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DISSERTATION

**AFFIRMATIVE ACTION AND THE
INTERIM CONSTITUTION**

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AFFIRMATIVE ACTION AND THE INTERIM CONSTITUTION

1. INTRODUCTION

The stately inauguration of President Nelson Mandela on 10 May 1994 sounded the death knell of the longest and most stubborn era of institutionalised racism and inequality known to mankind. The generals who escorted him safely onto the podium will never again receive their orders from a chain of command borne in an exclusively white caucus under the guise of parliamentary sovereignty. The new presidential authority is contained in an Interim Constitution which declares itself to be the supreme law of the Republic (1), embodying the concept of constitutional sovereignty for the first time in South Africa. The decisions of Parliament can no longer receive the majoritarian rubber stamp of approval from within its own ranks, but will be tested against the provisions of the Interim Constitution by an independent Constitutional Court. Those which are found to be inconsistent with the provisions of the Interim Constitution will be of no force or effect (2).

Constitutionality, then, marks a radical shift away from the arbitrary exercise of legislative power. It represents the ultimate check and balance to the traditional separation of powers by requiring direct judicial intervention in the affairs of government at both the executive and legislative levels. The role of the Constitutional Court is central to this scheme, guided in its deliberations by the provisions of the Constitution itself. While the Constitution predominantly sets out the structures and process of government, Chapter 3 provides twenty five entrenched fundamental rights to which all juristic persons are entitled (3). When an infringement of or threat to any such right is alleged, appropriate relief may be sought in a court with competent jurisdiction (4):

2. CHAPTER 3

It is within Chapter 3 that the sections alluding to affirmative action are to be found. Section 8, the Equality Clause, provides as follows:

- "(1) Every person shall have the right to equality before the Law and to equal protection of the law.
- (2) No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language".

Significantly, the Equality Clause is structured in such a way as to provide legislative recognition for a need to protect and advance people disadvantaged by unfair discrimination:

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

In addition to the clause on Equality, Section 26 relates to economic activity:

"(1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory".

The right is, however, wholly qualified as follows:

"(2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practises or equal opportunity for all, provided such measures are justified in an open and democratic society based on freedom and equality."

Thus, two of the twenty five fundamental rights are self-limited so as to ensure a constitutional basis for implementing measures designed to redress inequalities of the past and to promote equality of opportunity for all. Such measures are most commonly referred to as "affirmative action programs", though they may carry a broad variety of descriptions, including corrective action, "regstellende aksie", reverse discrimination, job preference or job reservation, equal employment opportunity, preferential treatment, employment equity and positive discrimination. The term "affirmative action" is relatively neutral from an ethical point of view, while each one of the other descriptions conveys certain subjective judgment in favour of or opposed to the very concept itself. For instance, "reverse discrimination" and "positive discrimination" may be terms used to refer to the self same employment practice, but they in no way reflect the same understanding of what that practice means - clearly, the latter suggests approval, the former not. It would therefore be preferable to use the neutral term "affirmative action" than to wrestle with the normative values which underlie the others.

Accepting this, one is immediately faced with a difficulty that affirmative action means different things to different people. While some commentators may stop short of goals and time tables, others may insist on quotas; while some may demand a commitment to merit, others may be willing to abandon it; while some may view affirmative action as a purely temporary measure to attain certain objectives, others may view it as the objective itself; furthermore, some may wish to confine affirmative action to the employment sector while others may apply it more broadly to political, educational, military and social sectors of society, as well. It is not the task of this paper to analyse the approach of commentators in different jurisdictions to these questions. Nor is it the task of this paper to analyse the merits and demerits of any one particular affirmative action program from a political or ethical or economic or labour point of view, although such an analysis will certainly assist by way of an introduction to affirmative action, placing it in its correct historical and philosophical perspective. The main object of this paper is to analyse affirmative action from a constitutional point of view via the specific provisions of Section 8 and Section 26 of the Interim Constitution. In effect, this entails a crystal ball approach to the constitutional delimitation of affirmative action by the Constitutional Court.

In the context of a constitution which makes provision for affirmative action, it is inappropriate to debate the possible merits or de-merits of its existence. The focus inevitably shifts to the practical effects of its implementation. Affirmative action must be viewed as a fait accompli. Indeed, long before the interim constitution had even been drafted, affirmative action had been widely practised in commerce and industry. While before, private companies have had a free reign to implement whatever affirmative action programs they deemed appropriate, now those programs may be challenged against the provisions of the interim constitution by both victim and benefactor alike. Accordingly, the affirmative action programs of the future will be shaped by the approach of the Constitutional Court to the relevant provisions.

While the qualifying provisions of Section 8 and Section 26 afford affirmative action protection against constitutional challenge, nowhere does the Interim Constitution enforce affirmative action upon any sector of the South African society (save only for Section 99(5)(d) which requires that the Judicial Services Commission have regard to the need to constitute a Constitutional Court which is representative in respect of race and gender when submitting its recommendations). For affirmative action to become anything more than a voluntary option, further legislation, in the form of an Affirmative Action Act, will be required. Such an Act is certainly envisaged, but it is expected to be some way off.

Namibia is only expected to promulgate such an Act during the latter half of 1994, some four years after independence. Be that as it may, such legislation will mark a radical shift away from current practice insofar as affirmative action will become compulsory in certain designated sectors of society. Canada, India, Malaysia, Australia and Sri Lanka are striking examples of countries that have enforced affirmative action in one form or another through legislation of this nature. When that time comes in South Africa, it will be the task of the Constitutional Court to ensure that the legislation itself passes the test of constitutionality when measured against Section 8 and Section 26. Clearly, then, the interpretation of these sections by the Constitutional Court is central to any analysis of affirmative action.

That is not however to say that affirmative action will be unaffected by the remaining provisions of Chapter Three. Importantly, the protection afforded affirmative action by Section 8 and Section 26 does not extend to other rights. Accordingly, it may be possible to base a challenge against affirmative action on the right to property or the right to human dignity or the right to freedom of association or to freedom of conscience, for example. In this way, affirmative action may come under judicial scrutiny via the back door, so to speak, and the Court will be required to look to the limiting provisions of Section 33 to determine the permissibility of affirmative action which have the effect of limiting such rights.

3. THE INTERIM CONSTITUTION

3.1. GENERAL COMMENTS

No study on the constitutionality of affirmative action would be possible without an understanding of provisions in the Interim Constitution which will influence the conduct of the Constitutional Court, and which will influence the effect of its decisions on society. In particular, the provisions relating to the application and to the interpretation of the constitution will have an important bearing on the Court's approach to affirmative action. But, before alluding to these, three general comments should be made about the new constitution:

3.1.1. TEMPORARY NATURE OF CONSTITUTION

The new constitution is purely a temporary measure designed to facilitate the transformation of South Africa from authoritarian rule to democratic government. Parliament sits for a period of five years (5). So, too, the President's term of office is for a period of five years (6). Provision is specifically made for the drafting and adoption of a new constitution by the Constitutional Assembly within a period of two years as from the date of the first sitting of the National Assembly (7). Apart from the fact that this new constitution must comply with the constitutional principles contained in Schedule 4 (8), each and every Section of the Interim Constitution, including the fundamental rights contained in Chapter 3, may be amended in toto. Sections that do not comply with the Constitutional Principles may even be excluded altogether. Accordingly, it is conceivable that the Constitutional Court will be faced with an entirely different text on affirmative action in years to come. Be that as it may, the Court will nevertheless enjoy the benefit of precedent relating to the Interim Constitution as the basic groundwork from which to operate.

3.1.2. POLITICS OF THE JUDICIARY

Chapter seven of the Interim Constitution details the hierarchy and jurisdiction of judicial authority in South Africa. In particular, provision is made for the establishment of a Constitutional Court (9), the appointment of judges to that court (10) and the promulgation of Constitutional Court Rules (11). These matters are not of great significance for purposes of this paper, except to note the controversy which has already surrounded the appointment of judges to the Constitutional Court and which has motivated certain amendments relating to the method of appointing the Court's Bench.

Constitutionalism empowers the judiciary to review all legislative and executive decisions of Government to ensure that Government does not stray from the principles and confines of the constitution. In this way, the judiciary becomes the ultimate political overseer in the land with power to declare invalid acts of Government that do not accord with the constitution.

The decisions of the United States Supreme Court over the past few decades are illustrative of the judiciary's intervention into hot political issues such as abortion and gay liberation. Indeed, that Court's approach to affirmative action has vacillated in accordance with changes in the political affiliations of its presiding officers. Likewise, the political leanings of the members of the South African Constitutional Court will influence the Court's approach to affirmative action. This particular feature of judicial politics is confirmed by past studies on judicial behaviour in South Africa, which focus on a judiciary steeped in the distinct socio-economic and socio-political conditions of apartheid (12). Given the nature of the new political order in South Africa and the spirit of reconciliation that it embodies, it is reasonable to expect members of the Constitutional Court to favour the rationale of affirmative action.

3.1.3

LIMITATION OF FUNDAMENTAL RIGHTS

No single fundamental right contained in Chapter 3 is absolute. The all-important Limitation Provision, Section 33, provides that the fundamental rights may be limited by law of general application provided such limitation will be permissible only to the extent that it is (a) reasonable and (b) justifiable in an open and democratic society based on freedom and equality and (c) does not negate the essential content of the right and (d) in respect of certain rights, the limitation is not only reasonable, but necessary.

Thus, the process of analysing the infringement of a fundamental right is two-stage: First, determine whether or not the legislation in question infringes upon any one of the fundamental rights. If it does, determine, secondly, whether or not the infringement is permissible. In this way, it may be possible for the Constitutional Court to sanction the limitation of an entrenched fundamental right. Section 33 will become one of the central issues in constitutional litigation for determination by the Constitutional Court.

That said, the general limitation clause will have little impact on issues relating to affirmative action. The two sub-sections referring to affirmative action, Section 8(3) and Section 26(2), are themselves specific limitations to the right to equality and the right to economic activity, respectively. As such, they are not fundamental rights themselves and, accordingly are not subject to the provisions of Section 33 which allows the limitation of "rights entrenched in this chapter" only. It is furthermore nonsensical and contrary to the sui generis rule of interpretation to subject one form of limitation to another. That would not only create the confusion of "two limitations making a right", but call for a hierarchy of limitations which could never have been envisaged. Accordingly, Section 8(3) and Section 26(2) will be analysed in isolation from Section 33.

Section 33 may however, be of significance in those instances when affirmative action is challenged on the basis of one of the remaining fundamental rights contained in Chapter 3. The Constitutional Court's interpretation of the limitations will influence the parameters of affirmative action significantly in this regard and is referred to in more detail below.

3.2. THE APPLICATION OF THE INTERIM CONSTITUTION

It goes without saying that the entrenched provisions of Chapter 3 are worth little more than the paper they are written on without the authoritative power to bind the various sectors of society. Hence, the chapter opens as follows:

"7(1) This chapter shall bind all legislative and executive organs of State at all levels of government".

Clear though the subsection appears to be, it opens judicial debate on the proper application of Chapter 3 by omitting to include the Judicial organ of State. On the face of it, this would appear to limit the application of the chapter to vertical relations between the State and the individual and thus to exclude its application on the horizontal plane as between citizens. If this were indeed the case, all non-state employment relations would escape the affirmative action provisions of Section 8(3) and Section 26(2), which would not only frustrate their very purpose, but allow for privatised apartheid.

A reading of Section 4 (2), providing for the supremacy of the constitution, confirms that the omission was by no means an oversight:

"This constitution shall bind all legislative, executive and judicial organs of state at all levels of government".

The source of the apparent paradox lies in the differences of opinion held by the members of the Ad Hoc Committee on Fundamental Rights at Kempton Park who influenced the final drafting of the constitutional text. On the one hand, there were those who favoured a strictly vertical application of Chapter 3 for fear that commerce and industry would abuse its provisions to hold onto their stranglehold over the commanding heights. On the other hand, there were those who favoured a degree of horizontal application in order to afford protection to the individual against the abuse of power by the holders of diffuse pockets of power, such as trade unions, churches, employers, universities and the like. While the former is regarded as the traditional view, the latter is more in line with international practice.

The content of the debate is not as significant for the purposes of this paper as its effect upon the final text of the constitution. In an attempt to draw a compromise between the two approaches, Chapter 3 is sprinkled with provisions allowing for seepage onto the horizontal plain:

Section 7(1) is immediately broadened by Section 7(2):

"This chapter shall apply to all law in force and all administrative decisions taken and acts performed during the period of operation of this constitution."

The reference to "all law in force" refers not only to legislation, but to Common Law and Customary Law, as well. There is no reason to suggest why the use of the word "law" should have anything but its normal meaning. This would seem to be confirmed by Section 33(2):

"Save as provided for in Subsection (1) or any other provision of this constitution, no law, whether a rule of the Common Law, Customary Law or Legislation, shall limit any right entrenched in this chapter."

Here, the word "law" is specifically defined as including the Common Law, Customary Law and Legislation. The Section furthermore subjects the Common Law and Customary Law to the rights contained in the chapter.

More horizontal seepage is to be found in Section 33(3):

"The infringement of the rights in terms of this chapter shall not be construed as denying the existence of any other rights or freedoms recognised or confirmed by Common Law, Customary Law or Legislation to the extent that they are not inconsistent with this chapter."

Clear recognition is given to Common Law and Customary Law rights which are not contained in Chapter 3 to the extent that they are not inconsistent with the chapter.

Of particular significance to affirmative action is Section 33(4):

"This chapter shall not preclude measures designed to prohibit unfair discrimination by bodies and persons other than those bound in terms of Section 7(1)".

Referring, as it does, to Section 7(1), Section 33(4) authorises measures designed to prohibit unfair discrimination by bodies and persons other than the Legislative and Executive Organs of State. In this way, it may be possible to promulgate

legislation of general application prohibiting unfair discrimination without the threat of constitutional invalidity. However, the Subsection would seem to fall short of protection for the legislative imposition of affirmative action programmes, imposing duties upon employers.

Section 33(4) is an indication of the fact that the horizontal application of the Constitution is not unlimited, for it would otherwise have been an unnecessary precaution. Be that as it may, a further significant provision providing for horizontal seepage is Section 35(3):

"In the interpretation of any law and the application and development of the Common Law and Customary Law, a Court shall have due regard to the spirit, purport and objects of this chapter."

The section not only refers to the interpretation of the existing law, but also to the application and development of Common Law and Customary Law in the future. This is a strong directive for horizontal seepage. In addition, the Section specifically differs from Section 35(1) in that it refers to "a Court", rather than "a Court of Law". -This would seem to imply that the subsection is intended to apply not only to the usual Courts of Law, but also to quasi-judicial administrative tribunals, such as the Industrial Court. The significance of this for affirmative action speaks for itself.

In terms of Section 104(3), any Judge shall, before commencing the functions of office, make an oath in the terms set out in Schedule (iii):

"I, AB, do hereby swear/solemnly confirm that I will in my capacity as Judge of the Supreme Court/Constitutional Court of the Republic of South Africa, uphold and protect the constitution of the Republic and the fundamental rights entrenched therein and in so doing administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the Law of the Republic".

In terms of that oath, all Judges are duty bound to uphold and protect the entrenched fundamental rights in the performance of their functions as a Judge. This would naturally subject all laws to the scrutiny of Chapter Three by the Judiciary.

Section 7(1) notwithstanding, there is ample evidence of the provision for a high degree of horizontal application of Section 8(3) and Section 26(2). Although these provisions do not go so far as to impose a duty upon any private employer, the legal relations between private employer and private employee will certainly be subject to scrutiny under the provisions of Chapter Three. Affirmative action will most certainly enjoy a place in the sun in all sectors of the South African economy.

3.3. INTERPRETATION

The second area of the Interim Constitution which is expected to have an important consequences^X for affirmative action is the interpretation of the Constitution. Without analysing the question of interpretation in full, two aspects of particular significance to affirmative action will be touched on: firstly, the provisions referring to foreign and international law and secondly, the judiciary's expected approach to interpretation in the South African context.

3.3.1. FOREIGN AND INTERNATIONAL LAW

Section 35(1) provides specific guidelines for the interpretation of Chapter 3:

"In interpreting the provisions of this chapter a Court of Law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this chapter, and may have regard to comparable foreign case law".

The subsection makes it mandatory for a Court of Law to have regard to public international law that is applicable to the protection of the entrenched fundamental right. Subject only to the test of applicability, all forms of international law, including Customary International Law, conventions and treaties, will be utilised for purposes of interpreting section 8(3) and Section 26(2).

Furthermore, the Court may have regard to comparable foreign case law, but is not compelled in this regard. Given the great extent to which the provisions of Chapter 3 have drawn from the text of the Canadian, the Namibian, the German and other Foreign Constitutions, the Constitutional Court will certainly be guided by the decisions of foreign jurisdictions on questions of affirmative action as the initial source of precedent. Accordingly, this paper will concentrate to a very large extent on case law in the United States of America and in India as a means of predicting the approach of the Constitutional Court. In the absence of any background to such law in South Africa, this is most appropriate.

The emphasis which the Interim Constitution places on International Law is strengthened by the provisions of Section 231, in particular sub-sections (3) and (4):

- "(3) Where parliament agrees to the ratification of or accession to an international agreement under subsection (2), such international agreement shall be binding on the Republic and shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.
- (4) The rules of Customary International Law binding on the Republic shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the Law of the Republic."

Section 231 (4) is of particular significance in that it may allow the norms underlying the body of Customary International Law to be drawn into South African Law without Parliament even agreeing to the ratification of any particular agreement. In this way, the United Nations Charter on Workers Rights and the International Labour Organisation are passed into South African Law. A detailed analysis of comparable foreign case law appears below with reference to the United States of America and India. As regards Public International Law applicable to the protection of rights entrenched in Chapter 3, it may be useful to set out relevant passages from International Charters which seek to promote the same goals as Section 8(3) and 26(2) of the Interim Constitution:

The European Community Charter of Fundamental Social Rights for Workers: Section 16 provides as follows:

"Equal treatment for men and women must be assured. Equal opportunities for men and women must be developed.

To this end, action should be intensified to ensure the implementation of the principle of equality between men and women as regards in particular access to employment, remuneration, working conditions, social protection, education, vocational training and career development.

The International Labour Organisation Discrimination (Employment and Occupation) Convention 111 of 1958: Article 1 provides that the following be discriminatory:

"Any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation".

The Canadian Charter of Rights and Freedoms: Section 15 provides as follows:

"1. Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

These provisions are strikingly similar to the South African Interim Constitution in content and structure.

Pursuant to the provisions of the Canadian Charter of Rights and Freedom, the Employment Equity Act was promulgated in June 1986. Section 2 cites the purpose of the Act as follows:

"The purpose of this Act is to achieve equality in the workplace so that no person shall be denied employment opportunities or benefits for reasons unrelated to ability and, in the fulfilment of that goal, to correct the conditions of disadvantage in employment experienced by women, aboriginal people, persons with disabilities and persons who are, because of their race or colour, in a visible minority in Canada by giving effect to the principle that employment equity means more than treating persons in the same way but also requires special measures and the accommodation of differences".

The Australian Affirmative Action (Equal Employment Opportunity For Women) Act No 91 of 1986: similarly, the preamble sets out the purpose of the Act as follows:

"An Act to require certain employers to promote equal opportunity for women in employment, to establish the office of the Director of Affirmative Action, and for related purposes".

In Section 3(1), an "An Affirmative Action programme" is defined as follows:

"A programme designed to ensure that:

- (a) appropriate action is taken to eliminate discrimination by the relevant employer against women in relation to employment matters; and

- (b) measures are taken by the relevant employer to promote equal opportunity for women in relation to employment matters."

Chapter 3 of the Namibian Constitution on Fundamental Human Rights and Freedoms: Article 10, entitled "Equality and Freedom from Discrimination", provides as follows:

- "1. All persons shall be equal before the law
2. No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social and economic status."

Article 23 entitled "Apartheid and Affirmative Action", provides as follows:

- "1. The practice of race discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices may be rendered criminally punishable by the ordinary courts by means of such punishment as Parliament deems necessary for the purposes of expressing the revulsion of the Namibian people to such practices.
2. Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programmes aimed at redressing social, economic or educational imbalances in Namibian society arising out of past discriminatory laws or practices, or for achieving a balanced structuring of the public service, the police force, the defence force and the prison service.

The African Charter on Human and Peoples' Rights: Article 3 provides as follows:

- "1. Every individual shall be equal before the law.
2. Every individual shall be entitled to equal protection of the law.

Article 19 provides as follows:

"All peoples shall be equal; they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another."

Article 15 provides as follows:

"Every individual shall have the right to work under equitable and satisfactory conditions, and shall receive equal pay for equal work."

3.3.2. APPROACH TO INTERPRETATION:

Although constitutionalism per se is new to South Africa, constitutional interpretation is not. The South African Courts have had occasion to test the constitutional validity of legislation. Hermeneutical studies of the Court's approach have revealed a tendency to adopt a literalist-cum-intentionalist approach to interpretation which, in essence, amounts to the well established "golden rule" of statutory interpretation. (13) This approach is well illustrated by Galgut AJA in Government of the Republic of Bophuthatswana vs Segale (14) as follows:

"The task of the Courts is to ascertain from the words of the statute in the context thereof what the intention of the legislator is. If the wording of the statute is clear and unambiguous they state what that intention is. It is not for the Courts to invent fancied ambiguities and usurp the functions of the legislature".

The fundamental flaw in this traditional approach to constitutional interpretation is that it fails to take into account the peculiar nature of constitutional text, as opposed to the text of legislation which is subject to the constitution. The distinction is explained in the Canadian case, Hunter et al v Southam Inc (15):

"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and easily repealed. A constitution by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of Government power and, when joined by a bill or charter of rights for the unremitting protection of individual rights and liberties, once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historic realities often unimagined by its framers. A judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind".

Although more recent decisions in the Courts of Southern Africa, in particular Bophuthatswana, Ciskei, Namibia and Zimbabwe, have displayed an increased tendency to acknowledge the sui generis nature of constitutional text (16), no uniform method of interpretation has emerged. With this in mind, it is clear that the Interim Constitution has provided specific guidelines in this regard. Section 232(4) reads as follows:

"In interpreting this constitution a provision in a Schedule, including the provision under the heading "National Unity and Reconciliation", to this Constitution shall not by reason only of the fact that it is contained in a Schedule, have a lesser status than any other provision of this Constitution which is not contained in a Schedule, and such provision shall for all purposes be deemed to form part of the substance of this Constitution".

This subsection drives a nail into the coffin of the literalist-cum-intentionalist approach and invites the Court to take into account the Constitution as a whole, to contextualise it and to interpret it within those terms of reference. This approach is reiterated in Section 35(3) in regard to Chapter 3:

"In the interpretation of any law and the application and development of the common law and customary law, a court shall have due regard to the spirit, purport and objects of this Chapter".

The court is called upon to enter into the spirit of the Constitution which is most concisely described in the Preamble:

"Whereas there is a need to create a new order in which in all South Africans will be entitled to a common South African citizenship in a sovereign and democratic constitutional state in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms;

And whereas in order to secure the achievement of this goal, elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles;

And whereas it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution;....."

In these ways, the Interim Constitution calls for both an intra- as well as an extra- textual contextualisation, appealing to values which underline its content as a whole and its history in general. This is in line with the purposive ~~of~~ approach of the German Constitution which appeals to the concept of the social state and social justice in the interpretation of its provisions, as well as to the Canadian Court which tends to favour the interpretation that promotes the purpose of the constitution (17).

As far as affirmative action is concerned, the shift away from the literalist-cum-intentionalist to a more holistic, purposive approach will be of major significance. A glance at the provisions referred to throws out a number of interesting clues in this regard:

"....there is a need to create a new order...."(18)

"....the promotion of National unity and the restructuring ... of South Africa...." (19).

"The Constitution provides an historic bridge between the past... and a future founded on the recognition of human rights, democracy and peaceful coexistence and development opportunities for all South Africans irrespective of colour, race, class, belief or sex." (20).

One of the most effective tools in creating a new order, in promoting national unity and in bridging the past and the future based on development opportunities for all, is affirmative action. Affirmative action goes further than the abolition of inequality. It is the means of achieving equality. As such, it is described in Section 8(3)(a) as the "measures designed to achieve..." particular goals, and this falls squarely within the spirit of the provisions set out above. Selective phrases from Schedule Four reinforce the purpose:

"...system of Government committed to achieving equality between men and women and people of all races" (21).

"The Constitution shall prohibit racial, gender and all other forms of discrimination and shall promote racial and gender equality and national unity" (22).

"Equality before the Law includes, laws, programmes or activities that have as their object the amelioration of the conditions of disadvantage, including those disadvantaged on the grounds of race, colour and gender." (23).

Accepting that the Constitutional Court is enjoined to consider the Constitution as a whole in determining the purpose of affirmative action provisions when called upon to interpret them, these clauses leave little doubt what that purpose is: programs or laws or activities to promote or achieve equality and to ameliorate the conditions of the disadvantaged. It is within this frame of understanding that it may be possible to analyse affirmative action in South Africa.

4. PRELIMINARY CONCLUSIONS

In summary, the following conclusions may be drawn:

1. Affirmative action will develop strictly within the confines of Constitutionality.
2. In assessing the Constitutionality of affirmative action, the Constitutional Court will be guided by the spirit and purport of the Constitution as a whole.
3. The rationale and objectives of affirmative action are to be found within the provisions of the Constitution: a means of redressing the imbalances of the past by promoting equality of opportunity.
4. At first, the Constitutional Court will be largely reliant on foreign legislation and case law for ruling on affirmative action.

5. HISTORY AND RATIONALE OF AFFIRMATIVE ACTION

5.1. INTRODUCTION

In South Africa, where racial and sexual discrimination have traditionally played such a central role in Government policy, it goes without saying that the first step in creating a new order is to eliminate all forms of discrimination. Hence, Section 8(1) of the Interim Constitution entrenches the right to equality before the law and to equal protection of the law, and Section 8(2) outlaws all forms of discrimination.

However, the basic principle upon which affirmative action is founded is that the elimination of formal discrimination is not enough to ensure the elimination of informal discrimination which may exist below the surface of society. For instance, opening up South African universities to all race groups will have little impact on the racial constitution of the universities so long as high academic standards are used as the basic test for entry. Clearly, people who have only experienced the deprivations of "Bantu education" will struggle to meet those academic standards and, accordingly, will be disadvantaged. This fact should be taken into account. Vincent Maphai distinguishes between formal equality of opportunity, on the one hand, and fair equality of opportunity, on the other (24). He maintains that in order to bring about the latter, "certain positive measures have to be taken to enable people who are underprivileged to compete so that their formal equality of opportunity is no longer a word but becomes something substantive" (25).

This, then, is the essential rationale for Affirmative Action. The basic assumption underlying it is that the past has been characterised by discriminatory practices which have resulted in certain groups in society becoming advantaged at the expense of others. In order to ensure equality of opportunity for those disadvantaged, it is necessary to do more than simply remove discriminatory practices -it becomes necessary to implement measures that will advance those people "in order to enable their full and equal enjoyment of all rights and freedoms", in the words of our Interim Constitution (26).

This rationale is one that has become accepted in most countries that are pursuing the goal of a new order free from their discriminatory past. However, what is not uniformly agreed upon is the nature of the measures necessary, and indeed permissible, to achieve that equality of opportunity. Clearly, the very minimum that is required is the abolition of legislation barring categories of people to areas of opportunity and the legislative enforcement of equal rights for all. But how much further should one go?

5.2. NAGEL

The American commentator, Thomas Nagel (27) has identified four progressive steps on the path to affirmative action:

The first involves bringing about formal equality of opportunity, as described by Maphai.

The second is to recognise that even without formal barriers there could still be discrimination, either consciously or unconsciously motivated. In order to counter this, it is necessary to make a self conscious effort at impartiality in the process of screening people for employment and places in academic institutions. This would involve an attitudinal change via processes of education and self awareness. But, as Maphai points out, even self conscious impartiality may not be sufficient to overcome the present effects of past discrimination, such as the example of a university applicant who has suffered the ill effects of a "Bantu education". Although legal and political discrimination may have been removed as barriers to entry, social discrimination may persist. This leads to the third step which requires the adoption of remedial measures that provide members of disadvantaged groups with the means to compete with others on a more equal basis. Such remedial measures may include academic support programmes and extra on-the-job training and guidance. Their purpose is to ensure fair equality of opportunity by giving substance to the formal equality of opportunity already existing.

Nagel recognises that even the provision of remedial help may not have the effect of eradicating the effects of past discrimination. Accordingly, a fourth step is proposed, a policy of preferential treatment - what he chooses to call "reverse discrimination" - in order to facilitate access for those whose qualifications are lower as a result of unjust discrimination. At this stage, it may be desirable to explore the feasibility of bringing about structural changes to society at a fundamental level in order to subvert the lingering effects of discrimination. Nevertheless, preferential treatment may be the only way of bridging the inequality gap in the interim period.

This fourth stage of Nagel's scheme is really what is understood to be affirmative action. More than remedial measures, it envisages the preferring of one person over another based on membership of a disadvantaged group, even though that other person may be better qualified. This is just one of the grounds on which affirmative action is challenged.

It is argued by Maphai that affirmative action is to be regarded as a last resort, after every other effort has failed (28). He points out that Nagel's four steps are by necessity both progressive and accumulative in their operation. It would be premature and, indeed, self-defeating to introduce affirmative action measures in an environment where discrimination has not been outlawed and fair equality of opportunity has not been achieved. Hence, Maphai regards affirmative action as a supplement to, rather than a substitute for, equal opportunity. He makes no apologies for equal opportunity - it is cherished by most civilised people - but concedes that affirmative action requires justification for the very reason that it favours certain groups over others.

So, faced with criticism that it discriminates in reverse, that it is paternalistic to its beneficiaries, that it results in a lowering of standards by ignoring merit in selection, that it perpetuates group consciousness and that it disadvantages innocent victims, particularly white males, affirmative action cries out for moral justification. This is by no means an academic exercise, as affirmative action has already been attacked on these and other grounds in foreign jurisdictions, and it is expected that our Constitutional Court will be faced with similar questions.

5.3. NEEDS PRINCIPLE

Perhaps the simplest justification of all for affirmative action is what might be termed the "needs principle" which is explained thus: Discrimination has resulted in disadvantage to certain groups, namely blacks and women. It is accordingly justified to discriminate in favour of such groups, not because they are black or female, but because they are disadvantaged. In the same way, parking bays may be reserved for the disabled - their disability creates this need. Racist and sexist discrimination of the past creates the need, then, for certain preferences in favour of blacks and women. Hence, not all discrimination is necessarily unjust. It may well be just when it is intended to promote some justifiable goal or to satisfy some worthy need.

The obvious flaw with the needs principle is that it will not always be the case that all members of a disadvantaged group are in need. This observation was made by John Edwards in the context of Great Britain (29). Even in the context of South Africa, however, it cannot be said that all blacks have been disadvantaged by racial discrimination, and that all women have been disadvantaged by sexist attitudes. Indeed, some may have become co-opted beneficiaries of the apartheid regime and the male hierarchy, respectively. In short, then, the needs principle may falter on the inability to distinguish between the needy and others within a designated grouping.

5.4. PUNISH - REWARD MODEL

A second possible justification for affirmative action is the belief that victims of past discrimination should be awarded compensation for the injuries done to them. Conversely, those who have benefited from past discrimination should be punished for having profited at the expense of others. This has been referred to as the "punish - reward" model. It holds that affirmative action is required by natural justice, punishing guilty parties and rewarding innocent parties. As such, it is backward looking, concentrating on what has been, rather than looking ahead at what should be (30). In this way it may be possible for compensation to be due without there being any particular need.

The same objection that has been raised to the needs principle may be applied equally to the punish- reward model : there is a distinct difficulty in identifying both the innocent and the guilty parties. Unless one is prepared to accept a type of vicarious responsibility, on the one hand, and a type of vicarious entitlement, on the other, individuals will be punished or rewarded simply because they belong to a group. In the South African context, it is surely a fallacy to treat whites and blacks as two distinct monolithic groupings, the former worthy of punishment and the latter worthy of reward. The history is more intricate than that. Such an approach would merely serve to perpetuate the "us and them" group consciousness of apartheid.

The objection to the punish-reward model is grounded in the complementary principles that compensation should be paid to the one harmed and that it should be paid by the one who caused the harm:

"To hold that descendants of the millions of Blacks barred throughout our history are entitled to compensation for the past injury of their ancestors, is to violate the first principle of compensatory justice, namely that recipients of compensation be the ones harmed. To expect the current and future generations of whites to pay for the sins of earlier generations of whites violates the second principle. The current and future generations of whites cannot be said to be responsible for the harm inflicted by earlier generations of whites unless one elevates the principle of racial heritage to moral and legal primacy" (31).

5.5. CONSEQUENCES MODEL

A third possible justification for affirmative action lies in a model which is the dialectic of the punish-reward model insofar as it seeks to promote an ideal by looking forward at ways of achieving the ultimate goals of affirmative action, rather than rewarding or punishing people for actions of the past. According to this model, affirmative action may be justified by the very consequences which it is designed to bring about. This possibility was explored by Ronald Dworkin in his exposition of two American cases involving the refusal of two universities to admit certain student applicants. In the one, Sweatt vs Painter (32), a black man was refused entry into the University of Texas Law School. In the other, De Funis vs Odegaard (33), a Jewish man was refused entry into the University of Washington Law School. Dworkin distinguished the two cases, supporting the claim of Sweatt and opposing that of De Funis, by identifying the purpose sought to be served in denying access to them. Clearly, excluding a person merely because he is black is not the same as excluding a person pursuant to a policy of affirmative action that is designed to bring about a more equal and just society.

".... in certain circumstances a policy which puts many individuals at a disadvantage is nevertheless justified because it makes the community as a whole better off" (34).

Historically, affirmative action has been challenged predominantly by white males who are resentful at having been replaced with blacks or women less qualified than themselves. De Funis was one. This will undoubtedly be one of the first and most vociferous arguments raised before the Constitutional Court in South Africa. If that Court is not going to bow down to pressure from the so-called "innocent victim" lobby, it is going to have to devise a suitable means of justifying affirmative action without trampling the entrenched rights of those individuals. In the United States, where affirmative action legislation is not specifically shielded from the equal protection guaranteed by the Fourteenth Amendment, as it is in Section 8 of our interim constitution, one of the main lines of attack on affirmative action has been to invoke the equal protection clause. In the case of De Funis, Dworkin counters this by arguing that De Funis never was deprived of his right to equal protection. He was merely deprived of a legal education which does not, by any stretch of the imagination, amount to a constitutional right. He would have been deprived of his right to equal protection had he been refused admission due to some arbitrary personal characteristic, borne out of

some prejudice in society. But that was not the case. He was denied admission because of a policy of affirmative action that sought to promote the ideal of a more equal and just society. As Dworkin argued, De Funis was due treatment as an equal, rather than (necessarily) equal treatment, and that is what he got. Rights were never in issue. With affirmative action shielded from the equality clause in our interim constitution, the equal protection argument will carry less weight in our Constitutional Court. Nevertheless, the court would do well to take heed of Dworkin's concluding remarks on equal protection:

"We are all rightly suspicious of racial classifications. They have been used to deny, rather than to respect, the right of equality, and we are all conscious of the consequent injustice. But if we misunderstand the nature of that injustice because we do not make the simple distinctions that are necessary to understand it, then we are in danger of more injustice still. It may be that preferential admission programmes will not, in fact, make a more equal society, because they may not have the effects their advocates believe they will. That strategic question should be at the centre of the debate about these programmes. But we must not corrupt the debate by supposing that these programmes are unfair even if they do work. We must take care not to use the equal Protection Clause to cheat ourselves of equality." (35).

6. AFFIRMATIVE ACTION LEGISLATION

Although few people in South Africa deny the need to redress the racial and sexist imbalance in our society, they do not agree on how that is to be done. At one end of the spectrum, for example, the South African Chamber of Business (SACOB) (36) has proposed voluntary affirmative action based on so-called "input" criteria (in essence, Nagel's third step of remedial measures designed to boost the competitive abilities of target groups), while, at the other end of the spectrum, the National African Federated Chamber of Commerce and Industry has proposed legislation that enforces fixed targets and quotas across the board - the so-called "output" criteria. It is only a matter of time before draft legislation in this respect is tabled in Parliament, but it would be overly speculative to predict where that legislation would lie on the spectrum.

The Namibian draft Bill of Affirmative Action in employment provides both for in-put criteria as well as for goals and timetables, but falls short of fixed targets and quotas. In terms of Section 36(3), affirmative action programmes include the following measures:

- "(a) a procedure to inform and consult employees and their representatives about the affirmative action programme;
- (b) a workforce analysis to determine whether persons in designated groups are reasonably represented in the various positions of employment;
- (c) an evaluation of existing employment practices to identify those which tend to discriminate^h or exclude persons in designated groups;
- (d) action to eliminate, amend or revise employment practices which tend to discriminate or to exclude persons in designated groups;
- (e) action to make a reasonable accommodation to the physical limitations of a disabled person;
- (f) where the relevant employer employs more than 50 employees, the provision of special training programmes or schemes to ensure that persons in designated groups and employees in designated groups acquire the necessary skills and qualifications to be recruited by or to advance their careers with the relevant employer;
- (g) the preferential recruitment or promotion of suitably qualified persons in designated groups to ensure that these groups are equitably represented in the various positions of employment.
- (h) the setting of numerical goals and general objectives that the employer intends to achieve;
- (i) the establishment of a timetable for attainment of the goals and objectives set pursuant to subsection (h);
- (j) an internal procedure to monitor and evaluate the implementation of the affirmative action programme".

A draft Affirmative Action Statute for South Africa has been proposed by A.W Blumrosen, R-G Blumrosen and Linda Human and published in the Industrial Law Journal (37). It has received favourable response as a suitable guideline for future legislation. Drawing extensively from experience in the United States, their statute incorporates a number of features which could be embodied in the final South African draft:

1. The statute deals only with employment and contracting, assuming that other sectors of the economy and of society, such as housing, education, land and financial institutions, will be handled by separate legislation.
2. The statute covers large employers and contractors in both public and private sectors.
3. The statute creates a governmental agency to provide advice, make rules and regulations, to assess reports, to inspect performance and to penalise violations inter alia.
4. The statute provides for periodic reporting to the agency by employers and contractors, crucial to monitor progress.
5. The statute allows trade unions and employers to negotiate their own affirmative action programmes in accordance with principles laid down in the statute.
6. The statute requires that employers improve the position of incumbent black and women workers by means of input criteria, such as in-house promotion.
7. The statute preserves the employer's right to hire and promote competent workers and requires that job related standards be utilised.
8. The statute provides a process by which wage disparities between jobs reserved for blacks and women, and those preserved for men can be removed.
9. The statute focuses on the work environment, requiring that it be non-racial and non-sexist.
10. The statute adopts a goals and timetables approach with respect to the recruitment, hiring and promotion of employees. This is preferred to anti-discrimination law enforcement and to rigid numerical quotas.

11. The statute sets up a voluntary register of black and female dominated business, requiring business and government to utilise them when it is practical to do so.

The authors of the statute have been severely criticized in many quarters for borrowing so heavily from experience in the United States. The critics point to the many differences between the two countries and caution against using the United States as a model for South Africa. Maphai, for example, writing in (1989) (38), noted that South Africa differed fundamentally from the United States and that it had not yet reached Nagel's first step of desegregation in that its political and economic system remained racially structured. In addition to this, there was no means of enforcing affirmative action programmes even if they were deemed desirable by government. For these reasons, he felt that it was inappropriate and premature to discuss affirmative action in the context of the United States. However, much water has passed under the bridge since he wrote that article. With the outlawing of discriminatory legislation, the establishment of a non-racial democratic government and the sudden appearance of the principle of constitutionality, the carpet has been pulled from under Maphai's feet, suggesting a closer similarity between South Africa and the United States in this regard.

A second difference between the two countries, so it is argued, lies in the fact that people of colour are in a minority in the United States, but in a vast majority in South Africa. Accordingly, it may be more appropriate to compare South Africa to countries like India and Malaysia where the beneficiaries of affirmative action are also in the majority. That argument is certainly a strong one (and will be explored again below), but should by no means cast doubt and suspicion over the American experience. In the first instance, affirmative action is not simply about colour. It is as much about women, the disabled, gays, the sick and aged. To this extent, the United States experience is wholly relevant. Secondly, as A W Blumrosen and R G Blumrosen argued (39), the failure of apartheid to educate black South Africans makes the United States relevant as far as employment is concerned. The fact that so few blacks are trained to engage in jobs that have been traditionally the preserve of whites, has had the effect of equalising ratios between blacks and whites in the United States and in South Africa. Those blacks who lack the basic skills and training to compete on this level, affirmative action notwithstanding, are in effect excluded from the formula, resulting in very similar conditions in South Africa to those in the United States. The balance will only shift when South Africa has begun to address the question of education and social upliftment. This is not, however, a matter for affirmative action.

Thus, the experience of affirmative action in the United States is certainly of relevance to South Africa. Furthermore, that experience provides particular insight into the mechanics of affirmative action. The United States is where the concept of affirmative action found its roots and where affirmative action has had an opportunity to develop into a relatively sophisticated programme. For these reasons, it is the first port of call on foreign jurisdictions.

7. UNITED STATES OF AMERICA

7.1. FEDERAL GOVERNMENT

The history of affirmative action in the United States corresponds very closely with the civil rights movement in that country and the political persuasions of successive governments. The roots of affirmative action and legislation outlawing discriminatory business practices date back to 1941 when President Roosevelt issued an executive order prohibiting Defence contractors from discriminating against minorities. That order was a small vessel on stormy seas where the "separate but equal" doctrine ruled the waves. It was only in 1954 that the doctrine was first overruled in education (40) and it was only during the late 1950's and early 1960's that the Civil Rights movement, under the leadership of Doctor Martin Luther King, began to alter perceptions in American society.

Subsequent Presidents issued similar such orders requiring non-discrimination by Federal contractors, but their orders lacked meaningful enforcement mechanisms, the Government lacked the necessary will and affirmative action remained lip service. It was only during the 1960's that a concerted effort was made to enforce the decrees.

In 1961, President John F Kennedy coined the phrase "affirmative action" for the first time in Executive Order No 10925. He went further than simply prohibiting discrimination and he imposed a duty upon private contractors to engage in affirmative action to ensure that applicants were employed and treated on the job without regard to race, creed, colour or national origin. This order was followed in 1965 by Executive Order No 11246 of President Johnson in terms of which Federal Contractors agreed:

"Not to discriminate against any employee or applicant for employment because of race, colour, religion, sex or national origin, and to take affirmative action to ensure that applicants are employed and employees are treated during employment without regard to their race, colour, religion, sex or national origin (41).

This Executive Order was administered by the Office of Federal Contract Compliance Programmes (OFCCP) in the Department of Labor, which supervised the compliance review of a contractor's activities. Failure of a contractor to comply with necessary requirements without justification resulted in sanctions, such as debarring from bidding on future Government contracts.

Increasingly, through the 1960's, Executive Orders were supplemented by detailed guidelines which specified when and how companies were to comply with affirmative action requirements. For example, the revised Philadelphia Plan of 1969 employed numerical goals and timetables as part of a mandatory affirmative action plan for construction contractors. By the end of the decade, affirmative action programmes had developed to include the following:

- (i) An analysis of minority utilisation in all job categories;
- (ii) The establishment of goals and timetables to correct minority underrepresentation, and
- (iii) The development of data collection systems and reporting plans documenting progress in affirmative action goals (42).

7.2. TITLE VII

At the same time that the Federal Government developed affirmative action enforcement mechanisms on Government contractors, Congress enacted a series of Civil Rights Acts outlawing racial and other forms of discrimination in voting, public accommodation, employment, education and housing. The most important of these new statutes for affirmative action was Title VII of the Civil Rights Act of 1964 which became effective on 2 July 1965. Section 703(d) provided as follows:

"It shall be an unlawful employment practice for any employer, labour organisation or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programmes to discriminate against any individual because of his sex, colour, religion, or national origin in admission to, or employment in, any programme established to provide apprenticeship or other training".

Originally the Act only applied to private employers, but with the passing of the Equal Employment Opportunity Act in 1972, it was extended to Public Employers, as well.

Title V11 is administered by a five member non-partisan Equal Employment Opportunity Commission (EEOC) which originally only had the power to investigate and conciliate claims of discrimination against private employers. If conciliation was not attempted or was unsuccessful, the complainant was entitled to institute de novo proceedings in the Federal Courts. At this stage, the Commission had no power to litigate and only the Attorney General could institute Federal Court proceedings against "patterns or practices" of discrimination. The powers of the EEOC in this regard were extended by the Equal Employment Opportunity Act of 1972 which authorised the Commission to bring suit in the Federal Courts against private parties. The EEOC could then pass that power to litigate onto individual plaintiffs.

Thus, Title V11 provided judicial channels for testing and enforcing affirmative action programmes, and it became the central focus of affirmative action litigation. Between 1964 and 1981, the Federal Courts decided more than 5000 cases brought by private litigants and by the EEOC. That figure does not include the many more thousands of cases settled out of Court (43). In the words of J S Leonard, "litigation under Title V11 by private parties and by the EEOC constituted the cutting edge of Government anti-discrimination policy" (44).

7.3. FOURTEENTH AMENDMENT

A further source for litigating affirmative action lay in the Equal Protection Clause of the Fourteenth Amendment - the equivalent of the fundamental right to equality embodied in Section 8(1) and (2) of the South African interim constitution. The Fourteenth Amendment reads as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Drew S Days 111 (45) notes that both Title V11 and the Fourteenth Amendment are colour blind in language insofar as they afford protection to "any individual" and to "any person", respectively, suggesting that the group affiliation of that individual is irrelevant. However, a tension exists between the colour blind nature of these texts and the historical context in which they were introduced into American Law. The Fourteenth Amendment was designed to afford legal protection to newly freed slaves and Title V11 was designed to enforce affirmative action. Innocent victims of affirmative action, usually white males, have latched onto the colour blindness of these texts and have used them to challenge the very affirmative action programmes which they are designed to promote. Much of the case history in the United States grapples with this apparent anomaly, as is illustrated by Dworkin in his analysis of De Funis. Indeed, this tension lies at the very heart of the debate on the legality of affirmative action programmes and has undoubtedly influenced the drafters of the South African interim constitution. They have attempted to side-step the issue by specifically providing that the clause on equality does not in any way preclude affirmative action measures. The United States Judiciary was not as fortunate. It had to devise a means of upholding affirmative action programmes without riding roughshod over the constitutional rights of so-called innocent victims, particularly those rights contained in the Fourteenth Amendment. In the process of defusing the tension, the American Courts set sweeping legal precedent on affirmative action which delineated its boundaries and interpreted its provisions.

7.4. DISCRIMINATION

One of the first issues to face the American Courts was the question of what constituted discrimination. This was an important question because it was initially necessary to prove discrimination in order to show a violation of Title V11. It may not, however, be as important in the context of South Africa. The draft statute proposed by the Blumrosens and ~~by~~ Human presupposes that discrimination has been the basic condition in South Africa. Accordingly, it would not be necessary to specifically prove discrimination in order to set affirmative action in motion. Such a presumption of discrimination automatically provides the remedial rationale for affirmative action which was so central to the early approach of the American Courts. Later, even those courts were prepared to recognise the use of affirmative action for non-remedial objectives, such as increased productivity and improved competitiveness, and accepted voluntary affirmative action programmes by business. More will be said of this.

Prior to the enactment of Title VII, discrimination was understood as an individual act based on a purpose or motive to subordinate all members of a particular class. This so-called "evil motive" may have been easy to prove against the advocates of apartheid, but was easily disguised in the United States at the time. Accordingly, it became virtually impossible to prove.

A second test of discrimination developed, the so-called "equal treatment test". The favouring of a man over a woman when the applicants are similarly situated was held to amount to discrimination. The test was all very well and effective so long as applicants were similarly situated. However, an employer who wished to exclude a particular group of people could employ an entry test requirement which, although neutral on the face of it, would count against the class of people he wished to exclude. For example he could keep women out by requiring that applicants be over six feet tall, or he could apply "no arrest" or academic and financial criteria to disfavour blacks. Not being similarly situated, these classes of people could not appeal to equal treatment.

7.5. GRIGG'S CASE

The way was finally cleared in 1971 in a landmark decision that came to dominate the course of affirmative action in the 1970's: Griggs vs Duke Power (46). The Court moved away from the idea that proof of purpose or intent to discriminate is necessary to establish a violation of the Act, and focused rather on the consequences of a particular employment practice:

"The employer's lack of discriminatory intent is suggested by special efforts to help the uneducated employees through company financing of two thirds of the costs of tuition for high school training. But, Congress directed the thrust of the Act to the consequences of employment practises, not simply the motivation" (47).

Thus, where a business practice, such as an academic screening device, or "word-of-mouth recruiting" had a disparate effect on blacks or on women, it was held to be discriminatory. It was also necessary that such a business practice or screening test be related to measuring job capability:

"the Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business reality. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practise is prohibited" (48).

The plaintiff simply has to establish a prima facie case of discrimination for the burden of proof to shift to the employer to show that there was some legitimate, non-discriminatory reason for the employment procedure (49). This provided employers with a strong incentive to utilise affirmative action programmes in order to avoid findings of discrimination against them, and resulted in affirmative action becoming the generally accepted practice. It became necessary for even the most non-racial of employers to adopt remedial programmes to ensure a balance in the proportional numbers of minorities.

"Both in human terms and in statistical terms, the nation's work force was "more equal" by the end of the decade" (50).

Certainly, by the end of that decade the court had legitimated affirmative action programmes which gave preference to people on the basis of race and gender, accepting the principle that it was necessary to be colour and gender conscious while the injustices of discrimination persisted. ~~The~~ was affirmed in the case of University of California Regents v Bakke (51) where the University's admission programme to its medical school set aside 16 out of 100 places for members of minority groups. The Court held that it was permissible to take race into account in devising an admissions policy, reasoning as follows:

"In order to get beyond racism, we must first take racism into account".

7.6. WEBER'S CASE

If the Griggs principle dominated the American law of affirmative action during the 1970's, the 1980's were dominated by the "bottom line" concept established in 1979 in the case of United Steel-workers vs Weber (54). The relationship between them is described by A W Blumrosen as follows (53):

"Griggs was the stick, threatening an employer with a finding of illegality, an injunction and financial consequences if his business practices perpetuate the inferior status of minorities and women. "Bottom line" is the carrot, rewarding the employer whose practices "mirror" the congressional purpose. Both the Griggs theory and the "bottom line" theory are legal doctrines in the service of congressional purpose".

Weber was a classical example of a white employee challenging an employment practice which reserved places for blacks in a situation where the available black labour pool was extremely low. Specifically, the employer introduced a training programme which reserved 50% of the places in the programme for blacks. Weber argued that the programme violated Title V11.

Of particular significance for the South Africa scenario is the fact that the Court rejected the plain meaning of the language of the statute and chose to interpret the statute in the light of the purpose or the spirit of the statute. The primary purpose of the statute was "to open employment opportunities for Negroes in occupations which had been traditionally closed to them". Accordingly, any programme which was consistent with that purpose was valid, even though race formed the basis upon which places were reserved. Given the strong directive towards purpose in the interpretation of our interim constitution, the Constitutional Court will undoubtedly follow the lead of Weber in dispensing with the innocent white victim. In the words of that Court, the programme in question did not "unnecessarily trammel the interest of white workers". That phrase could become catching.

The essence of the Weber finding is that programmes which seek to improve employment opportunities for minorities are protected against the claim of discrimination. The employer is, thus, encouraged to pursue programmes which increase the proportion of minorities and women, thereby ensuring a "bottom line" in their numbers. Any programme which is designed to bring about the bottom line is thus permissible, including percentages, goals, numbers and timetables (54).

Following from this principle is the Court's finding that it is not necessary for the beneficiaries of a programme to be actual victims of prior discrimination - it is sufficient that they merely be members of groups which have been discriminated against, so-called societal discrimination. Section 8(3)(a) of the interim constitution would appear to favour an approach of this kind: reference is made to "persons or groups or categories of persons disadvantaged by unfair discrimination", and not to specific individuals who can be identified as victims of discrimination.

The Weber decision raises a question that is central to its implementation, namely how much is enough to establish bottom line? A W Blumrosen (55) identifies three general indices which may be utilised to measure the extent to which affirmative action has succeeded in a given society: unemployment rates, occupational distribution and income ratios. By monitoring statistical records of these indices, it may be possible to evaluate the effectiveness of affirmative action programmes. Once a statistically proportional result has been attained, the employer has achieved bottom line, so it could be argued.

This approach, however, fails to take account of the Griggs definition of discrimination as "adverse impact" which is by no means a statistical concept (56). Adverse impact is a legal concept which may be evident from a variety of relative, non-statistical factors and which may allow for justification by the employer on the basis of business necessity. It would thus be inappropriate to employ statistics alone to determine bottom line. A possible alternative was presented in Hazelwood School District vs United States (57): bottom line is reached when opportunities are distributed in the same proportions that would exist if there was no discrimination at all. Although this poses a hypothetical such a distribution would approximate proportions in the population as a whole and would accommodate the statistical variables of adverse impact.

Perhaps the most significant result of Weber is that it permitted voluntary affirmative action programmes for non-remedial purposes. In other words, it became possible for employers to implement affirmative action programmes in the absence of any prior discrimination in order to achieve some business benefit, such as increased productivity, better customer relations, improved marketing and diversity of ideas. The initial justification for affirmative action as a means of remedying past discrimination was soon replaced by the lure of such non-remedial benefits that programmes offered to American businesses (58). Indeed, businesses pursuing affirmative action programmes were shown to out-perform their competitors in both rates of profitability and growth (59). This resulted in overwhelming support for affirmative action, as was demonstrated during the 1980's when the business community resisted the efforts of President Reagan to oppose programmes based on goals and quotas.

Acceptance of voluntarily non-remedial affirmative action programmes was not, however, unqualified. As the Weber approach developed through subsequent cases in the 1980's, it became clear that such programmes would only be permitted under certain generalised circumstances. An important case in this regard was Johnson vs Transportation Industry (60) where the court upheld the consideration of gender as a factor in promoting within traditionally segregated job classifications where women were substantially under-represented in proportion to their representation in the available labour pool. It may be possible to present a broad summary of those circumstances as follows (61):

1. The programme must not unnecessarily trammel the interests of white employees. In other words, it should not create an absolute bar to their advancement or intrude upon their legitimate expectations.
2. The programme should be temporary in nature, designed to eliminate racial or gender imbalance, not to maintain a permanent balance.
3. Goals and timetables are permitted as long as the programme has a measure of flexibility.
4. There should be a sense of proportionality to the qualified labour pool.
5. Societal discrimination - not just specific discrimination of an employer - may be a sound basis for affirmative action programmes.

7.7. AFTER WEBER

These are the kinds of limitations that the South African Constitutional Court will be required to consider when it is called upon to determine when an affirmative action programme is admissible and when it is not. At the end of the day, the court may have to make a political decision in order to resolve competing interests. It is for this reason that the composition of the court will be of utmost importance. The Reagan - Bush era in the United States saw a concerted attack on affirmative action by the Federal Government. Significantly, the United States Supreme Court was packed with conservative judges, among them Chief Justice Rehnquist and Justices Scalia, Kennedy, White, O'Connor and Clarence Thomas. They stood in opposition to the likes of Justices Steven, Brennan, Marshall and Blackmun who formed the liberal backbone of the Supreme Court. (62) The move to the right resulted in a sprinkling of decisions which has the affect of eroding what progress had been made in affirmative action jurisprudence:

7.7.1. Fire Fighters Local Union 1984 vs Stotts (63): The Court flew in the face of Weber by allowing relief "only to those who have been actual victims of illegal discrimination". While the debate on whether or not societal discrimination suffered for the purposes of Title VII continued, the majority of the courts felt that it was sufficient, as is evidenced by Weber and Johnston. Stott was relegated to a specific situation, namely lay-offs in a modification of a consent decree.(64)

7.7.2. City of Richmond vs J A Croson and Company (65): The court held that where programmes designed to advance minority rights by affirmative action were instituted by State and Local Governments, they are subject to "strict scrutiny". In the case of Federal programmes, however, the court held that a more relaxed standard should be applied. This case was in line with Wygant vs Jackson Board of Education (66) which imposed a higher standard of "strict scrutiny" as the constitutional test for such programmes, requiring that they further a compelling state purpose and be narrowly tailored.

The question of what test should apply to affirmative action cases is one that had never been fully resolved by the Supreme Court:

"Chief Justice Rehnquist and Justices Powell, O'Connor and Scalia have urged adoption of a strict scrutiny test. But Justice Stevens in Paradise and Wygant seems to have adopted a rational-basis-with-bite test, and in Bakke, Justices Brennan, Marshall and Blackmun urged the intermediate test in their joint opinion. Justice White's position remains ambiguous." (67)

Opinion is clearly divided along political lines, the balance of power amongst the justices being of paramount importance.

It was further held in City of Richmond that the party adopting the affirmative action programme must demonstrate previous discrimination, enforcing the remedial nature of affirmative action.

- 7.7.3. Martin vs Wilks (68): The Court dealt with the question of "permissible collateral attack" and upheld the right of white workers who were not a party to the case to challenge the hiring and promotion plan agreed to by black fire fighters in local public employment.
- 7.7.4. Wards Cove Packing Company Inc vs Atonio (69): The Court placed an onerous burden by requiring that the plaintiff demonstrate that a particular affirmative action programme having an adverse impact is not a business necessity. In effect, it established a presumption that affirmative action programmes are a business necessity, requiring the plaintiff to lead evidence to the contrary. The decision severely eroded the Griggs principle by shielding adverse impact programmes from attack.

The effect of these decisions on the business community was minimal, as it favoured affirmative action and pressed ahead with such programmes, regardless. Nevertheless, the decisions of 1989, particularly the revision of the Griggs principle by Wards Cove, precipitated a political reaction (70). In February 1990, Senator Edward Kennedy and representative Augustus F Hawkins began a legislative campaign to correct the court's hostile interpretation of affirmative action and civil liberties. This led to the promulgation of the 1991 Civil Rights Act. In effect, the Act rejected the policies of the 1989 court decisions and re-inforced the principles underlining the decisions in Griggs, Weber and Johnson and the Philadelphia plan on goals and timetables (71).

The American experience demonstrates the dangers of the constitutional court becoming a political tool in the struggle for power by competing ideological camps. Affirmative action is only one of the fields where this struggle may be fought. Current politics in South Africa points to the favouring of an extremely lenient approach to affirmative action upholding such programmes on the basis of the favourable consequences they are designed to promote. This is clearly in keeping with the spirit embodied in the Interim Constitution. However, the ultimate fate of affirmative action will be influenced to a large extent by the political affiliations of members of the constitutional court and the people who appoint them. Judging by the first appointments to the constitutional court, it would seem as though affirmative action will receive an extremely sympathetic hearing.

8. INDIA

8.1. SOUTH AFRICAN SIMILARITIES

If it is argued that the American experience of affirmative action is of little relevance to South Africa, it cannot be denied that the Indian experience is greatly apposite to the South African scenario. The Indian struggle for independence against Colonial rule has close parallels with South Africa's struggle for liberation from apartheid. The drafters of the Indian Constitution of 1948 were entrusted with virtually the same task as those of the 1993 South African interim constitution, namely to devise the constitutional mechanism for burying a history of prejudice and oppression, satisfying conflicting interests and demands, and fulfilling the expectations of a deeply divided society.

In particular, there is the recognition of the need to ensure real equality of opportunity by going further than simply providing for formal equality:

"We must begin by acknowledging first that there is a complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on privilege of graded inequality which means elevation for some and degradation of others. On the economic plane, we have a society in which there are some who have immense wealth as against the many who are living in abject poverty. On 26 January 1950, we are going to enter into a life of contradictions. In politics, we will have equality and in social and economic life we will have inequality....We must remove this contradiction at the earliest possible moment, or else those who suffer from inequality will blow up the structure of political democracy which this assembly has laboriously built up" (72).

Such words of caution are as relevant to South Africa today as they were to India then. They were the basic premise upon which the key equality and equality of opportunity provisions were drafted.

The second reason for the close similarity between South Africa and India lies in the structure of the provisions themselves. It has been demonstrated how American jurists did not have the luxury of constitutional recognition of affirmative action, as contained in Section 8(3) of the South African Interim Constitution. They were required to embark on a journey of jurisprudential gymnastics in order to uphold affirmative action measures which apparently flew in the face of the Fourteenth Amendment. To this extent, the Indian constitution is structurally identical to the South African interim constitution. Article 15 provides as follows:

- "1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them
2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability or restriction or condition with regard to:
 - (a) Access to shops, public restaurants, hotels and places of public entertainment; or
 - (b) The use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.
3. Nothing in this article shall prevent the State from making any special provision for women and children.
4. Nothing in this article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Caste and the Scheduled Tribes.

And Article 16 provides as follows:

1. There shall be ^e equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
2. No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, or residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.
3. Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office (under the Government of, or any local or other authority within, a State or Union territory) any requirement as to residence within that state or union territory prior to such employment or appointment.

4. Nothing in this article shall prevent the State from making any provision for the reservation of appointments of posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.
5. Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination".

Although the exact wording of these articles differs from that of Section 8, they serve the same purpose: they provide that there is a right to equality, but that that right should not exclude measures designed to advance certain sectors of society. It is the extent to which such measures have been permitted that has been the subject of judicial scrutiny in India and that provides particular insight into the meaning of our own provisions.

A third similarity between South Africa and India lies in the fact that the intended beneficiaries of affirmative action represent the vast majority of the population in both countries. Articles 15 and 16 of the Indian Constitution refer to "socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes" and to "any backward classes of citizens", respectively.

The Scheduled Castes who are also known as the "untouchables", make up approximately 16% of the total population of more than 850 000 000 Indians. They live all over the country and speak the language of the region they inhabit. They have always occupied the lowest economic positions and have been barred access to many areas of civil society. The stigma with which they have always been branded has been abolished by Article 17 of the Constitution:

"Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with Law".

The Scheduled Tribes comprise approximately 8% of the total Indian population. The distinction between Tribes and Castes was first pursued by the Colonial Administration, but is not an easy one to maintain. The Tribes consist of approximately 400 communities differing greatly in nature, which mainly occupy isolated hill and forest areas in the country.

The Schedule Castes and Scheduled Tribes are relatively easy to identify and have been listed in a schedule to the constitution pursuant to Articles 341 and 342. Not so the "socially and educationally backward classes" and the "any backward classes" of citizens. There is no definition of these groups in the Constitution and so the matter has had to be settled by the Supreme Court. The debate has centred on whether economic standing or caste should be used to identify these so-called other backward classes. Clarity was only obtained in 1992 when it was recognised in the Mandal Commission case (73) that caste may be used as the criterion, together with other factors. Practical obstacles, however, remain in view of the fact that caste, apart from the Schedule Castes, has not been included in the Indian Census since 1931. It is, accordingly, extremely difficult to estimate the correct numbers of the other backward classes, but they are estimated to be in the region of 50% of the total population. Together with the Scheduled Castes and the Scheduled Tribes, they constitute almost three quarters of the Indian population (74).

As in the United States, the Indian Supreme Court has sought to reconcile the primary tension that exists between the right to equality, on the one hand and the recognition of affirmative action and reverse discrimination, on the other. "The problem", explains Marc Galanter, "is that insistence on formal equality perpetuates existing denials of opportunity, while insistence on substantive improvement for some threatens the formal equality of the remainder" (75). The issue is one that is likely to dominate proceedings in the South African Constitutional Court. Although there are less than 200 reported judgments on affirmative action in India, the Court has developed an extremely detailed approach to these issues.

8.2. MANDAL'S CASE

One of the most important cases of affirmative action in India is the so-called Mandal Commission case in 1992 (77). It arose out of a public interest challenge by several parties against a Government Office Memorandum issued in August 1990 for the reservation of jobs in accordance with the recommendations of the Mandal Commission. The Mandal Commission, more fully called the Second Backward Classes Commission Into Reservation for Socially and Educationally Backward Classes in Services Under the Government of India, had been set up to investigate this area of job reservation in 1979. It brought out a wide range of recommendations, including the use of quotas. The case dealt with a number of key issues relating to affirmative action which had not received absolute clarity in the Courts before then. Although the validity of the Government Office Memorandum was upheld by a majority of six to three, the judgment of the court is not altogether clear. The majority delivered three judgments and the minority three. As the case report itself states:

"The other Judges constituting the majority (Pandit & Sawant) and those of the minority have however taken independent stands on various issues, questions and aspects. At places the judges of minority individually agreed with the leading judgment while on other issues the other judges of the majority have individually disagreed with the leading judgment. Moreover, all the issues raised and decided have not necessarily been touched upon by each of the judges."

A resume of the chief developments prior to the Mandall Commission case serves to illustrate these key issues more clearly.

8.3. BALAJI'S CASE

In the case of Balaji vs State of Mysore (77), the Court was called upon to rule on an order of state in 1958 reserving 75% of seats in Educational Institutions for designated backward classes in Mysore. The reservation was set aside. In 1958, the reservation was lowered to 65% and once again set aside. In 1960, on the advice of the Mysore Backward Classes Committee, the reservation was lowered further to 40%, the remaining 60% allocated on merit. The Court held that this, too, was an "unreasonable restraint on the fundamental rights of other citizens". A new scheme was then devised in 1962 which reserved 28% of the seats for backward classes, 22% for more backward classes, 15% for Scheduled Castes and 3% for Scheduled Tribes, a total of 68% reserved seats. Twenty Petitioners brought the action, arguing that they would not have been denied admission to the Education Institution had it not been for the reservations.

In the first instance, the Court accepted the principle that the State may issue reservation orders in order to assist the advancement of backward classes. Such reservations, however had to be consistent with the maintenance of efficiency of administration, as set out in Article 335 of the Constitution:

"The claims of the members of the Scheduled Caste and the Scheduled Tribes, should be taken in consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

The Court recognised that excessive reservation policies could have the effect of excluding worthy candidates and lowering the quality of graduates, and that this would not be in the best interests of the community as a whole. This would subvert the object of Article 15(4) which is the advancement of backward classes. Accordingly, it was held that the reservation should be within reasonable limits, in particular that the reservation should be reasonably below 50%. The Court laid no hard and fast rules as to how much below 50% the reservation should be. Each case would depend upon the circumstances, balancing competing interests of advancing backward classes, the well-being of the community as a whole and others. In view of the fact that the reservation totalled 68% of the positions available, the Court struck down the scheme - it infringed the so-called less than 50% rule (78).

8.4. DEVADASAN'S CASE

The case of Devadasan vs Union of India (79), which dealt with Article 16(4), followed a similar line of reasoning to Balaji's case. Although less than 50% of the appointments in the Public Service had been reserved, the scheme had applied a carry-forward rule whereby reserved appointments that had not been taken up in one year were carried forward to the following year. The effect of this was that the aggregate of reserved appointments in a single year and those carried forward amounted to more than 50%. The Court held this to be unconstitutional, confirming that reservation in public employment must be less than 50%. As in Balaji's case, the Court reasoned that the reservation should be a reasonable allowance for backwardness, and should not be so excessive so as to deny a reasonable opportunity for employment to others. Once again, there had to be a balancing of interests in each case.

8.5. 50% RULE

The Mandal Commission case touched upon issues raised in both of these judgments. All but one of the judges held that 50% was the maximum permitted reservation and accordingly that it was the rule. It was stated thus:

"...while 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of the country and the people. It might happen that in far flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of the conditions peculiar to and characteristic to them, need to be treated in a different way, some relaxation in the strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out".

The Court furthermore confirmed that the scheme in Davadasan's case was invalid due to the carry forward rule. Although it may be permissible to carry reservations forward to succeeding years, all reservations in excess of 50% in any one year were of no force and effect.

The 50% rule is based upon the particular interpretation which the Courts placed on Sub-articles 15(4) and 16(4). With both sub-articles starting "Nothing in this article", the Courts have had to determine what the correct relationship between the sub-articles and their main articles is.

Dealing with Article 15, Balaji's case took the line that 15(4) is in the nature of an exception to 15(1). Accordingly, any scheme which sought to exclude certain sectors of society and favoured reservations would defeat the object of 15(1) and fall outside the ambit of 15(4). The same line was taken in Devadasan's case in regard to Article 16, where it was reasoned that:

"...a proviso or an exception cannot be so interpreted as to nullify or to destroy the main provision. To hold that unlimited reservation of appointments could be made under clause (4) would in effect efface the guarantee contained in clause (1) or at best make it illusory. No provision of the Constitution or of any enactment can be so construed as to destroy another provision contemporaneously enacted therein."

In this view, it is thus necessary that the reservation be "within reasonable limits", in particular less than 50%.

This view has not remained unchallenged. In Devadasan's case itself, Subba Rao J dissented as follows:

"The expression "Nothing in this article" is a legislative device to express its intention in a most emphatic way that the power conferred thereunder is not limited in any way by the main provision but falls outside it. It has not really carved out an exception, but has preserved a power unchallenged by the other provisions of the article" (80).

On this approach Subba Rao J upheld the scheme, notwithstanding the fact that the effect of the carry forward was to reserve posts in excess of 50%. Subba Rao J's interpretation was adopted by Krishna Iyer J in the State of Kerala vs Thomas (81) who quoted the above passage from the judgment of Subba Rao J.

Further support for this approach is to be found in the judgment of Mathew J in the Thomas case:

"...though complete identity of equality of opportunity is impossible in this world, measures compensatory in character and which are calculated to mitigate insurmountable obstacles to ensure equality of opportunity could never incur the wrath of Article 16(1)".

In this way, the way was opened to sanction schemes which were designed to achieve equality of opportunity even though the 50% rule may be infringed. The majority of the Court in the Mandal Commission case also held that 16(4) is not an exception to Rule 16(1):

"...it is an instance and an illustration of the classification inherent in and permitted by clause (1) or an emphatic way of stating a principle implicit in Article 16(1)."

Clearly, the approach of the South African Constitutional Court to the relationship between Section 8(1) and Section 8(3)(a) and between Section 26(1) and Section 26(2) will influence the extent to which the Court will be prepared to sanction affirmative action programmes. Section 8(3)(a) and Section 26(2) are similarly worded: "This section shall not preclude" and "Sub-section (1) shall not preclude", respectively, as in the situation of the wording in the Indian Constitution, these phrases could be interpreted either to imply

exceptions to the main sub-sections or to fall outside of them, as co-called legislative devices. Judging by developments in India, in particular the approach of the Mandal Commission case, it would seem as though the South African Court will favour the latter interpretation. Even so, it is clear from the Indian experience that such measures will not enjoy unfettered latitude, but that all relevant considerations will be weighed in the balance to determine their reasonableness.

8.6. SUBSTANTIVE EQUALITY

The Indian Supreme Court has applied the same reasoning as the American Supreme Court to counter the apparent contradiction between the right to equality, on the one hand, and affirmative action, on the other, by recognising that equality of opportunity means substantive equality. In Ahmedabad St. Xavier's College Society vs State of Gujarat (82).

"... it is obvious that equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of déferential treatment in order to attain a result which establishes an equilibrium between situations."

? He explains this in the Thomas case as follows:

"Formal equality is achieved by treating all persons equally: "each man to count for one and no one to count for more than one." But all men are not equal in all respects... it is just to promote certain inequalities precisely to compensate for the fact that men are actually born different. We, therefore, have to resort to some sort of proportional equality in many ways to achieve justice" (83).

In this way, the Supreme Court has got around the difficulty of utilising the process of classifying people in order to remedy the inequality that the very classification has brought about. This is stated by Ray C.J. in the Thomas case as follows:

"Discrimination is the essence of classification. Equality is violated if it rests on an unreasonable basis. The concept of equality has an inherent limitation arising from the very nature of the constitutional guarantee. Those who are similarly circumstanced are entitled to an equal treatment. Equality is amongst equals. Classification is, therefore, to be found on substantial differences which distinguish persons grouped together from those left out of the groups and such differential attributes must bear a just and rational relation to the object sought to be achieved" (84).

In this way, the Indian Supreme Court has provided judicial recognition for the primary justification for affirmative action.

8.7. ARBITRARINESS

Advocate Joel Krige (85) has identified what he calls "a new approach to equality" in India, as evidenced in three separate judgments by Bhagwati J. It is based on arbitrariness and undermines the initial approach of the Supreme Court to Articles 15(4) and 16(4) as exceptions to their main articles even further. In 1958, the Indian Supreme Court laid down two conditions for permissible classification (87):

1. The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and
2. The differentia must have a rational relation to the object sought to be achieved by the statute in question.

The new approach holds that where the classification does not meet these two conditions, it is not reasonable. It would then be said to be arbitrary and the guarantee of equality would be breached. Inherent in this approach, is a commitment to the principle of reasonableness which was so central to the Balaji and Devadasan judgments. However, the court has moved far from the notion that reasonableness ought to be less than 50%, and sought to relate it to the objects which affirmative action measures are designed to bring about. Reasonableness is, thus, judged according to the compatibility of the relationship between the means and the end.

9. CONCLUSIONS ON UNITED STATES AND INDIA

The American and Indian experiences illustrate that the tension between equality and affirmative action cannot be wished away. The tension has been at the centre of judicial debate on affirmative action and has forced the courts to tread carefully in their attempts to reconcile their juxtaposed positions. In jurisdictions where affirmative action is provided by government decree or by constitutional guarantee (as in the United States and India, respectively), the courts have tailored the scale of affirmative action programmes out of respect for limitations imposed by equality.

The bottom-line approach by Weber has an effect similar to the less-than-50% rule in tempering affirmative action programmes. Similarly, the Indian Court's use of reasonableness in determining the limits of affirmative action would appear to mirror the general approach of the American Court that affirmative action programmes should not unnecessarily trammel the interests of white employees, that they should be temporary in nature, that there should be a sense of proportionality to the qualified labour-pool and that goals and timetables should be flexible. Clearly, the two courts have devised similar means of resolving the same dilemma.

At the same time, however, both courts unequivocally recognise the rationale of affirmative action and accept that its ultimate goal, equality of opportunity, is substantive rather than purely formal in nature. That path was cleared by the two American cases of Griggs and Bakke, and recognised in no uncertain terms in the Indian case of Thomas. Justification for affirmative action is not purely an academic debate. In the light of the tension that exists between equality and affirmative action, it is imperative that the South African Constitutional Court provides a sound and rational justification for affirmative action in order to safeguard it against such attacks. Dworkin's analysis of De Funis is no less relevant in this regard than the reasoning of Matthew J in the Thomas case.

Despite any limitations that the courts may have placed on affirmative action, the general trend in both the United States and in India appears to be an easing of restrictions on affirmative action. Clearly, the conservative backlash to affirmative action during the 1980's in the United States was short-lived. The Civil Rights Act of 1991 has seen to that. At the same time, the Indian Supreme Court has moved to a relaxation of the less-than-50% rule and, according to Krige, it favours a more arbitrary approach. That may be so, but a word of caution for South Africa is that both the American and the Indian Supreme Courts have battled with affirmative action for a number of decades. The South African Constitutional Court will be dealing with the issue for the first time and, it is felt, would do well to take heed of developments in those other jurisdictions. An opening of the floodgates to affirmative action could well result in a backlash of the type experienced in America. On the other hand, an overcautious approach might hinder the very purpose of the legislation.

10. **SECTION 26**

Section 26 of the Interim Constitution is novel and has no precedent in International Covenants. It is accordingly difficult to determine exactly what the approach of the Constitutional Court will be to it. Be that as it may, it is submitted that Section 26 takes the question of affirmative action no further than Section 8(3)(a). While Section 8(3)(a) makes specific reference to affirmative action, Section 26(2) refers to measures designed to promote a broad range of objectives only one of which is "equal opportunity for all". For this reason, it is submitted that Section 8(3)(a) has more influence to bear on the interpretation of affirmative action than Section 26(2).

This would seem to be re-enforced by the nature of the fundamental rights entrenched in Section 8 and in Section 26, respectively. Section 8 provides for the right to equality which, as has been illustrated, is the principal source of tension with affirmative action. Recognising this, the drafters of the interim constitution follow it with Section 8(3)(a) in a similar vein to the drafters of the Indian and Canadian constitutions. Section 26, on the other hand, is unique. It has been inserted into the interim constitution for reasons that are quite unrelated to affirmative action. Having done so, and having seen the extent to which the right could be used to erode not only affirmative action, but also accepted labour and employment practices, sub-section (2) has been inserted to modify the ambit of the right of sub-section (1) (88). As such, the tension between affirmative action and the right to free economic activity is subordinate to the tension that exists between affirmative action and the right to equality.

For these reasons, it is submitted that the interpretation of Section 26(2) as it relates to affirmative action will also be subject to and determined by the interpretation which the court chooses to place on Section 8(3)(a). Provisions in the interim constitution relating to its application and to its interpretation are as applicable to Section 26 as they are to Section 8. There is, therefore, no reason to believe that the court will apply different approaches to the two sections.

11. **CONCLUSION**

Given the discriminatory nature of South Africa's history, affirmative action will play a leading role in shaping the new social order. Not only will it enjoy moral justification, but it has been provided constitutional protection against competing fundamental rights, particularly the right to equality. At the same time, however, affirmative action programmes and a future Affirmative Action Act will be subjected to constitutional scrutiny at all times. Experience in the United States and in India confirms that it may be necessary to temper such programmes in order to achieve an acceptable balance between competing claims. As much as the Constitutional Court may wish to uphold the spirit of affirmative action, it will not be able to ignore the effect of competing rights. It is expected that these issues will only fall in the limelight as and when an Affirmative Action Act is promulgated and it becomes compulsory for organisations to implement affirmative action programmes. The time scale for this is likely to be after 1999 when the New Constitution has been drafted and brought into effect. Until then, the public and private sector will be left to their own devices and the Constitutional Court will have the opportunity to concentrate on other pressing issues.

NOTES

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3. Section 7(3).
4. Section 7(4).
5. Section 38(1).
6. Section 80(1).
7. Sections 68 and 73.
8. Section 71(1).
9. Section 98.
10. Section 99.
11. Section 100.
12. Dugard "The Judicial Process, Positivism and Civil Liberty" SALJ (1971) 181 and "Some Realism about the Judicial Process and Positivism - A Reply" SALJ (1981) 372.
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14. 1990(1) SA 434 (BA).
15. (1985) 11 DLR (4th) 641 (SCC) at 649.
16. LM du Plessis & J R de Villiers "Bill of Rights Interpretation in the South African Context (2): Prognostic Observations" Stell LR (1993) 2 pp.204-214.
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18. Preamble to the Constitution of the Republic of South Africa.
19. Ibid.

20. "National Unity and Reconciliation".
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22. Constitutional Principle III.
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25. Ibid.
26. Section 8(3).
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30. V.T.Maphai p.9.
31. D.J.Verster Webber Wentzel "To affirm or not affirm - that is the question" (1992).
32. 339 US 629 70SCt 848.
33. 94 SCt 1704 (1974).
34. R.Dworkin Taking Rights Seriously (1977) Chapter 9 p.232.
35. R.Dworkin p.239.
36. A SACOB Policy on Affirmative Action No 1/93 13 July 1993
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37. Industrial Law Journal (1994) Vol 15 Part 2 pp.217-249.
38. V.T.Maphai p5.
39. A.& R.Blumrosen "Clearing the Thicket about Affirmative Action"
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