policy and found that these policies had in mind to critically address all the relevant factors as specified and if a reasoned and balanced decision results in the selected candidate not being from

³¹⁵ Ibid at 594.

³¹⁶ (2000) 21 *ILJ* 1138 (LC).

³¹⁷ paras 8-13.

³¹⁸ paras 29-33.

³¹⁹ paras 38-39.

the targeted group, reasons must be given. This was done but the recommendation of the panel was rejected. The court should not really interfere with the application of an internal policy and found that Mr. Mpanza was appointed not in accordance with the technikon's affirmative action policy read with the recruitment policy. The technikon failed to prove the non-discrimination against Ms McInnes.³²⁰ She was dismissed based on her race and not on the foundation that a person or group of persons should be advanced, because of past discrimination. Affirmative action as a defence is never mentioned in the Labour Relations Act and can never be used as a reason to dismiss an employee to accommodate a person from the designated group.

We will now turn to cases focusing on efficiency of the delivery of a service versus the application of affirmative action. The *McInnes* case slightly touched on it where the focus of the technikon was to provide outstanding service delivery to students, but opted rather to hold transformation as a greater objective in appointing a lesser qualified person and dismissing a qualified one which did not belong to the targeted group.

*Coetzer & Others v Minister of Safety & Security & Another*³²¹ is one of the typical cases addressing discrimination based on race and the matter of efficiency in the public sector. The remedy of these cases should be in the interest of and the benefit of the South African people. An application was brought to the Labour Court by aggrieved members of the specialised explosives unit of the South African Police Service. It is important to note from the onset was that, because of its size the South African Police Service was divided into business units which were supposed to have their own employment equity plan. This plan is supposed to determine the goals and action to be taken to reach these goals.³²²

Seventy promotional posts became available in this unit nationally and a percentage split of 70 percent for non-designated employees and 30 percent for designated employees were allowed. The reason for setting this goal was to enhance representivity within the service.³²³ Twenty eight of the 70 posts were for the rank of captain in the explosives unit. Some of the employees in the non-designated class applied for the post in the designated category, but were unsuccessful. Twenty eight of the 70 posts were not filled

³²⁰ Paras 40-45.

³²¹ (2003) 24 *ILJ* 163 (LC).

³²² Para 20.

³²³ Para 5.

but were re-advertised for designated members. Afterwards, eight were filled by members of the designated group.³²⁴ Because of the critical nature of the work, the commander and divisional commander proposed that 20 of the posts should be filled by members of the non-designated group. The applicants then brought the case before the Labour Court for discrimination based on race. The application was based on the Employment Equity Act, s 6(1).³²⁵

The South African Police Service conceded to discriminating against the applicants based on their race, but invoked s 6(2) of the Employment Equity Act, to argue that it was not unfair discrimination, because taking affirmative action distinguishing between race gender and disability, was consistent with this section.³²⁶ The employment equity plan produced was contested, because it was for the national police force and not specific to the needs of the explosives unit.³²⁷

Two important factors were raised by the applicants.

- The employment equity plan took place in the absence of a specific plan for the explosives unit.(Reference to the national plan utilized instead of a plan specific to the needs of the unit)
- Section 15(4) of the Employment Equity Act³²⁸ makes reference that no absolute barriers should exist to hamper the recruitment and promotion of members of the non-designated group. The issue of prohibition of absolute barriers is also echoed in paragraph three of the employment equity plan.³²⁹

An absolute barrier is an insurmountable obstacle and the re-advertisement of the 28 posts could possibly be viewed as an insurmountable obstacle. If one judges it against the backdrop of the purposes of the Employment Equity Act, this should be seen as an insurmountable obstacle to the designated group in general.³³⁰ In order for the South

³²⁴ Para 9.

³²⁵ Paras 10-14. Act 55 of 1998 s 6(1) 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.'

³²⁶ para 16.

³²⁷ paras 21-22.

³²⁸ Act 55 of 1998.

³²⁹ *Coetzer* at para 25. 'Whereas the focus of employment equity is on black people, women and persons with disabilities, no employment policy or practice will be established as an absolute barrier to prospective or continued employment or advancement of persons not from designated groups.' (Emphasis added.)

³³⁰ Paras 26-27.

African Police Service to justify fair discrimination, it becomes relevant to evaluate their employment equity plan in the context of the Constitution of South Africa. The Employment Equity Act must be interpreted-³³¹

- in compliance with the Constitution;
- so as to give effect to its purpose;
- taking into account any relevant code of good practice issued in terms of this Act or any other employment law; and
- in compliance with the international law obligations of the Republic, in particular those contained in the A International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.

It is important to understand that the Constitution is the supreme law and that it is also the source of the Employment Equity Act. It is imperative to acknowledge that the Constitution sets out goals and societal values and also deals with the police service in subsection 205 to 208.

Specifically noted in section 205 is that:

1. 'The national police service must be structured to function in the national, provincial and where appropriate, local spheres of government.
2. National legislation must establish the powers and functions of the police service and must enable the police service to discharge its responsibilities effectively, taking into account the requirements of the provinces.
3. The objects of the police service are to prevent, combat and investigate crime, to maintain public order, to protect and secure the inhabitants of the Republic and their property, and to uphold and enforce the law.'³³²

The Constitution envisages a balance between affirmative action and other imperatives, including the goal for the police service to discharge its service effectively. The balance between the two imperatives should be one that is rational.³³³ The relationship between efficiency in the public service and affirmative were also debated in, *Public Servants Association of SA & others v Minister of Justice*,³³⁴ and *Stoman v Minister of Safety & Security & others*.³³⁵ In *Stoman* it was also argued that proper plans should be designed and put in place. Haphazard discrimination would be counterproductive and little would

³³¹ Section 3, Act 55 of 1998.

³³² South African Constitution of 1996 s 205; South African Police Service Act 68 of 1995.

³³³ *Coetzer* (n 321) at para 32.

³³⁴ (1997) (3) SA 925 (T); (1997) 18 *ILJ* 241 (T).

³³⁵ (2002) (3) SA 468 (T); (2002) 23 *ILJ* 1020 (T).

be achieved with it.³³⁶ In *Public Servants*, the ideal of representivity is seen to be linked to efficiency.

‘A police service, for example, could hardly be efficient if its composition is not at all representative of the population or community it is supposed to serve. This view may depend on how one perceives efficiency, of course.... To summarize some of the above: Some tension may in certain situations exist between ideals such as efficiency and representivity, and a balance then has to be struck. Efficiency and representivity, or equality, should, however, not be viewed as separate competing or even opposing aims.... Be that as it may, in the present case the applicant is not relying on the lack of efficiency which may result from the appointment of the fourth respondent.’³³⁷

The *Public Service* sentiment about representivity and efficiency resembles the concept of representative bureaucracy discussed in Chapter Three. Landman J concluded in Coetzer, that affirmative action measures should be in harmony with constitutional provisions. Section 205 of the Constitution mainly requires the common law and Acts of Parliament to give expression to it in order to enhance the values and ideals set out in the Constitution. The Constitution envisions an integrated system of law and government.³³⁸

In a more recent case dealing with efficiency and affirmative action, *Solidarity on behalf of Barnard v SA Police Service*,³³⁹ the court laid down important pointers for handling cases grappling with these issues.

‘Due consideration must be given to the particular circumstances of individuals potentially adversely affected. In this regard the need for representivity must be weighed up against the affected individual's rights to equality and a fair decision made.’

‘But both as a matter of substance and procedure, implementation of employment equity plans should be effected with due regard not only to the individual's right to equality, but also to the dignity of affected individuals.’

‘The extent to which the implementation of employment equity plans may discriminate against or adversely affect individuals is limited by law. In this case at least the following considerations are relevant.

First, the terms of the Employment Equity Act require the application of its provisions to be done in a manner that is both rational and fair. Second, due recognition must be given to the affected individual's rights to equality. Third, in the implementation of an employment equity plan, due recognition must be given to the right of affected persons to dignity.’

³³⁶ (2002) 23 ILJ 1020 (T) at 480B-D.

³³⁷ *Public Servants Association of SA & Others* (n 305) at 482.

³³⁸ *Coetzer* (n 321) at para 33.

³³⁹ (2010) 31 ILJ 742 (LC).

‘If a post cannot be filled by member of the designated group, promotion to that post should not ordinarily and in the absence of a clear and satisfactory explanation be denied to a suitable candidate from another group.’

‘There must be a rational connection between the provisions of the employment equity plan and the measures adopted to implement the provisions of that plan.’

‘The efficient operation of the public service or what is termed 'service delivery' is a relevant factor to be taken into account in the implementation of an employment equity plan.’³⁴⁰

In *Harmse v City of Cape Town*³⁴¹ the court had to determine, if affirmative action is a defence which could be used by an employer or a right which could be executed by an employee. The applicant claims that the employer discriminated against him for not short listing him for any of the three posts he applied for. Unfair discrimination claims are rooted in s 6 of the Employment Equity Act and the applicant made his claim based on following grounds of discrimination.³⁴²

- race;
- political belief;
- lack of relevant experience; and/or
- other arbitrary grounds.

The respondent appointed two white males and the applicant alleges that the respondent’s choice not to shortlist him, constitutes unfair discrimination based on race.³⁴³ The applicant also further relies on s 5 of the Employment Equity Act; obliging every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. It is argued that this section is peremptory and applies to all employers. The application of affirmative action is deemed as a means for an employer to eliminate unfair discrimination.³⁴⁴ Affirmative action is a defence for an employer in situations of unfair discrimination, but should be

³⁴⁰ Ibid at para 25(1) - 25(6).

³⁴¹ (2003) 24 *ILJ* 1130 (LC).

³⁴² Para 2.

³⁴³ Para 14 s (9 & 10).

³⁴⁴ Para 32.

confined to such a limited a role in the elimination of unfair discrimination in the workplace. Affirmative action as a measure has the following roles to play:³⁴⁵

- It includes measures to ‘eliminate employment barriers’
- to ‘further diversity’ in the workplace
- to ensure equitable representation in the workplace

Affirmative action is seen more than a defence and includes pro-activeness and self-activity by the employer.³⁴⁶ The respondent also noted reasons relating to experience for not short listing the applicant, but the Employment Equity Act notes that an employer may not discriminate against a person based on a lack of relevant experience.³⁴⁷ The selection criteria to determine if an employee is suitably qualified could be deemed to be a policy or practice and the applicant alleged that the reasons why he was not selected related to the selection criteria. It is acknowledged that employers may use the ‘lack of relevant experience as a *sin qua non* for the purposes of appointment or promotion.’ Section 6 of the Employment Equity Act, refers to the fact that it is not an exhaustive list. In conclusion, affirmative action is indeed a defence which could be utilised by an employer against allegations of unfair discrimination. However, whether it would suffice as a defence or a right, will depend on who makes the claim.³⁴⁸

A few cases may be dealt with under the umbrella of referring to degrees of disadvantage. This is the issue where members of the designated group are differentiated depending on their level of being disadvantaged.³⁴⁹ *Motala & Another v University of Natal*³⁵⁰ was a case where a female Indian student was denied admission to the Medical School of the University of Natal. The applicant contended unfair discrimination, which was rejected by the court.

‘The contention by counsel for the applicants appears to be based upon the premise that there were no degrees of “disadvantage”. While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree

³⁴⁵ Act 55 of 1998 s 15.

³⁴⁶ *Harmse* (n341) at para 33.

³⁴⁷ Act 55 of 1998 s 20(5).

³⁴⁸ *Harmse* (n 341) at paras 40-45.

³⁴⁹ *Dupper* (n 62) at 264.

³⁵⁰ 1995 (3) BCLR 374 (D).

of disadvantage to which African pupils were subjected under the [apartheid] system of education was significantly greater than that suffered by their Indian counterparts. I do not consider that a selection system which compensates for this discrepancy runs counter to the provisions of the equality provision of the Interim Constitution].³⁵¹

A very sensitive issue is the one dealing with the fact that white women should benefit under affirmative action. According to legislative prescription in the Employment Equity Act, all females will benefit from redress. Christine Quinta places this controversial issue in perspective and argues as follows:

‘White women like all other women over the world, have been discriminated against within their own society. The systematic deprivation of black people were subjected to was declared a crime against humanity by the United Nations and has often been compared to what happened during the reign of the Nazi’s in Germany. To compare this with the prejudices that the white women have been exposed to by their own men, is to trivialize an immensely destructive phase of our history. In reality the oppression of black people has benefitted both white men and white women. The argument is not that white women should not benefit from affirmative action programmes. They should, but only where it will not further disadvantage a black person.’³⁵²

The above issue was illustrated in *Henn v SA Technical (Pty) Ltd*,³⁵³ where a white female brought an application before the labour court that she had been discriminated against because of her race.³⁵⁴ The company admitted to fair discrimination³⁵⁵ which was in line with the company’s affirmative action plan.³⁵⁶ The tension occurred because the white women are also part of the designated group and she therefore deemed it to be unfair discrimination. During the recruitment process, the white female was recommended, but it was rejected by the human resources department on the grounds that they needed to be in line with their employment equity plan and would not employ any white females.³⁵⁷ The demographics were given as evidence to substantiate their choice of employing blacks rather than whites.³⁵⁸ It was also highlighted that the employer being a designated employer, had to abide by the legal prescription of the Employment Equity Act to apply

³⁵¹ Ibid at 383C-E.

³⁵² Quinta (n 27) at 19.

³⁵³ (2006) 27 ILJ 2617 (LC).

³⁵⁴ Para 5.

³⁵⁵ Para 25.

³⁵⁶ Para 6.

³⁵⁷ Para 10.

³⁵⁸ Paras 12-18.

affirmative action where preference had to be given to people of disadvantaged groups.³⁵⁹

Degrees of disadvantage were also acknowledged in this context.

‘It cannot be disputed that the degrees of the past discrimination were not the same. In the result, there are different degrees within the designated groups. Both the applicant and the African women that were appointed are from the designated groups. The question then arises whether the employer can legitimately classify members of the designated groups in relation to their relative disadvantages as against each other. This is what the respondent did in the present matter. The respondent's case is, however, not based on degrees of past disadvantage.’³⁶⁰

The above themes underlined are, but a few in the ocean of issues which occurred in courts relating to affirmative action. Other issues brought before the court included the following:

*Willemse v Patelia NO & others*³⁶¹

In this case, the employer used gender representivity as reason to deny a promotion for a white male with disabilities. This person was the best candidate for the post on merit and was recommended by the selection committee. Numerical targets set for gender and race were already met and therefore the employer failed to comply with the policy directive on representivity and merit and therefore the failure to promote the employee was deemed to be unfair.

*Dudley v City of Cape Town & another*³⁶²

The failure to apply affirmative action in preferring a member of the designated group who has applied for employment, does not in law on its own constitute unfair discrimination.

*Thekiso v IBM South Africa (Pty) Ltd*³⁶³

The Employment Equity Act does not establish an individual right. Section 15(2)(d)(ii) does not impose an obligation on an employer who contemplates retrenchments, to retain

³⁵⁹ Paras 26-27.

³⁶⁰ Para 28.

³⁶¹ (2007) 28 *ILJ* 428 (LC).

³⁶² (2008) 29 *ILJ* 2685 (LAC).

³⁶³ (2007) 28 *ILJ* 177 (LC).

black employees in preference to white employees, in order to meet its employment equity needs.

The focus of this chapter was to establish if any other criteria were highlighted in courts to assist in establishing disadvantage. With regards to disadvantage, the case law mostly reinforces the criteria of race, gender and disability as prescribed by the Employment Equity Act. The acknowledgement of alternative criteria to identify disadvantage, is noted in *Solidarity on behalf of Barnard v SA Police Service*, where it was stated, that due consideration should be given to the circumstances of the group which was adversely affected.³⁶⁴ Prior to *Solidarity on behalf of Barnard v SA Police Service*, the case, *Minister of Finance & another v Van Heerden*³⁶⁵ also acknowledged the other forms of differentiation, but these differentiations are still not utilized as a means to identify the group to be eligible for redress. The *Henn v SA Technical (Pty) Ltd* and the *Motala & Another v University of Natal*, indicated that degrees of disadvantage do exist.. One could only differentiate if the legacy of discrimination leading to disadvantage is acknowledged. The acknowledgement of socio- economic factors impacting on the determination of the beneficiary group is dealt with only in a secondary manner in the cases illustrated above. In the next chapter the investigation will turn to the determination of the beneficiary group by directly relying on the socio economic factors as mentioned indirectly in the above chapter.

³⁶⁴ *Solidarity on behalf of Barnard* (n339).

³⁶⁵ *van Heerden* (n 56).

Chapter Five

AN ALTERNATIVE ASSESSMENT OF DISADVANTAGE

5.1 Introduction

In South Africa, the government still continues to institutionalise apartheid race categories as a means to manage racial redress. Racial redress policies require individuals to classify themselves according to these categories on all official documentation.³⁶⁶ It is confirmed through various research findings³⁶⁷ that by using these methods of categorisation, we reinforce race consciousness. This works against the constitutional ideal of non-racialism. The use of race also creates political realities and ways of thinking and viewing our world.³⁶⁸ It is important to conceptualise race as a social construct. This conceptualisation will allow for knowledge and practice, towards its downfall.³⁶⁹

The following extract gives an indication of the realities which run along racial cleavages in South Africa. These factors could and should be considered when one wishes to determine an individual's status of disadvantage or advantage.

‘The settler’s town in a strong-built town, all made of stone and steel. It is a brightly-lit town; the streets are covered with asphalt and the garbage-cans swallows all the leavings, unseen, unknown and hardly thought about...The settler’s town is a well-fed town...; it’s belly is always full of good things.[It]... is a town of white people... The... native town... is a place of ill fame... [people are] born here, it matters little where or how; they die there; it matters not where, nor how... It is a world without spaciousness;...a hungry town, starved of bread, of meat, of shoes, of coal, of light. The native town is a town on its knees, wallowing in the mire.’³⁷⁰

The above is an indication of the stark realities of what was and still evident in our contrasting communities in South Africa. It is important to acknowledge context to aid in warranting appropriate differential treatment, which can build full citizenship for all in South Africa. This approach was followed by Justice Sachs in his dissenting judgement in

³⁶⁶ Z Erasmus ‘Reformulating racial citizenship(s) for South Africa’s interregnum’ (2010) 74 *Transformation* 47 at 48.

³⁶⁷ M Nobles ‘History counts a comparative analysis of racial/colour categorization in US and Brazil censuses’ (2000) 90 *American Journal of Public Health* 1738 at 1740.

³⁶⁸ *Ibid* at 1745.

³⁶⁹ Erasmus (n 366) at 50.

³⁷⁰ F Fanon cited in Erasmus (n 366) at 47-48.

the Constitutional Court, in the *City of Pretoria v Walker*.³⁷¹ It is argued that this reasoning revitalises non-racialism and facilitates a formation of citizenship that contests social inequality.³⁷² Erasmus argues that a formation of substantive citizenship is constructed through differential treatment which encompasses the economic, social and political relationships between social groups.³⁷³ For this reason, more than just, political-economic, it also has cultural- valuational dimensions which bring it into the universe of recognition.³⁷⁴ This then also prompts one to imagine oneself as part of a polity and not as a member of naturalised racial, cultural and or traditional families, constructed by colonialism and apartheid. It will also act as a catalyst to move away from a purely race-based approach in the application of affirmative action.

The previous chapters pointed out that although case-law indicated acknowledgement of other contextual factors other than the criteria of race, gender and disability to be taken into account when affirmative action beneficiaries are identified, race are still favoured as the main identifier of beneficiaries. These other factors are also acknowledged in legislation.³⁷⁵ This Chapter will focus on the use of socio-economic factors in the identification of affirmative action beneficiaries. Class-based affirmative action is not an easy concept to implement, but is one that is attainable. This approach takes the current context and circumstances into consideration when beneficiaries are considered.

It is mentioned elsewhere that there is a correlation between status and socio-economic disadvantage. One could follow an approach of overlaying status with socio-economic disadvantage. In order to qualify, the individual should indicate socio-economic disadvantage as well as membership to a group status group. This principle is applied in India, where two categories of disadvantage are provided for.³⁷⁶ Firstly, the president specified Scheduled Castes and Scheduled Tribes.³⁷⁷ Secondly, socially and educationally backward classes of citizens³⁷⁸ and other backward classes³⁷⁹ are identified. A national

³⁷¹ 1998 (3) SA 363 (CC).

³⁷² Erasmus (n 366) at 47.

³⁷³ Ibid at 55.

³⁷⁴ Ibid at 58.

³⁷⁵ PEPUDA (n 60).

³⁷⁶ Fredman (n 66) at 33.

³⁷⁷ Constitution of India available at <http://lawmin.nic.in/coi/coiason29July08.pdf> articles 341(1), 342(2). [Accessed 01 December 2012].

³⁷⁸ Constitution of India s 15(4) available at <http://lawmin.nic.in/coi/coiason29july08.pdf> [Accessed 01 December 2012].

³⁷⁹ Constitution on India Article 16(4) available at <http://lawmin.nic.in/coi/coiason29july08.pdf> [Accessed 01 December 2012].

list is drawn up by the Commission for Backward Classes to indicate the group falling in the backward classes. The Indian Constitution mandates the advancement of these backward classes. This method of re-categorising allows for the redefinition of the beneficiary group to benefit those in real need of redress. Following this approach places an administrative burden on the organ of state or the agency responsible for the monitoring of affirmative action. The definition of the beneficiary class would be those who are disadvantaged. In the South African context, it differs in the sense that it advances those who had been disadvantaged by past discrimination. This differs from the Indian experience in the manner that it looks at redressing history and actually overlooking current realities. The proposal of using socio-economic status as the identifier of beneficiaries, is easier said than done, and the challenge actually lies in the practical application of the method. The linking of group membership to other factors in the Indian context is not easy in determining eligibility for affirmative action benefits.³⁸⁰

The approach of looking at class status is promoted by Richard Kahlenberg, during the late nineties and is thoroughly discussed in his book, *The Remedy: Class, Race and Affirmative Action*. The class-based approach will also compensate for groups who had been subjected to past discrimination. This approach will address the on-going economic legacy of discrimination against minorities.³⁸¹ Class-based affirmative action is also known as ‘economic’ or ‘socio-economic’ affirmative action and in some cases admissions for the poor.³⁸² These differences in naming also cause some confusion in what should be examined when granting benefits under a class-based approach and what it is expected to achieve.³⁸³ Class-based affirmative action may be divided into two camps, namely race neutral supporters who favour class-based considerations solely as a remedy to economic hardship. Secondly race-conscious supporters who believe that class-based affirmative action can maintain racial diversity.³⁸⁴

³⁸⁰ Faundez (n 3) at 35.

³⁸¹ R Kahlenberg ‘Class-based affirmative action’ (1996) 84 *California Law Review* 1037 at 1037- 1038.

³⁸² Espenshade & Radford, Long, Bowen & Bok cited in M Gaertner ‘Evaluating a new approach towards affirmative action policy: Results from a randomized controlled study’ (2010) Submitted for the AERA session “Division D Exemplary Work From Promising Researchers” at 4. available at <http://chronicle.com/items/biz/pdf/Gaertner.pdf> [Accessed 01 December 2012].

³⁸³ Ibid.

³⁸⁴ D Malamud ‘Assessing Class-Based Affirmative Action’ (1997) 47 *Journal of Legal Education* 452.

Kahlenberg sets three important principles as the framework for class-based affirmative action. It is important to note that Kahlenberg's angle is to address socio-economic disadvantage in the United States.³⁸⁵

Firstly the goal of genuine equality of opportunity should be provided where natural talents may flourish to their full capacity. Secondly, a system which is able to be administered should be put in place. Thirdly the program should be adopted by the republican form of government of the day in the United States. All these would not be equally applicable in the South African context, because our political setting and the application of equality differs from the approach in the United States. We will focus on the defining the concepts and the practical application of the concept.

5.2 Class-based or socio-economic disadvantage

The practical implementation of class-based affirmative action begs for many questions to be answered. The following questions of implementation are serious and difficult.³⁸⁶

- How is class to be defined?
- Should only the poor or the lower-middle-income group as well, benefit?
- Should there be sliding scale of benefits?
- In what context should class preferences apply?
- Should class preferences apply to people of all ages?
- How would the idea be implemented?
- Would class-based preferences entirely replace racial, gender disability preferences?

The class or socio-economic based affirmative action will pay attention to the social and economic background of the applicants for employment or admission into a university.³⁸⁷

It is seen as a system of preferences, based on the applicant's status of being economically disadvantaged in education, employment and contracting.³⁸⁸ A class-based approach will require some sort of means test and beneficiaries will have to be assessed

³⁸⁵ Kahlenberg (n 210) at 122-123.

³⁸⁶ Ibid at 121.

³⁸⁷ R Roach 'Class-based affirmative action: battle over race-conscious approaches pushes idea to the surface' (2003) 20:9 *Black issues in Higher Education* 22 at 22.

³⁸⁸ Kahlenberg (n 210) at 83.

against a context and a set of economic criteria.³⁸⁹ In order to establish socio economic status of an individual, the definition of what class means is crucial. This will also indicate that the identification of socio-economic status is much more complex than just a ranking or grading of individuals to afford them affirmative action benefits.

Definition of class

Class is not referred to here as how Marx would define it to refer to as those who own the means of production as to those who do not. Three basic ways of defining class is crucial:

Simple definition of class

With this approach, the focus is only on family income. The use of income tax returns will give one a good indication of what the family income would be. Provision should also be made for regional adjustments to reflect differences in the cost of living in different regions.³⁹⁰

Moderately Sophisticated definition of class

According to sociologists³⁹¹ the following are the three main determinants of socio-economic status; income, education and the occupation of the parents.³⁹²

A parent's education is correlated with academic achievements and life chances and certain studies suggest that this is a better indicator of the child's educational achievement rather than the income of the parents. Studies have shown that a school teacher with a master's degree earning less income than a sanitation worker provides his child with greater educational advantages. The most common way of measuring the parent's education is by the number of years of schooling.³⁹³ Parental educational status are also deemed to be the best measure of class, but using this as a predictor of class will vary across countries.

³⁸⁹ Darity *et al* (n 73) at 239.

³⁹⁰ Kahlenberg (n 210) at 128-129.

³⁹¹ S Mayer & C Jencks *Growing Up In Poor Neighbourhoods: How Much Does It Matter?* (1989) 243 *Science* 1441; J Crane *Effects of Neighbourhoods on Dropping Out of School and Teenage Childbearing* in C Jencks & P Peterson *'The urban underclass'* (1991) at 299,303-304; D Bok *'Admitting Success'* (1985) 192:5 *New Republic* 14.

³⁹² Laird interview: Telephonic interview held with Robert Laird (1995) noted in Kahlenberg (n 210) at 129.

³⁹³ Kahlenberg (n 390).

The parent's occupation is another factor which could be used to determine a child's success. The parent's occupation is seen to be a good predictor, because it is a culmination of the parent's education and income. The criteria of occupation is also said to be a good means to check against fraud in the reporting of income. The administration of categorising the various occupations may pose an administrative obstacle, but has become evident that objective ranking of jobs has become consistent over the last few years.³⁹⁴

Sophisticated definition of class

This definition of class will include factors such as; income, education, occupation, wealth, schooling opportunities, neighbourhood influences and family structure.

Wealth is normally derived from income which is a snapshot of the net worth in a given year. It is argued that wealth is a much better indicator of class status, than income. The reason for this is that it cumulates the advantages of the past, rather than only focusing on the present. The problem of using wealth as an indicator of economic status is that it is not as easily available as indicators of income.³⁹⁵ By looking at assets and not only income gives one an idea if a child once suffered living in poverty and for how long. Wealth is also expressed as net worth and it is argued that African Americans have a lower net worth than their white counterparts.³⁹⁶ This could definitely be said about the black population in South Africa as well.

Schooling opportunities of a child also impact on a child's life chances. For example, high concentrations of poverty within a school community are seen to be a serious obstacle to cross. Research indicated that learners in poverty schools will perform poorer than those in more affluent schools.³⁹⁷

Studies have shown that neighbourhoods have an impact on an individual's life chances. Factors increase such as dropping out of school or having children out of wedlock, for example.³⁹⁸ These factors place an additional burden on the underclass. Research has indicated that families in middle class neighbourhoods will have a higher school

³⁹⁴ Kahlenberg (n 210) at 130.

³⁹⁵ Darity *et al* (n 73) at 240-241.

³⁹⁶ Kahlenberg (n 210) at 132.

³⁹⁷ Data provided in Kahlenberg (n 210) at 132-133.

³⁹⁸ W Wilson 'The truly disadvantaged: The inner city, the underclass and public policy' (1987) at 642.

graduation rate than those in poorer communities.³⁹⁹ The objective criteria which are commonly used to measure the neighbourhood's level of poverty would include; median family income, the male unemployment rate, the percentage of female-run households and even the crime rate in the area.⁴⁰⁰

Family structure is another factor to consider in the assessment of a child's life chances and it refers to the absence or presence of two parents, but might also refer to a parent's age. Children growing up in a single-parent home are negatively impacted with regards to income.⁴⁰¹ Studies indicated that single parent children, normally single mothers are six times more likely to be in poverty than other American families.⁴⁰² In another study, it was found that the IQ of most children from a family structure where fathers were absent was lower than their peers who reside with parents.⁴⁰³ Family structure may be a good indicator of disadvantage, but is a factor that is in constant flux and changes rapidly over time, it might not be reliable⁴⁰⁴

Social exclusion is also an important concept to grasp for it is argued that it has a direct correlation with poverty. Social exclusion is a concept originating from France termed '*les exclus*' - those who were excluded by the French welfare system and thus unable to participate in different spheres of social and economic activity.⁴⁰⁵ This is typically what happened in South Africa, during the colonial and apartheid eras.

The above three definitions may pose challenges when one wishes to utilise them to assess a person's level of disadvantage. Due to the inaccessibility of information in the employment sphere, this evaluation is more suitable for the education sector where entry to colleges or universities is assessed. The most useful and fairest of the test of class is the sophisticated one and should be employed as far as possible. The more factors one adds to the test, the chances of it falling short due to fraud, is minimised. This test would, however, be difficult to apply in the employment context, because the criteria set out in

³⁹⁹ Data provided in Kahlenberg (n 210) at 133.

⁴⁰⁰ Ibid (n 210) at 134.

⁴⁰¹ Ibid.

⁴⁰² Census information cited in Khahlenberg (n 210).

⁴⁰³ D Moynihan *The Negro family: A case of national Action* (1965) at 36-37.

⁴⁰⁴ Kahlenberg (n 210) at 135.

⁴⁰⁵ Lenoir and Whiteford cited in P Saunders *et al* 'Towards new indicators of disadvantage: Deprivation and social exclusion in Australia' 2007 Social Policy Research Centre at 9. www.sprc.unsw.edu.au [accessed 01 December 2012].

the sophisticated test is much more accessible for university officials than to the employer.

In the employment sector, a more simple approach should be adopted. Employers could look at factors such as income and it is said that parental income is a good indicator of many things. For example, this could indicate a low educational level: filling of low-status occupation, living in neighbourhoods with bad influences and bad schools.⁴⁰⁶ Because of the cumbersome test when one wishes to utilise the sophisticated test to determine need, some opponents to the use of socioeconomic indicators to establish disadvantage, wish at times to make the system inadministrable.⁴⁰⁷ Nothing is more difficult about the class-based approach opposed to the race-based approach. It is said that race is simpler only because it avoids a number of ambiguities. The issues of theory and practice are one that could make or break the popularity of a theory. Therefore the application of the theoretical concept of class-based affirmative action will be under the scope now.

5.3 How will we determine socio-economic disadvantage and possible implications of the approach?

Elsewhere in this research, it is mentioned that legislation proposes that factors other than race, gender and disability should be taken into account when disadvantage is determined. Disadvantage is a link to specific socio-economic conditions experienced by an individual. This approach would warrant a means test and the following factors in our context should be considered to assess and determine an individual's socio economic status. It is argued that some affirmative action programmes fail to reach the worst-off members of society and on the other hand provide benefits to members who do not need redress at all.⁴⁰⁸ These concepts namely under- and over-inclusion were discussed in Chapters One and Two of this research.

It is argued that poverty is the most enduring cause of social disadvantage.⁴⁰⁹ Therefore poverty may serve as an indicator of disadvantage and important research in the

⁴⁰⁶ Kahlenberg (n 210) at 136.

⁴⁰⁷ Faundez (n 380).

⁴⁰⁸ Ibid.

⁴⁰⁹ P Saunders (n 405) at 1. Available at www.sprc.unsw.edu.au [Accessed 01 December 2012].

determination of poverty or disadvantage becomes crucial when policy decisions with regards to affirmative action are made. This section will now turn to how one could assess disadvantage by viewing an individual's current economic circumstances. For this evaluation, a benchmark should be set to be measured against individual circumstances.

‘Social disadvantage takes on many different forms, and the identification and the measurement of poverty and other forms of disadvantage must be grounded in the actual living standards and the experiences of people in poverty.’⁴¹⁰

With the above as backdrop criteria for the identification of disadvantage will now be defined.

Income is seen as a good indicator of an individual's standard of living, but other factors should also be included to determine the levels of poverty. One such factor is accumulated wealth.⁴¹¹ When it is referred to income, it involves family income. This is fairly easy to assess through income tax statements and even declarations of proof of receiving a welfare grant.⁴¹² The assessment of family income should have the priority to assess family hardship and therefore a holistic approach should be followed in assessing family income.⁴¹³

Goldsmith also identifies four major factors which could influence an individual's socio-economic status.⁴¹⁴

- Geography
- Wealth
- Family educational history

The above factors are in line with what Kahlenberg also highlighted in his sophisticated definition of class.⁴¹⁵

Where people reside is an indication of the social class they belong to.⁴¹⁶ Being the poorest in an affluent neighbourhood would be more beneficial than being the richest in a

⁴¹⁰ Ibid at 2.

⁴¹¹ Ibid at 8.

⁴¹² Receiving a welfare grant is an indication that a means test was already completed by Social Services to establish a person's economic status to receive state funded grants or benefits.

⁴¹³ N Goldsmith ‘Class-based affirmative action: Creating a new model of diversity in Higher Education’ (2010) 34 *Journal of Law and Policy* 313 at 340.

⁴¹⁴ Ibid at 341.

⁴¹⁵ Kahlenberg (n 401).

not so affluent neighbourhood. By using the geographical criteria, a person's social class may be derived. Applicants for positions could be assessed according the criteria of where they originate from. More weight could possibly be given to rural applicants. The simplest method of categorisation could be to use the postal code in the South African context.

Wealth could have many meanings. It could refer to an applicant's tangible assets and could include stocks, mutual funds and real estate which would be easy to measure.⁴¹⁷ The drawback of the assessment of wealth is that it would be difficult to measure and would be reliant on self-declaration. This poses a challenge to use this as reliable measurement criteria. This could also easily fall foul to fraud.

Education is seen to be instrumental to overcome intergenerational economic disadvantage. Prior family educational achievements form an important role in determining an applicant's socio-economic status. This educational history influences the applicant's occupation, income potential and social circle.⁴¹⁸ The applicant's secondary school information is also an important determinant of disadvantage and is closely tied with geography.

Although the above criteria are more aimed at admissions to universities or colleges, it could be tailored to fit the workplace as well. The criteria might not all be suitable for the workplace due to the fact that it might pose administrative burdens on an employer to assess all these criteria. One could possibly also investigate a software program with a built-in scoring method to evaluate and assess members of the designated group to ensure that the real beneficiaries of affirmative action should receive the necessary redress. A question still to be unravelled is the weight that these socio-economic factors will enjoy in evaluating a group to be identified for redress. The weight assigned will closely be linked to the approach followed by what it is that the measure wishes to achieve: i.e. a race-based measure to bring about relief for socio-economically disadvantaged or a race conscious measure to bring about diversity?

⁴¹⁶ Gaertner (n 380) at 12.

⁴¹⁷ Goldsmith (n 413) at 342-343.

⁴¹⁸ Ibid at 343.

The application of the class-based approach is promoted by William Bowen and Derek Bok in their book, *The Shape of the River*. The question was posed, if the class-based approach could adequately achieve racial diversity in the context of the United States and if one could establish a link between achieving racial diversity and to alleviate socio-economic disadvantage. As one knows that a correlation between race and socio-economic factors do exist, it was however found that the correlation is not high enough that the one could serve as proxy for the other.⁴¹⁹ In South Africa, a strong correlation between the socio-economic factors and race exist. One could then make an assumption that socio-economic factors could stand as proxy for race.

5.4 Conclusion

This research was concerned with the much discussed, controversial and contentious topic of affirmative action. This topic was discussed from many angles over the last couple of decades. Since the inception of the application of affirmative action in the United States, these tensions still continue to simmer. Affirmative action has many angles from which it could be viewed from; moral, ethical, philosophical, legal, economic perspectives. Each of these perspectives has its own distinct viewpoints.

With this research, the practical determination of who the beneficiaries of affirmative action should be is explored. The South African context was used as point of departure and how affirmative action was dealt with in the United States was also brought into the discussion. It has been acknowledged that affirmative action has many complexities and it would be detrimental to haphazardly import a redress program from one country into another.

Departing from the above point, it is acknowledged that each country has its own complex context and history to be taken into account before a policy decision on the application of a redress program may be taken. The concept of affirmative action ultimately intends to equalise disparities in society by distributing opportunities in a fair manner. This does not mean a superficial application of taking from the have's and giving

⁴¹⁹ R Linn & K Welnereds 'Race-Conscious Policies for Assigning Students to Schools: Social Science Research and the Supreme Court Cases. Washington, DC: National Academy of Education' (2007) at 42.

it to the have not's. It is then also beneficial to link affirmative action with the concept of equality, because this is ultimately what affirmative action wants to achieve.

Notions of equality was discussed and placed into context where it was applied. It became evident that from the start of implementation of affirmative action, that South Africa subscribes to a substantive notion of equality. This notion acknowledges the impact of colonialism and apartheid on the unequal distribution of wealth. It was also established that unequal distribution of wealth could be closely linked with racial lines in South Africa.

The practical application and specifically how beneficiaries are determined was in the spotlight with this research. Legislation prescribes three broad categories that will be eligible for affirmative action benefits namely; race, gender and disability. It was found that the demarcations of beneficiaries may at times cause much frustration. The criterion using race is the most contentious one and was widely debated over the last few years. The South African jurisdiction applies a group-based approach and will afford benefits to all belonging to this group, irrespective of the actual need of the individual. This, in particular, gave rise to the concepts of over- and under inclusion which is also discussed in this research. Another writer argues that one should take a nuanced approach in the application of affirmative action. This would mean that not only should race be taken into consideration, but that one should take into account other factors such as socio-economic status or class of an individual, when beneficiaries are determined. This approach does not mean that one should totally discard the use of group identification to identify the beneficiaries, but to further reclassify the group to determine the real intended beneficiaries of the redress measure. In the United States, attempts were made since the late nineties to introduce the concept of socio-economic or class-based affirmative action,⁴²⁰ but as one could see that the debate has not stopped and the solution is far from being found.

The purpose of this research is to stimulate further debate into assessing the merits of the use of class to determine beneficiaries of affirmative action. It is acknowledged that this approach is not without its drawbacks. However, the positives should be measured against the drawbacks to ultimately determine the viability of looking at the implementing of this type of approach in South Africa. The use of race has not served its

⁴²⁰ Gaertner (n 380) at 9.

time and therefore until the nuanced approach is applied, one will still explore the possibility to infuse the use of race with the concept of actual disadvantage.⁴²¹ If class-based affirmative action policies are designed correctly it will boost the enrolment of low income students and then increase socio-economic diversity in education. In the South African context, socio-economic policies will create racial diversity, because of the high correlation between race and class.⁴²² Disadvantage will now become the focus and not the accompanying status-based criteria. With this, poor white candidates will now also stand a chance to be in line for positions⁴²³ which were set aside for members of the disadvantaged group who are predominantly black in the South African context. Case law and legislation highlighted that other forms of disadvantage do exist, but until now cases were brought before the courts to indicate socio-economic disadvantage to receive the benefits of a redress measure. It is acknowledged that even if a class-based affirmative action program is adopted, there will still be a continuing need to address race and gender-based issues.⁴²⁴

⁴²¹ Goldsmith (n 413) at 317.

⁴²² Ibid at 334.

⁴²³ Ibid at 339.

⁴²⁴ Kahlenberg (n 381) at 1096.

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