CHAPTER 7
SUMMARY, CONCLUSIONS, RECOMMENDATIONS AND PROJECTIONS

1 INTRODUCTION

This final chapter focuses on a profile of affirmative action beneficiaries in employment, as apparent from the previous chapters. The requirements to benefit from affirmative action are summarised and certain conclusions are drawn. Only brief summaries and conclusions are provided, with the focus being on problems in South African law only.[1]

Four issues – the concept 'disadvantage', the notion 'degrees of disadvantage', the concept 'suitably qualified', and citizenship as a possible criterion to benefit from affirmative action – are covered. A fifth issue, deficiencies of categorisation, though not a requirement to benefit from affirmative action, has been considered in order to fine-tune the use of categorisation in an endeavour to ensure that affirmative action measures indeed reach their intended beneficiaries in South African workplaces. Deficiencies of categorisation refer to, for example, multiple disadvantage, which is generally not recognised in legislation, but which appears to need consideration in practice.

The current position in South African law regarding these five issues is set out first. Then the position in the US and Canada with regard to these same issues is stated. This

1 Comprehensive summaries can be found in the evaluatory paragraphs of the various chapters (see chapter 4 pars *Evaluation of disadvantage*; *Evaluation of degrees of disadvantage*; *Evaluation of concepts 'suitably qualified' and 'merit'* ; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case*; *Evaluation of Department of Labour*; *Evaluation of citizenship as unfairly discriminatory against non-citizens*; *Evaluation of Citizenship and Immigration Acts*; *Evaluation of the notion 'common citizenship'*; chapter 5 pars *Evaluation of disadvantage*; *Evaluation of large-scale immigration*; *Evaluation of US citizenship*; *Evaluation of state classifications*; *Evaluation of Congress' classifications*; chapter 6 pars *Evaluation of Abella Report on disadvantage*; *Evaluation of the concepts 'unqualified' and 'merit'*; *Evaluation of large-scale immigration*; *Evaluation of Canadian citizenship*; *Evaluation of interpretation*; *Evaluation of citizenship* above).

is done in an endeavour to find solutions to the problems experienced in South Africa. On the basis of these two expositions, some recommendations[2] based on the comparative research are made in order to clarify obscure areas and/or provide an interpretation where needed in South African law.

Recommendations are made mainly to: (a) promote legal certainty in South African affirmative action law; and (b) ensure that affirmative action measures in fact reach their beneficiaries, as intended by the EEA. In some instances, mere projections (based on comparative research) are made to give an indication of the probable way forward for affirmative action in South Africa.

2 DISADVANTAGE

2.1 Actual past disadvantage or group membership

2.1.1 Current position in South Africa

Against the background of substantive equality (as embraced by the Constitution, the Constitutional Court and the EEA),[3] it is submitted that the Labour Court correctly interpreted the concept 'disadvantage' in the affirmative action context to relate to group membership.[4] In other words, membership of one of the designated groups as set out in the EEA is sufficient in order to benefit from affirmative action. A showing of actual past personal discrimination is not required.

It has been submitted above that evidence of past discrimination under apartheid in South Africa has been amply documented and that no additional evidence need be adduced in the affirmative action context.[5] Members of the designated groups are thus

2 Recommendations are numbered chronologically in the text, in square brackets and in bold.

3 See chapter 3 pars 3.4.2; 3.4.4; 3.5.1; 3.5.2.

4 See chapter 4 pars 2.1.3.2; *Evaluation of disadvantage* above.

5 See chapter 4 par 2.1.2. In this regard, it has been held that apartheid has been branded as a 'crime against humanity'.

deemed to have suffered disadvantage for purposes of affirmative action.[6] Moreover, a showing of past discrimination may be unnecessary and wasteful, *inter alia* because it exacerbates division, focuses upon the wrongs of the past, and promotes the notion of proving that one is a victim. These are all issues which may be counterproductive and will not assist with integrating South African society and workplaces. Also, no proof is required by employers of their *own* past discrimination against the designated groups.[7] It is submitted that the issue of affirmative action for South African citizens disadvantaged under apartheid and patriarchy has been debated extensively, and that the evidence and causes of past discrimination, as documented by the ILO Country Review, have formed a proper factual basis for affirmative action in favour of blacks, women and the disabled in the workplace.[8]

Assuming disadvantage in favour of the designated groups makes it clear that the substantive notion of equality recognises the extent to which opportunities are determined by individuals' social and historical status as part of a group/s.[9] It also makes it clear that substantive equality recognises systemic discrimination: discrimination does not occur in an individualistic manner – it is part of patterns of behaviour towards groups.[10]

This group-based interpretation of 'disadvantage' as found in South Africa is similar to that found in the early days of affirmative action in the US,[11] but is in stark contrast to that which is currently found.[12]

6 See chapter 4 pars 2.1.2; 2.1.3; *Evaluation of disadvantage* above.

7 See chapter 4 pars 2.1.1; 2.1.2; *Evaluation of disadvantage* above.

8 See chapter 3 pars 3.4.4; 3.5.2.1 above.

9 See chapter 2 par 3.1.3 above.

10 *Ibid*.

11 See chapter 5 par 4.1.3.2 above.

12 See chapter 5 par 4.1.3.4 above.

2.1.2 Comparative material

2.1.2.1 US

It was seen above that affirmative action for private employers (under statute) and public employers (under the Constitution) differs.[13] For the latter, under the Fourteenth Amendment, the Supreme Court has held that race-based classifications pursuant to an affirmative action plan by a public employer must satisfy strict scrutiny. In Title VII cases, in contrast, more flexibility is allowed for private employers in designing affirmative action plans.

Affirmative action under Title VII has to satisfy three requirements before the plan can be held to be lawful. These are: (a) a remedial purpose to correct a 'manifest imbalance' in a traditionally segregated job category; (b) the affirmative action plan must not unnecessarily trammel the interests of non-minority members; and (c) such a plan must be temporary. An employer justifying an affirmative action plan need not point to its *own* prior discriminatory practices and there is no need to approach a prima facie case of discrimination.[14] With regard to past personal discrimination or membership of a group in order to benefit from affirmative action, initially, past personal discrimination was required, but, since the 1980s, mere group membership has sufficed.[15]

Under the Fourteenth Amendment, additional requirements have been set: (a) a 'compelling interest' must be shown for a race-based affirmative action plan; and (b) the plan has to be narrowly tailored to achieve such a 'compelling interest'. To prove a compelling interest, an employer must provide evidence of its *own* past discrimination against a particular group, as well as against an individual as a member of such a group, in a particular area and industry and 'approaching a prima facie case'. Evidence of general 'societal discrimination' has been found to be 'amorphous' and 'insufficient'.

The PWEA (which requires that 10 percent of grants for local public works projects

13 See chapter 5 pars 4.1.3.2; 4.1.3.3; 4.1.3.4; 4.1.3.5 above.

14 *Ibid*.

15 See chapter 5 pars 4.1.3.2; 4.1.3.3 above.

should be expended on socially and economically disadvantaged MBEs) lays down rebuttable presumptions to exclude minority groups as such, or a member of such a group, which have not *in fact* been disadvantaged under past discrimination in a particular area and industry.[16]

These strict, individual- and group-based requirements for beneficiaries of affirmative action may be explained against the background of: (a) the US officially endorsing the notion of equality of opportunity, which focuses on groups, but only up to a certain point, whereafter the focus returns to the individual;[17] (b) affirmative action having been operative in the US for 40 years, with a large number of minority group members and women in fact having benefited therefrom; (c) inconsistent political support for affirmative action, resulting in erratic interpretation by the US Supreme Court;[18] and (d) the fact that minorities are affirmed.

All of these are in stark contrast to the position in South Africa where: (a) the notion of substantive equality has been embraced and has been interpreted consistently; (b) only six years have elapsed since legal intervention regarding affirmative action; and (c) strong political support by a majority, for a majority, exists.[19] A standard for proving past discrimination has thus not been an issue in South Africa, but may become an issue in future.[20]

It was noted that the US has completed a full circle, starting off with affirmative action as a remedial measure to compensate for past discrimination against black people, but that, at this stage, upholds it for diversity reasons. Although this has only been in the context of university admissions, it is unclear whether diversity will be valid in the workplace as well.[21] Moving from one justification to another like this may be explained against the background of large-scale immigration into the US over centuries, and, in particular, by

16 See chapter 5 pars 3.9; 4.1.3.4 above (see, in particular, the *Croson* case (488 US 469 (1989)).

17 See chapter 1 par 4; chapter 2 par 3.1.4; chapter 5 pars 3.5; 3.7; 3.9 above.

18 See chapter 1 par 4; chapter 5 fn 153 above. The South African Constitutional Court and the Canadian Supreme Court, on the other hand, appear to be more independent instruments.

19 See chapter 3 pars 3.4.2; 3.4.3; 3.4.4; 3.5.1.3; 3.5.1.4; 3.5.2; chapter 4 par 2.1.3.2 above.

20 See recommendation **[2]** below.

21 See chapter 5 pars 4.1.3.5(b); *Evaluation of disadvantage* above.

millions of immigrants who, since the late 1980s, have been mostly Asian and Latin American (in contrast to the situation after World War II when they were mostly European).[22] The acceptance of diversity, nevertheless, appears strange against the background of assimilation of such immigrants and the emphasis on individualism in the US.

2.1.2.2 Canada

Since the inception of affirmative action, the Canadian Supreme Court has interpreted the concept 'disadvantage' to relate to 'group membership'.[23] This interpretation was later substantiated and confirmed in the Abella Report, which also formed the basis of the CEEA.[24] The Abella Report strongly recommended that disadvantage be *assumed* in favour of members of the designated groups,[25] similar to the South African position.[26]

This approach however changed in later years when the Canadian Supreme Court in *Apsit*[27] held that past discrimination against a group, as well as the cause thereof, had to be proven under the Charter, somewhat similar to the position in the US.[28]

This interpretation has however been widely criticised as being a standard too high.[29] It has *inter alia* been argued that: (a) it will be difficult to accurately determine the 'specific' cause (an 'amorphous, complex and indeterminate' concept), as disadvantage often results from complex situations over centuries; (b) intent to show past discrimination will usually be absent in a court case, *inter alia* because disadvantaged groups are usually not parties to such a case; and (c) the use of the concept of the *cause* of a group's

22 See chapter 5 pars 4.3.2; *Evaluation of large-scale immigration* above.

23 See chapter 6 par 3.5.4.2(c)(i) above.

24 See chapter 6 pars 3.7.2; 4.1.2 above. The well-researched Abella Report stands in stark contrast to the American situation where no investigation took place to pinpoint the beneficiaries of affirmative action, and where, consequently, benefiting groups multiplied.

25 See chapter 6 par 4.1.2.2(a) above.

26 See chapter 3 par 3.5.1.5; chapter 4 pars 2.1.2; 2.1.3.2 above.

27 [1988] 1 WAR 629 (Man QB) (see chapter 5 par 3.6.5.3(b) above).

28 See chapter 5 par 4.1.3.4(c) above. Proof of past individual discrimination was however not required.

29 See chapter 6 par *Evaluation of Apsit case* above.

disadvantage could probably lead to many affirmative action programmes being challenged.[30]

In *Lovelace*,[31] the Canadian Supreme Court further complicated the issues and imported the discrimination test into the affirmative action context. This test follows a two-stage approach which entails: (a) differential treatment between the claimant and others in *purpose or effect* on an enumerated or analogous ground; and (b) *substantive discrimination* that violates the *human dignity* of the affected group/s, with four contextual factors having been laid down for assessing such discrimination.[32]

The discrimination test as such has been criticised as being unduly complex, indeterminate in its result, and easily manipulable. The concept 'dignity' as used in the discrimination enquiry has been criticised *inter alia* as being vague and burdensome to complainants. The contextual factors provided have been criticised for not really assisting in establishing whether a distinction impairs dignity, as the concept of dignity is inherently vague and unpredictable in its application.[33] Importing the discrimination test into the affirmative action context has evoked strong criticism, mainly on the grounds that many affirmative action plans may now be challenged.[34]

These developments came as a surprise given the background of substantive equality as embraced in Canada. But, in the light of the severe criticism levelled at these cases, it is unclear whether the *Apsit* and *Lovelace* cases will be followed in Canada in future.

With regard to the CEEA, no one has to date challenged the findings of the Abella Report that the designated groups are in fact disadvantaged.[35] No case law exists where it has been argued that a member of a designated group has not been disadvantaged, or

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30 *Ibid*.

31 [2000] 1 SCR 950; 188 DLR (4th) 193 (see chapter 6 par 3.6.5.3(c) above).

32 *Ibid*.

33 *Ibid*.

34 *Ibid*. It is submitted that it is undesirable that the Canadian requirement of proof of past discrimination against a group, as well as the cause thereof, be followed in the South African context. These would unnecessarily impact on the legitimacy of affirmative action programmes and their beneficiaries.

35 See chapter 6 par 4.1.3 above.

that past personal disadvantage is a requirement to benefit from affirmative action under the CEEA (unlike the position in the US[36] and (initially) in South Africa[37]).

2.1.3 Recommendations and projections

[1] It appears to be both correct and desirable to identify beneficiaries of affirmative action in South African workplaces by way of membership of a designated group. It is submitted that this interpretation, based on the substantive notion of equality, will assist in achieving equality of outcome in the highly unequal South African workplaces, as opposed to formal equality[38] or equality of opportunity[39] which, it is submitted, will not address South Africa's history of systemic discrimination. It must be remembered in this regard that workplaces did not become discrimination-free, nor did all opportunities become available to everyone overnight, upon passage of the interim Constitution. Effects of systemic discrimination of the kind found in South Africa typically persist and will take generations to rectify.[40] Such a group-based approach will (it is hoped) ensure that affirmative action for a majority is applied in a practical, uncomplicated and speedy way. However, in time, and once large numbers of members of the designated groups have in fact benefited from affirmative action in the workplace, it might be possible to argue that 'mere' group membership is not sufficient, but only to ensure that affirmative action measures reach the largest possible number of members of the designated groups.

[2] It is recommended that rebuttable presumptions (as used in the American PWEA[41]) may then be considered to exclude members of the designated groups who have

36 See chapter 5 par 4.1.3.2 above.

37 See chapter 4 par 2.1.3.1 above.

38 See chapter 2 par 3.1.2 above.

39 See chapter 2 par 3.1.4 above.

40 This interpretation might however prove to be a bone of contention as more and more people enjoy the benefits of equality from birth, as pointed out above (see chapter 4 par fn 45 below. But, more about this later (see recommendation **[2]** above and below).

41 See chapter 5 par 3.9 above.

already benefited from affirmative action.[42] This recommendation should not be seen as abolishing the group-based approach of substantive equality, but only as a way of ensuring that designated group members who have not yet benefited from affirmative action get an opportunity, instead of certain members benefiting over and over. As mentioned above, the group-based notion of substantive equality as a key for affirmative action should not be abolished, as the other notions of equality do not sufficiently recognise and address the nature of systemic discrimination found in the South African context.[43] It is of course also possible that, at some stage in the future, some designated groups may become sufficiently represented in certain occupational categories and levels in the workplace so as not to justify their inclusion under affirmative action any longer. This hints at the temporariness of affirmative action, which is addressed below.[44]

Related to the requirement of membership of a designated group in order to be eligible to benefit from affirmative action is the continuing debate on whether this should be coupled to other factors. As seen above, in all three comparator countries – South Africa, the US and Canada – suggestions have been made that poverty be taken into account in targeting beneficiaries.[45] Some problems however exist in this regard: (a) this is an individualised approach, inconsistent with the group-based approach of substantive equality that is strongly supported in South Africa; and (b) the number of beneficiaries may become unmanageable.[46] It was pointed out above that, if the factor of poverty is taken into account, government might have to abandon affirmative action and, instead, introduce significant income-redistribution programmes. It is in any event submitted that poverty as a factor for establishing the beneficiaries of

42 See chapter 5 pars 3.9; 4.1.3.4(a); 4.1.3.4(b) above.

43 See recommendation **[1]** above.

44 See par 5 below.

45 See chapter 4 par 2.1.4; chapter 5 par 4.1.4; chapter 6 par 4.1.4 above.

46 See chapter 4 fn 92 above.

affirmative action in South African workplaces is not appropriate. It may, however, be appropriate in the broader South African societal context.

2.2 Degrees of disadvantage

2.2.1 Current position in South Africa

The EEA does not make provision for the notion 'degrees of disadvantage', and, accordingly, no hierarchy exists for affirmative action for the different designated groups.[47] Instead, the Act advocates 'equitable representation' in occupational categories and levels in the workforce to determine the appointment (or promotion) of members of the various designated groups on the basis of affirmative action.[48]

The notion 'degrees of disadvantage' has been mooted intermittently in South African case law. Although introduced in the education context, it is encountered in the employment context as well. In this regard, it has been held that: (a) Africans carried the brunt of discrimination under apartheid; and that, consequently, (b) coloureds, Indians and white women were not affected to the same extent as Africans.[49]

It was submitted that the notion 'degrees of disadvantage' is not likely to find application in the employment context.[50] This was based on the reasoning that: (a) it may be difficult to measure the *extent* of discrimination that any person has suffered; (b) discrimination based on disability, race and gender are *different* in nature; (c) it may be difficult to *prove* degrees of disadvantage, and, consequently, requiring a party to do so could *unnecessarily complicate* a case.[51] It is further submitted that it is not necessary to use this concept in practice, as there is no real need for it. A specific recommendation with

47 The EEA, however, provides that guidelines may be issued in order to prioritise certain designated groups for purposes of affirmative action. This may be done in terms of a code of good practice (s 54(1)(a) fn 8 of the EEA).

48 See chapter 3 pars 3.5.2.3(c)(i); 3.5.2.3(c)(ii) above.

49 See chapter 4 par 2.1.3.3 above.

50 See chapter 4 par *Evaluation of degrees of disadvantage* above.

51 *Ibid*.

regard to a contextualised approach will be made below.[52]

2.2.2 Comparative material

2.2.2.1 US

In the US, the Civil Rights Act, Executive Orders and other relevant legislation do not use the notion and, accordingly, no formal hierarchy exists for groups which must be affirmed.[53] Nevertheless, it has been argued that affirmative action should be limited to African-Americans owing to their severe oppression under slavery.[54] In this regard, it has been held that there was never a comparable historical justification for including other ethnic groups as designated beneficiary groups under affirmative action in America. Yet, descendants of black slaves constitute fewer and fewer of affirmative action's beneficiaries.[55] And, for political reasons, affirmative action has been extended beyond the original descendants of black slaves to include blacks from the Caribbean and other areas.[56] Despite calls for affirmative action for blacks only, nothing has been done in practice to ensure this.

In essence, then, despite affirmative action meant primarily for blacks, other groups have been added on. And, once added, these groups have fought to remain in the favoured category, but the reasons why they were included in the first place remain obscure.[57]

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52 See par 2.2.3 below.

53 See chapter 5 pars 3.5; 3.7; 3.9 above.

54 See chapter 5 par 4.1.4 above. Data indicates that prejudice and covert discrimination against African-Americans, relative to Native, Hispanic and Asian Americans, is today still the most prevalent in respect of the former.

55 See chapter 5 pars 3.8; 4.3.2 above.

56 *Ibid*.

57 *Ibid*. For example, it was argued that Asian Americans should not be included because there was no statistical evidence of discrimination against them as a group.

2.2.2.2 Canada

Neither the Charter nor the CEEA uses the notion 'degrees of disadvantage' and thus, as in South Africa and the US, no formal hierarchy exists for the designated groups in Canada.[58] Although the Abella Report acknowledged that the designated groups displayed a range of differences within and among themselves,[59] this was not formally recognised in the CEEA.

In fact, in *Lovelace*,[60] the Supreme Court confirmed that 'pitting' one aboriginal group against another in a 'perverse competition' over which was the 'more needy' did not accord with the purpose and spirit of section 15 of the Charter. It was held that it was not only the 'most disadvantaged' groups that should be the targeted groups of affirmative action programmes.[61]

2.2.3 Recommendations

[3] It is recommended that the notion 'degrees of disadvantage'*not* be implemented in the South African employment context. Instead, an appropriate contextualised approach is suggested.[62] An assessment of the relative importance of the various individual and collective profiles of disadvantage in a particular workplace would be the correct approach in deciding who to appoint or promote.[63] As was pointed out above, in a particular work force, some groups might be more disadvantaged or under-represented than others, and appointments and promotions in their favour might therefore be justified.[64] Such decisions must be based on the actual representivity of

58 See chapter 6 pars 3.6; 3.7; 4.1.2.2(a) above.

59 See chapter 6 pars 4.1.2.2(a); 4.1.4 above.

60 [2000] 1 SCR 950; 188 DLR (4th) 193 (see chapter 6 par 3.6.5.3(c) above).

61 *Ibid*.

62 See chapter 4 par *Evaluation of degrees of disadvantage* above.

63 *Ibid*.

64 *Ibid*.

the different designated groups in the various occupational categories and levels at a given point.

[4] To effect a contextualised approach, it is recommended that the employer's employment equity plan be relied on in determining under-representivity in each occupational category and level in the workforce, and, consequently, to inform the decision as to whom to appoint or promote to a particular post.

Predetermined and arbitrary hierarchies and ranking of the designated groups are thus not necessary. If the figures in the longer term show that some of the designated groups are no longer under-represented in a particular occupational category or level, the employer may then take into account the merit principle in deciding who to appoint. This again hints at the temporariness of affirmative action.[65]

2.3 Deficiencies of categorisation

2.3.1 Current position in South Africa

Criticism levelled at affirmative action categories in terms of the EEA is based on four main themes, namely: over-inclusiveness; under-inclusiveness; the fact that degrees of disadvantage are not taken into account within and between the designated groups,[66] with the result that those least in need of affirmative action in the groups generally benefit; and the fact that no provision has been made for multiple disadvantage, or for several elements of disadvantage.[67] While the first three deficiencies may be logical consequences of categorisation in that the groups cannot be defined so exactly that only the most deserving benefit,[68] the latter is different in nature. It is submitted that multiple disadvantage can be built into the categorisation process in order to address the position of doubly or triply disadvantaged people.

65 See par 5 below.

66 See, however, par 2.2.3 above where this is discussed and addressed.

67 See chapter 1 par 2.2.2; chapter 4 par 2.1.4 above.

68 See chapter 1 par 2.2.1 above.

Reports preceding the Constitution and the EEA pointed out that *African women* had been the most disadvantaged members of South African society, and that they should accordingly be targeted as a special category under affirmative action programmes.[69] Also, though initially recommended that special attention be given to the broader group of *black women* generally,[70] this has not materialised.

Recently, it was reported that the poor representation of black females among the total representation of blacks and the total representation of females in the workplace suggested that inadequate attention had been paid to their compounded disadvantage, and that drastic intervention was required.[71]

In contrast to the concept 'degrees of disadvantage' discussed above,[72] it appears that there is a need in practice to recognise and address the concept of multiple disadvantage in South African workplaces. A specific recommendation in this regard is made below.[73]

2.3.2 Comparative material

2.3.2.1 US

It was seen above that criticism levelled at affirmative action categories in the US has been based on the same themes as advanced in the South African context.[74] In addition, the closed process of defining the targeted groups (as Title VII does not specify the groups) by officials and agencies not accountable to voters was pointed out.[75] In this

69 See chapter 3 pars 3.4.4; 3.5.2.1 above.

70 *Ibid*.

71 *Ibid*.

72 See par 2.2.1 above.

73 See par 2.3.3 below.

74 See chapter 5 par 4.1.4 above.

75 *Ibid*. Criticism in this regard has not been encountered in South Africa or Canada. South Africa relied on the independent ILO Country Report for evidence and figures on discrimination, and it was on these that the subsequent choice of designated groups was based (see chapter 3 pars 3.4.4; 3.5.2.1; 3.5.2.3(c)(iii) above). Canada relied on the well-investigated Abella Report for its choice of

regard, it was seen that, despite affirmative action meant primarily for blacks, other minority groups were added on a seemingly arbitrary basis, without any clear criteria and without conclusive proof of discrimination against them.[76]

The criticism levelled at the use of race as a basis for categorisation was recently borne out by the large number of Americans who indicated that they considered themselves 'multiracial' and wished to be identified as such (if they had to be racially identified at all).[77] It has been speculated that the US may eventually decide that it is futile to measure race and to legislate for so many groups, and that this may lead to a reformulation of the concept of race, or even to its disappearance.[78] In this regard, it has in fact been recommended that the term 'race' be eliminated from the 2010 census.[79] This will most probably affect the categorisation of affirmative action beneficiaries in future in the US. In contrast, it is foreseen that in South Africa, race will probably be used for the foreseeable future.

As in South Africa,[80] it has also been mooted in the US that race-neutral bases such as poverty should determine the beneficiaries of affirmative action.[81] This has been countered, however, by pointing out that, for all the arbitrariness and over-breadth of existing affirmative action categories, they are 'far more' objective and administrable than a need-based programme would be.[82] Rather than amending the categories of affirmative action beneficiaries, it has been suggested that more rigorous proof of actual discrimination-based disadvantage be proven before affirmative action is upheld, as the Supreme Court in any event did in *Croson*.[83]

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beneficiaries of affirmative action under the CEEA (see chapter 6 par 4.1.2.2(a) above).

76 See chapter 5 pars 3.8; 3.9 above.

77 See chapter 5 par 4.1.4 above.

78 *Ibid*.

79 *Ibid*.

80 See chapter 4 par 2.1.4 above.

81 See chapter 5 par 4.1.4 above.

82 *Ibid*. It has been argued that it is far easier to detect a person's skin colour, language, ethnicity and gender accurately than it is to make the kind of empirical and normative judgements necessary to determine the extent and the causes of a person's economic need.

83 488 US 469 (1989) (see chapter 5 par 4.1.3.4(c) above).

2.3.2.2 Canada

As in South Africa and the US, the deficiencies of categorisation as used by the CEEA have been pointed out as being over-inclusiveness; under-inclusiveness;[84] the fact that those least in need of affirmative action in the various groups benefit from it; the fact that no provision is made for degrees of disadvantage; and, particularly, the fact that no provision is made for multiple disadvantage.[85] The latter has, however, been recognised in practice as being both female and a member of another designated group, that is, visible minorities, the disabled and native people. During the third review of the CEEA it was argued that the fact that the CEEA failed to explicitly recognise double or triple disadvantage suppressed recognition of multiple disadvantage and consequently led to an incomplete and misleading picture of the level of representation and of the nature of disadvantage for certain groups.[86] It was argued that if it were possible to identify the areas of greatest need, then measures could be 'fine-tuned' to address those areas specifically. It was recommended that a means be developed to separately identify people who were members of more than one designated group and to provide a comparative analysis of their disadvantages in employment that might result from belonging to more than one designated group.[87] To date, this has not materialised.

2.3.3 Recommendations

[5] It is recommended that the concept 'multiple disadvantage' be recognised in South African employment law (similar to Canadian law) and that the EEA be amended to this effect. Such recommendation is made because it is foreseen that the position of

84 Under-inclusiveness of male workers in traditionally female jobs has been pointed out particularly.

85 See chapter 1 par 2.2.2; chapter 6 par 4.1.4 above. In addition, Canada has experienced undercounting due to self-identification by members of designated groups. Undercounting may not be as problematic in South Africa where blacks and women are fairly easily recognisable. Borderline cases may, however, prove problematic. It may, however, be problematic with regard to mentally disabled people.

86 See chapter 6 par 4.1.4 above.

87 *Ibid*.

multiple-disadvantaged people will *not* improve without legal intervention. Such an amendment will recognise that, apart from 'main effects' discrimination, multiple discrimination is found in practice.[88] It will also recognise that the intersectional nature of disadvantage creates different and multiple forms of inequality which cannot be explained or rectified simply by reference to one of the groups.[89]

Recognising multiple disadvantage will, it is hoped, lead to more effective combating of this phenomenon in South African workplaces. This approach, in essence, will strengthen the position of people who have suffered compounded disadvantage, and, in particular, that of African women who have during the course of investigations been shown to be in a particularly precarious position. It may thus also assist in achieving gender equality.

It is thus recommended that the EEA be amended to insert the following under section 1 of the Act, headed 'Definitions':

> '1. "Multiple disadvantage" means that disadvantage may have two or more elements;'

[6] Further consequential amendments to the EEA must be made. For example, section 20(2)(c)[90] will have to be amended to insert the following at the end of the subsection:

> '(2)(c) Multiple disadvantage of people from designated groups[91] must be taken into account by designated employers when an employment equity plan is prepared and implemented.'

88 See chapter 1 par 2.2.2 above.

89 *Ibid*.

90 Section 20 of the Act is headed 'Employment equity plan'.

91 In accordance with the wording generally used in the EEA. See, for example, ss 4(2); 13(1); 15(1); 15(2)(a); 15(2)(c); 15(2)(d)(i); 19(1); 20(2)(c); 42(a); 42(d) of the EEA.

[7] It is further suggested that the Code of Good Practice: Preparation and Implementation of Employment Equity Plans be amended to give guidance to employers on how to amend their employment equity plans accordingly. In terms of the EEA, the Commission for Employment Equity will have to advise the Minister of Labour on such amendments to the Code.[92]

[8] It is recommended that the issue be debated at NEDLAC by business, labour and the government in order to set the process in motion. Technical assistance from the ILO, if necessary, may be requested by government, business and labour to assist in the process.[93] Such assistance could be focused on developing a way to separately identify individuals who are members of more than one designated group and to provide a comparative analysis of their disadvantages in employment as a result of belonging to more than one designated group. Quantitative data will have to be aggregated from statistics to meet their needs. It may be useful to involve the services of Statistics South Africa in the process as well.

3 THE CONCEPTS 'SUITABLY QUALIFIED' AND 'MERIT'

3.1 Current position in South Africa

It was seen above that the EEA has adopted a 'modified' concept of merit, namely that of 'suitably qualified'.[94] This concept deviates from the (individual) merit proper principle where the 'best' candidate gets the job, and may imply reduced standards. Merit, however, remains relevant in this altered way. It was submitted that this approach makes

92 See s 30(c) of the EEA.

93 See chapter 2 par 2.1.3.1 above.

94 See chapter 4 par 2.2 above.

sense in the South African context of affirmative action in the workplace.[95] It was argued that it would not have been attainable to have applied the merit proper principle in the current situation of a shortage of skills, qualifications and experience on the part of members of the designated groups caused by apartheid educational policies and workplace practices.

With regard to the meaning of the concept 'suitably qualified', it was seen that the EEA has laid down four factors which must be used in combination with one another to establish whether a person is in fact 'suitably qualified': (a) formal qualifications; (b) prior learning; (c) relevant experience; or (d) the capacity to acquire, within a reasonable time, the ability to do the job. These must all be taken into account in this process.[96] In making a determination, the employer may not unfairly discriminate against a person *solely* on the ground of lack of relevant experience.[97] The fourth factor, the capacity to acquire, within a reasonable time, the ability to do the job, in particular, was pointed as being unclear. Some specific recommendations are made below in an endeavour to clarify this factor.[98]

It was also seen that the EEA, in an effort to address skills shortages, requires designated employers, as part of their employment equity plans, to have measures in place to retain and develop people from designated groups, as well as measures to implement training measures.[99] Notwithstanding these provisions, it has been reported that there are critical skills deficiencies at present.[100] Even the National Skills Development Strategy:

95 See chapter 4 par 2.2.1 above.

96 See chapter 4 par 2.2.2 (see, in particular, ss 20(3); 20(4); 20(5) of the EEA).

97 *Ibid* (see, in particular, s 20(5) of the EEA).

98 See par 3.3 below.

99 See chapter 3 par 3.5.2.3(c)(ii) above (see, in particular, s 15(2)(d)(ii) of the EEA).

100 See chapter 4 par *Evaluation of the concepts 'suitably qualified' and 'merit'* above.

2005-2010[101] of the Department of Labour does not seem to

101 It has as its objectives *inter alia*: (a) prioritising and communicating critical skills for sustainable growth, development and equity; (b) promoting and accelerating quality training in the workplace; (c) promoting employability and sustainable livelihoods through skills development; and (d) assisting designated groups, including new entrants, to participate in accredited work, integrated learning and work-based programmes in order to acquire critical skills to enter the labour market, as well as for self-employment (see National Skills Development Strategy: 2005-2010 33; 6; 12; 16; 18).

sufficiently address these shortages. Specific recommendations are made below with regard to skills shortages.[102]

3.2 Comparative material

3.2.1 US

The US, unlike South Africa, uses the merit proper principle in the context of affirmative action, an ideal apparently embraced by most American workers.[103] Nevertheless, it has been argued that 'unqualified' or 'less qualified' people get appointed over better qualified white men on the basis of race and gender.[104]

It has been pointed out that merit may be used in many different senses. In this regard, it has been stressed that those who wish to, or must (the civil service), adopt the rhetoric of merit must identify which model of merit they are using or defending, and why that model is preferable to the other models.

With regard to tests, it was seen that indications are that they are culturally biased against people of colour and may, as such, be open to challenge. Accordingly, calls have been made to include broader recognition of merit beyond tests, grades and statistics to include race and ‘overcoming obstacles’ as factors of a person's social and cultural history in affirmative action appointments and promotions. It was submitted that this would be similar to the position in South Africa, where the ‘modified’ concept of merit is used in the affirmative action context.

In contrast to the American experience, South Africa is in its infancy with regard to

102 See par 3.3 below.

103 See chapter 5 par 4.2.1 above.

104 *Ibid*

implementing and applying affirmative action, with little being done as far as the interpretation and meaning of the concept 'suitably qualified' are concerned.[105] What can be learnt from the US in this regard is that this concept should be made clear to avoid a never-ending debate on the actual meaning of the concept. A particular recommendation will be made in this regard below.[106]

3.2.2 Canada

In contrast to the US, which endorses the individual merit principle, Canada, like South Africa, has recognised that a 'modified' concept of merit is necessary to successfully apply affirmative action for the designated groups.[107] This is so because some of these group members do not possess the necessary skills, qualifications and experience owing to centuries of discrimination. Although the CEEA provides that 'unqualified' people do not have to be appointed under affirmative action, it has been conceded that the merit proper principle is not applied in practice, and that this may lead to reduced standards.[108]

The CEEA, like the South African EEA, emphasises education and training to assist the designated groups in the attainment of skills and professional qualifications in order to provide them with legitimate qualifications for jobs.[109] In this way, some of the major problems experienced by the US, specifically the filling of educational and occupational quotas with unqualified or underqualified minority members, have been largely avoided.

3.3 Recommendations and projections

105 As used in s 20(3) of the EEA (see chapter 4 par 2.2.2 above).

106 See par 3.3 below.

107 See chapter 5 par 4.2; chapter 6 par 4.2 above.

108 See chapter 6 pars 3.5.2.3(c)(ii); 4.2.4 above.

109 *Ibid*; chapter 3 pars 3.5.2.3(c)(i); 3.5.2.3(c)(ii) above).

[9] It is recommended that the National Skills Development Strategy be accelerated and be continued in the longer term in order to assist South African citizens belonging to the designated groups to overcome the consequences of apartheid education and workplace practices.[110] Measures should assist members of the designated groups to acquire the *same* qualifications as members of groups that were favoured in the past.[111] In other words, qualifications required by the labour market should be obtained, rather than lowering the level of those qualifications.

[10] With regard to the concept 'suitably qualified' as set out in the EEA, it is recommended that guidelines be issued to assist employers and employees in giving meaning to and developing the application of the concept, and, in particular, the fourth factor, namely 'the capacity to acquire, within a reasonable time, the ability to do the job'. Such guidelines should be contained in a code of good practice drafted under the auspices of the Commission for Employment Equity and issued by the Minister of Labour.[112] With regard to*process*, it is recommended that special care be taken to involve people from the designated groups in the drafting of such a code. With regard to *content*, it is submitted that useful principles so far laid down by the Labour Court be included. For example, the principles that an employer must provide an employee with an opportunity to gain experience,[113] and that, where a person's ability has already

110 See UNESC Final Report Prevention of Discrimination par 109.

111 *Ibid.*

112 In terms of s 54 of the EEA. As noted above, such code of good practice must be taken into account when interpreting the EEA (s 3 of the EEA).

113 See chapter 4 par 2.2.4.3(c) above.

been established, the insistence on the possession of a qualification is unfair,[114] may be considered for inclusion.

Two further issues need to be addressed in such a code: a definition (in the broad sense of the word) for 'ability' and measures, or a test, to determine ability.

Although it can be argued that a test score is, at best, an imprecise measure of ability, it seems that it does at least provide an employer with some information if properly used.[115] It is submitted that, if tests are properly used, employers will not rely on insignificant score differentials as a basis for an employment decision. Such a 'test' should follow the EEA's model in that it must be scientifically valid and reliable, must be of such a nature that it can be applied fairly to all employees, and must not be biased against any employee or group.[116] Such a 'test' should further allow employers to assess the suitability of applicants based on criteria which are relevant to the job.[117] The selection process should begin with the employer identifying the knowledge, abilities and other attributes required to do a job successfully. Having identified such criteria, the employer should then adopt selection techniques for identifying whether applicants possess these qualities.[118] With regard to *interpretation*, it is suggested that the concept 'suitably qualified' be interpreted, not as static, but as relative, and as evolving with time into the merit proper principle.[119] This again hints at the fact that affirmative action is temporary and, at some stage, has to come to an end.[120]

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114 See chapter 4 par 2.2.4.3(d) above.

115 See chapter 5 par 4.2.4.3 above.

116 See s 8 of the EEA.

117 See Davis 3 191.

118 *Ibid*. Such techniques must be predictive of how individuals will behave with regard to the relevant job-related criteria.

119 The American experience in defining the exact concept of merit to be used may have comparative value when such a stage is reached (see chapter 5 par 4.2.4.2 above).

120 See par 5 below.

4 CITIZENSHIP

4.1 Current position in South Africa

It was seen above that the EEA does not explicitly provide that beneficiaries of affirmative action should have citizenship status.[121] Despite this, citizenship as a requirement in order to benefit from affirmative action was successfully argued in the Labour Court in the case of *Auf der Heyde*,[122] and on the basis that the concept 'affirmative action' envisaged by the Constitution and the (then) LRA was one developed against the particular backdrop of South Africa's history of discrimination. The only people to whom affirmative action should legitimately and fairly be directed were thus found to be those previously and directly disadvantaged by unfair discrimination in South Africa itself.[123] The basis has therefore been laid for citizenship status as a legitimate limitation in respect of beneficiaries of affirmative action.

In evaluating the *Auf der Heyde* case in terms of modern interpretation theory, it was submitted that, against the background of South African historical and constitutional contexts, an accurate interpretation of the Constitution (the LRA and the EEA) points to affirmative action measures meant *primarily* to benefit South African citizens.[124]

Moreover, it was argued that the addition by case law of 'citizenship' as a requirement to benefit from affirmative action passes the test of the principle of international law that affirmative action measures must not be contrary to the non-

121 See chapter 4 par 2.3.1 above.

122 (2000) 8 BLLR 877 (LC) (see chapter 4 par 2.3.2 above).

123 *Ibid*.

124 See chapter 4 pars 2.3.3.3; 2.3.3.4; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above.

discrimination principle.[125] Thus, it was pointed out that there is a *sufficient connection* between citizenship as a requirement to benefit from affirmative action and the right to equality (of which affirmative action forms part), or that citizenship is *relevant* to the right to equality in South African workplaces.[126] Although the ground of citizenship in this context might be argued to be *discriminatory* against foreigners in South Africa, it was submitted that it could not be argued to be *unfairly* discriminatory.[127]

Although no case on affirmative action in this respect has yet reached the Constitutional Court, it was submitted that a purposive and contextualised approach to interpretation would most probably lead to the application of affirmative action *mainly* for South African citizens who are black, disabled and/or female.[128] Such an interpretation, it was submitted, would recognise the fact that affirmative action has been developed against the specific background of South Africa's history. In this way, it was submitted, the dignity of the South African people would be particularly entrenched and previously excluded people would be integrated into South African workplaces (and the broader society).

Notwithstanding this, it was pointed out that particular groups of non-citizens, such as migrant workers in the mining and agricultural sectors who were discriminated against in the past in the country, might be able to receive the benefits of affirmative action owing to the fact that the affirmative action provisions of both the Constitution and the EEA are broadly worded.[129] It was submitted that it is possible that section 9(2) of the Constitution can be used to affirm non-citizens as a 'category' of people disadvantaged by unfair racial

125 See chapter 2 par 2.1.2.4(c)(i); chapter 4 pars 2.3.4.3; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above.

126 See chapter 4 par 2.3.4.3 above.

127 *Ibid* for the reasoning in this regard.

128 *Ibid*.

129 See chapter 4 pars 2.3.5.5; *Evaluation of Interpretation of Constitution, EEA and Auf der Heyde case* above (see also *Brink* 1996 (4) SA 197 at par 41).

discrimination in the past. The wording of both the Constitution – 'persons, or categories of persons, disadvantaged by unfair discrimination' – and the EEA – 'as a result of apartheid and *other* discriminatory laws and practices' – arguably leaves the back door open for affirmative action for categories of people unfairly discriminated against on the basis of, for example, nationality.[130] It was concluded that 'other' discriminatory laws and practices – related and unrelated to apartheid – might therefore exist in South African society, and that these needed to be addressed as well.[131] Such an interpretation includes not only the mischief of the past constitutional order against South African citizens, but goes wider[132] and includes other groups on the receiving end of apartheid and other discriminatory laws and practices in the broader context.[133] It was however pointed out that care should be taken in providing guidelines on exactly what evidence is necessary to prove discrimination for a particular group.[134]

This interpretation, it was further submitted, is substantiated by the rules of interpretation, which provide that the provisions of the Constitution and the EEA must be

130 See chapter 4 par *Evaluation of Interpretation of Constitution, EEA and Auf der Heyde* case above. Affirmative action in this regard will have to be designed by way of legislative and other measures in order to protect or advance disadvantaged people as set out by s 9(2) of the Constitution.

131 *Ibid*.

132 *Ibid*; chapter 4 par 2.3.3.2(c)(ii)A above.

133 It was argued that apartheid, a race-based policy, indirectly discriminated against all black people on the basis of nationality. The race factor has impacted on black aliens in general (see chapter 4 pars 2.3.3.4; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above). Indications are that nationality is a sensitive ground in South Africa. See, in this regard, the PEPUDA (see chapter 3 fn 333 above) which contains a directive principle to the effect that special consideration must be given to the inclusion of the ground of nationality in the definition of 'prohibited grounds' (s 34(1)(a)). See also chapter 2 par 2.1.3.4(d) above for the international situation which indicates that discrimination on the ground of nationality is widespread. This has a particular bearing on South Africa, which, for many years, has drawn heavily for its unskilled labour requirements on countries in the southern African region, namely Lesotho, Mozambique, Botswana and Swaziland, and for specific sectors such as mining and agriculture, with the workers concerned not being able to qualify for permanent residence or citizenship. These 'mischiefs' also need to be remedied, and the Constitution can be a 'remedial measure' in this sense too.

134 See chapter 4 par 2.3.3.4 above.

understood as part of the whole of their texts.[135] It was submitted that both texts point to *mainly* the history and background of apartheid, but also to the broader context of the country, in that they aspire to non-racialism and non-sexism, to the achievement of equality, to the advancement of human rights and freedoms, and to diversity.[136] In this way, it was argued, it can be said that the Constitution and the EEA aspire to a realisation of the 'scheme of values' informing the legal and constitutional order in its totality and that this constitutes a 'value-activating interpretation'.[137] Such an approach is also in line with the interpretation clause of the Constitution which requires that, when interpreting the Bill of Rights, courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and that, when interpreting any legislation, courts must promote the spirit, purport and objects of the Bill of Rights.[138] It was argued, lastly, that this is in line with the interpretation clause of the EEA which holds that the Act must be interpreted in compliance with the Constitution so as to give effect to its purpose.[139]

The related issue as to whether a distinction can be made in the affirmative action context with regard to the different ways in which citizenship may be acquired was argued *not* to be legitimate in the South African historical context.[140] All citizens – irrespective of the way in which citizenship has been acquired – should qualify for the benefits of affirmative action.[141] This submission was based on the notion of common citizenship as

135 See chapter 4 pars 2.3.3.2; 2.3.3.3; 2.3.3.4; *Evaluation of Interpretation of Constitution, EEA and Auf der Heyde case* above.

136 See chapter 4 pars 2.3.3.4; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above.

137 See chapter 4 pars 2.3.3.2(c)(ii)C; *Evaluation of interpretation of Constitution, EEA and Auf der Heyde case* above.

138 See ss 39(1); 39(2) of the Constitution (chapter 3 par 3.5.1.2(a) above).

139 Sections 3(a); 3(b) of the EEA (chapter 3 par 3.5.1.2(a) above).

140 See chapter 4 par *Evaluation of the notion 'common* citizenship' above.

141 See chapter 4 pars 2.3.5 1; 2.3.5.2; 2.3.5.3 above.

found in the Constitution.[142]

The aforegoing discussion raises the question whether naturalised citizens may benefit from affirmative action, irrespective of the time spent in South Africa. In this regard, South Africa may borrow from the US, where this issue has been considered. A specific recommendation in this regard will be made below.[143]

The Departments of Labour's guidance on whether foreigners may be included for purposes of affirmative action, was argued to be ambiguous.[144] It was submitted that it would defeat the purpose of the Constitution and the 1995 LRA (as well as the EEA) if employers were allowed to recruit black, female and/or disabled foreigners/non-citizens and use such figures when measuring and setting numerical goals and when reporting on affirmative action.[145] Specific recommendations are made in this regard below.[146]

4.2 Comparative material

4.2.1 US

It was seen above that, in the absence of any explicit legislative requirement in respect of citizenship (except for the MBE clause of the PWEA which requires citizenship, but which requirement has been disregarded in practice[147]) as a criterion in order to benefit from affirmative action, affirmative action only for citizens of the US has not

142 Section 3 of the Constitution (see chapter 4 pars 2.3.5.5; *Evaluation of the notion 'common citizenship*' above).

143 See par 4.3 below.

144 See chapter 4 par 2.3.3.5; *Evaluation of Department of Labour* above.

145 *Ibid*.

146 See par 4.3 below.

147 See chapter 5 pars 3.9; 4.3.1.

materialised.[148] The situation in the US was, however, seen to be quite different from that of South Africa.

Although initially intended to equalise the position between white and black people, the equal protection clause of the Fourteenth Amendment to the US Constitution has been interpreted by the Supreme Court as protecting people of all races and national origins.[149] Exclusions or classifications of people in terms of alienage/citizenship in various areas of the law have consistently been interpreted as being discriminatory and unjustifiable.[150] The Fourteenth Amendment has been applied to the individual as a *personal right*, and to *all people within the jurisdiction of the US: citizens and non-citizens*.[151] This outcome has been held to be understandable when viewed against the background of large-scale immigration into the US over centuries.[152] Moreover, though blacks were initially excluded from the political community in that they were denied citizenship, this was rectified fairly early on in the history of the US (in contrast to the position in South Africa where it was rectified only in the 1990s). It is clear that the nature of the group/s that is/are to be affirmed and their historical circumstances determine whether citizenship may be fairly used as a requirement for affirmative action. In terms of the principles of international law, which require that affirmative action measures must not be contrary to the non-discrimination principle,[153] it may then be said that, in the American context, citizenship (as a criterion for

148 See chapter 5 par 4.3.1 above. It appears that self-identification has also played a role in immigrants benefiting under affirmative action.

149 See chapter 5 par 4.3.4 above.

150 See chapter 5 pars 4.3.4.1; 4.3.4.2; *Evaluation of state classifications*; *Evaluation of Congress' classifications* above. With the exception of two cases during World War II, the Fourteenth Amendment has been interpreted to apply to both citizens and non-citizens of the US, irrespective of the residential status of the person at issue.

151 *Ibid*.

152 See chapter 5 par 4.3.2 above.

153 See chapter 2 pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B; chapter 5 pars *Evaluation of state classifications*; *Evaluation of Congress' classifications* above.

benefiting from affirmative action, over and above being a member of one of the designated groups) is a ground *not* relevant, and *not* used.

Many immigrants/non-citizens have benefited under affirmative action in the US, particularly since the 1970s.[154] The question arises whether these immigrants, who came voluntarily to the US, deserve the same protection as black Americans, who were subjected to slavery. It has been argued that allowing immigrants to benefit under affirmative action has created the anomalous result whereby affirmative action is used to remedy the effects of past discrimination in respect of people who have *not* suffered from discrimination *in* the US.[155]

It has been held that recent immigrants have not been in the US long enough (and discrimination faced in their native countries cannot justify violating the equal protection rights of US citizens) to have experienced the degree of discrimination or to have been affected by such discrimination in the way long-time African-Americans have.[156] Such recent immigrants are not likely to have been significantly affected, either directly (through discrimination faced personally in the US) or indirectly (through discrimination faced by their ancestors), to an extent comparable with that of African-Americans. Such people, then, do not only take jobs from those whom affirmative action is supposed to benefit, but also from deserving whites and other minorities.

Excluding recent immigrants from affirmative action raises two issues. First, there are immigrants who, though members of groups historically discriminated against in the US, have not lived a significant part of their lives in an area of the country (mainly the south) where, historically, the most insidious discrimination occurred.[157] This argument, based on

154 See chapter 5 par 4.3.2 above.

155 *Ibid*.

156 *Ibid*.

157 *Ibid*. The added element of geographical location of people discriminated against has played a role in the US, while this is not the case in South Africa or Canada.

geographical differences, presumes that the adverse effects of past societal discrimination result only when members of the disadvantaged groups (or their ancestors) have been subjected to the most pervasive discriminatory practices and laws. However, it ignores social and racial discrimination, which affect everybody in a society ridden for centuries by systemic, racial discrimination.[158] In this regard, Marshall J in *Bakke*[159] argued that, with regard to African-Americans, 'no one' has managed to escape the impact of historical discrimination in America.[160] Thus, it has been argued, whereas recent immigrants have most likely been affected very little, if at all, by past discrimination, those living in the US for a significant period of time (and even more so those whose ancestors have lived in the US), regardless of the location in the country, have been 'somewhat' residually affected by past discrimination.[161]

Secondly, excluding recent immigrants involves determining how long a person must have lived in the US in order to be considered 'sufficiently affected' by past discrimination so as to qualify as a beneficiary of affirmative action.[162] It has been held that no matter when recent immigrants came to the country, their possible entitlement to the benefits of affirmative action cannot be based on the residual effects of past societal discrimination against their ancestors. Further, recent immigrants who came to the US after the Civil Rights Act was implemented are less likely to have been personally subjected to the pervasive, discriminatory practices and laws that were in place prior to that time. However, it has been pointed out that US society did not become colour-blind overnight upon passage of the Civil Rights Act in 1964, nor did all opportunities suddenly become available to everyone at that time.

158 See chapter 5 par 4.3.3 above.

159 98 S Ct 2733 (1978) at 2804.

160 See chapter 5 par 4.3.2 above.

161 See chapter 5 par 4.3.2 above.

162 *Ibid*.

Accordingly, it has been recommended that the line regarding immigrant eligibility for affirmative action benefits must be drawn well after 1964.[163] Exactly where to draw this line should, it has been suggested, be left to the politicians.

4.2.2 Canada

As with the US, the Canadian situation is quite different from the South African position with regard to citizenship as a requirement in order to benefit from affirmative action. It was seen above that the use of citizenship in the context of affirmative action is not regulated in legislation, as is also the case in South Africa and the US.

Citizenship is currently a non-issue in the Canadian affirmative action context.[164] This has been explained on the basis of two broad themes: (a) large-scale immigration into Canada in order to expand its small population and economy (something not found in South Africa), which immigrants have accounted for a large percentage of the population since the early days (and still do today); and (b) though initially excluded from Canadian society and denied citizenship, subsequent efforts were made to 'integrate' such immigrants. Firstly, Canadian citizenship was granted to all people resident in Canada in the late 1940s (unlike South Africa which attended to this only in the early 1990s, but similar to the position in the US).[165] Citizenship is thus not as sensitive an issue as it currently is in South Africa due to the time lapse since rectifying the exclusion. A second step to integrate minorities resulting from immigration was taken in the mid-1980s when they were included as a designated group under the CEEA.[166] This Act aims to integrate minorities

163 *Ibid*.

164 See chapter 6 par 4.3.1 above.

165 See chapter 4 par 2.3; chapter 5 par 4.3; chapter 6 pars 4.3.3; 4.3.4 above.

166 See chapter 6 pars 4.1.2.2; 4.1.2.2(a)(iii) above.

in the workplace by way of affirmative action.

In terms of the principles of international law, which require that affirmative action measures must not be contrary to the non-discrimination principle,[167] it may then be said that, in the Canadian context, citizenship (as a criterion in order to benefit from affirmative action, over and above being a member of one of the designated groups) is a ground *not* relevant, and *not* used. The historical context, the nature of the group/s that is/are to be affirmed, and the timing of rectifying the exclusion has therefore determined that citizenship cannot be used fairly as a criterion for benefiting from affirmative action.

It was seen that, in Canada, newcomers are generally encouraged to maintain their cultural heritage, as opposed to the US approach of assimilating migrant cultures.[168] Canada is thus described as a 'mosaic', in contrast to the 'melting pot' of the US which cherishes 'sameness'.[169]

167 See chapter 2 pars 2.1.2.4(c)(i)A; 2.1.2.4(c)(i)B above.

168 See chapter 5 4.3.2; chapter 6 par 4.3.2 above.

169 *Ibid*. The position of Canada should further be distinguished from that of the US, in that the latter has never experienced problems with regard to the size of its population or economy.

4.3 Recommendations

[11] To effect the appointment of South African citizens under affirmative action, it is recommended that, as a matter of priority, the Department of Labour take a formal policy decision that South African citizens be appointed and promoted under affirmative action in the workplace.[170] Such a policy decision should unambiguously make it clear that affirmative action is meant for those South African citizens who suffered disadvantage under patriarchy and apartheid: foreigners who have not shared in this history, should not reap these benefits.

[12] It is recommended that such a decision be preceded by debate between business, labour and the government at NEDLAC, as was done with the Employment Equity Bill.[171] Again, the Commission for Employment Equity will have to advise the Minister of Labour on such a decision.[172]

[14] Such a policy decision must be reflected on the Department's website under 'Frequently Asked Questions'.[173] It is suggested that the current ambiguous answer to the question 'Do foreign nationals qualify as members of designated (disadvantaged) groups?' in section 7 be amended to read as follows:

> 'Foreign nationals may neither be included in the various designated groups as reported by the employer, nor would it would be acceptable to use these employees as the basis for measuring and setting numerical goals.'

170 It is recommended that the issue of affirmative action for previous migrant workers in mining and agriculture be dealt with separately.

171 See chapter 3 par 3.5.2.2 above.

172 See s 30(1)(c) of the EEA.

173 See chapter 4 par 2.3.3.5 above; http://www.labour.gov.za/docs/legislation/eea/faq.html.

[14] It is recommended that a corresponding amendment be made to the EEA to ensure legal certainty.[174] As an amendment will be open to challenge under the limitations clause of the Constitution, it should be carefully worded so as not to constitute an unjustifiable limitation to the right of equality.[175] In this regard, it is suggested that the following provision be inserted under section 4 of the EEA, headed 'Application of this Act':

> '(4) Chapter III[176] of this Act applies only to citizens of the Republic, regardless of the way in which citizenship was acquired.'

[15] Corresponding amendments will have to be made to the Regulations[177] to the EEA and to the Code of Good Practice: Preparation and Implementation of Employment Equity Plans to ensure legal certainty. The Commission for Employment Equity must advise the Minister of Labour on such amendments.[178]

[16] When considering recently naturalised citizens belonging to one of the designated groups for affirmative action, two broad considerations are submitted on the basis of the American experience.[179] On the one hand, there are recently naturalised citizens who have not lived a significant part of their lives in South Africa. On the other, there are long-time, naturalised citizens who have lived and worked in the country for a substantial period of time. The former have most likely been affected very little, if at

174 See ss 73; 75 of the Constitution in this regard. Again, the Commission for Employment Equity must advise the Minister of Labour on such an amendment (see s 30(1)(c) of the EEA).

175 Section 36 of the Constitution (see chapter 3 par 3.5.1.3(c) above).

176 Chapter III of the EEA relates to affirmative action.

177 Section 30(1)(b) of the EEA.

178 See s 54(1)(b) of the EEA.

179 See chapter 5 par 4.3.2; par 4.2.1 above.

all, by past discrimination under apartheid, while the latter have most probably been affected.

If it is argued that recently naturalised citizens should be excluded, the question then arises: what time period in South Africa may be considered 'sufficient' to qualify as a beneficiary of affirmative action? In this regard, it can be argued that immigrants who came to South Africa after the interim Constitution came into operation are not likely to have been subjected to the discriminatory practices and laws that were in place prior to that time. However, it should again be kept in mind that the country did not become discrimination-free overnight upon passage of the interim Constitution. The effects of systemic discrimination in the country may linger on for many years to come.

With regard to naturalised citizens belonging to one of the designated groups, it is recommended, in terms of the discussion above, that a date well after the interim Constitution came into operation be set as a cut-off date for such people to benefit from affirmative action. Immigrants who have acquired citizenship after such date should not benefit from affirmative action under the EEA. This date should be debated at NEDLAC between business, labour and the government before implementation by the Department of Labour.[180]

[17] Over and above ensuring affirmative action for citizens, a broader effort must be made by government and business to ensure that South African citizens acquire jobs in the South African labour market.[181] Generally, a sensible approach may be to consider nationals first for available jobs, and, only if no such persons with suitable qualifications can be found, can the employer go wider and recruit foreigners. The Immigration Act has in fact

180 The question of affirmative action for immigrants as a group will depend on future demographic changes in South Africa. It is submitted that this is however a totally different issue from that in respect of current affirmative action for South African citizens under the EEA who were disadvantaged mainly by apartheid.

181 Though some argue that immigration is a short-term solution to skills shortages, others hold that immigrants by and large do not take other people's jobs, but that they in fact create jobs (see Financial Mail 'Skills the Real Issue' 25 March 2005).

laid the basis for such an approach. On the one hand, it provides that work permits for certain 'quota' work may be issued only if the foreigner falls within certain categories determined by the Minister of Home Affairs.[182] A 'general' work permit may be issued only if the prospective employer satisfies the Department of Home Affairs that, despite a diligent search, it has been unable to employ a person in the country with qualifications equivalent to those of the applicant.[183] It is further provided that permanent residence permits may be granted only if it can be shown that the position and related job description were advertised in the prescribed form and that no 'suitably qualified' citizen or resident has been found to fill the position.[184] Moreover, such a foreigner must also have extraordinary skills or qualifications.[185]

On the other hand, the Immigration Act provides that the South African economy should have access to the 'needed' contributions of foreigners. Such contributions are, however, explicitly stated so as not to adversely impact on the rights and expectations of South African workers.[186] This approach clearly involves a weighing up of interests and can only be adopted if there is cooperation between the Department of Labour, the Department of Home Affairs and the Department of Foreign Affairs. It is recommended that particular attention be given to enforcing the provisions of the Immigration Act in order to ensure that priority is given to South African citizens as far as available jobs are concerned.

182 See s 19(1) of the Immigration Act.

183 See s 19(2)(a) of the Immigration Act. In this regard, it is suggested that, once a foreigner has been appointed in terms of these criteria, he or she cannot be promoted to, or be appointed in, another job on the basis of affirmative action. If such a person eventually acquires South African citizenship, it is submitted that promotion to, or appointment in, another job on the basis of affirmative action would not be apposite.

184 Section 27(a) of the Immigration Act.

185 Section 27(b) of the Immigration Act.

186 See Preamble and s 2(j) of the Immigration Act. The Immigration Act also provides that the needs and aspirations of the age of globalisation should be respected, that the Provisions of the General Agreement on Trade in Services must be complied with, and that xenophobia must be prevented and countered (Preamble).

5 POSTSCRIPT

South Africa is in its infancy as far as affirmative action is concerned, in contrast to the US which has some 40 years of experience, and to Canada with about 20 years of experience.[187] The success and credibility of affirmative action in South Africa is crucial, in the sense that a majority has to be affirmed. The consequences of unsuccessful affirmative action in South Africa will impact not only on the members of the designated groups on an individual basis (that is, on their self-esteem and dignity), but also, in a broad sense, on co-employees, employers, the economy of the country, foreign investment and global competitiveness.

Political power and support for affirmative action by a majority for a majority in South Africa will probably lead to a more liberal and vigorous application of affirmative action in contrast to America and Canada (to a lesser extent), where political support has been inconsistent and where calls to abolish affirmative action (particularly in the US) are currently growing stronger.[188] This again brings to the fore the issue of the temporariness of affirmative action.

This debate regarding temporariness has already been opened in South Africa, though, it is submitted, prematurely.[189] It must be kept in mind that the EEA has as its

187 See chapter 1 par 4; chapter 3 par 3.5; chapter 5 par 3.5; chapter 6 pars 3.5.3; 3.6.5 above.

188 See chapter 1 par 4; chapter 5 par *Evaluation of Croson*; 5.4 above.

189 See Business Day 'Lekota Takes on Race Labels' 2 June 2004 where the Minister of Defence stated that a time would have to come in the 'near future' when representivity according to race would be scrapped. Though he acknowledged the theoretical targets that were set for different race groups, he expressed the yearning, 'when do we cease to be black, white, Indian and Coloured but are simply all South Aricans?'. This question was posed by the Minister to 'open the debate on the matter'. For some of the responses to this, see Rapport 'Lekota het Moed' 6 June 2004; Business Day 'Change Dare Not Stop' 11 June 2004; Rapport 'Waarheen Gaan Lekota Debat?' 20 June 2004; Beeld 'Regstellende Aksie Kán Nog Nie Verdwyn' 25 June 2004 where the deputy Minister of Justice stated that South African society was, as yet, far from being equal. It is submitted that this last statement is correct.

purpose 'equitable representation in all occupational categories and levels in the workforce'.[190] It is submitted that this is a measurable purpose. However, no formal cut-off date for affirmative action is provided for in either the Constitution or the EEA. Nevertheless, it seems obvious that employment equity plans will have to be extended for a substantial period of time to attain 'equitable representivity' in South African workplaces, a country with a history of hundreds of years of discrimination in employment and other areas of society. It is further submitted that it is important that the inequalities of the past be addressed effectively to ensure the stability of the political order and of society in the long term.[191] Moreover, addressing inequality effectively will also imply that disadvantage will, over time, be erased so that the designated groups will accordingly no longer be entitled to benefit under affirmative action.[192] In other words, the object of the affirmative action measures is limited to 'full and equal enjoyment of all rights and freedoms', and nothing more.[193]

A further issue that comes to the fore is whether it is possible to achieve this purpose in the light of the actual experience in other countries that have been practising affirmative action for many years.[194] It appears that the general practice of affirmative

190 See s 2(b) of the EEA. See also the Labour Market Report 150 where it was recommended that the affirmative action and employment equity plans should emphasise the rate of change rather than the absolute level of achievements.

191 Rapport 'Uitdagings van Regstelling' 11 July 2004.

192 See chapter 3 fn 249 above. A related issue is whether diversity (as a requirement of affirmative action in terms of the EEA) (s 15(2)(b)) or as a need of business imperatives in view of globalisation) will require affirmative action to be continued in future.

193 Davis et al *Fundamental Rights* 60.

194 Note, again, that most countries start out with an affirmative action programme consistent with the ideal of equality of opportunities. However, this ideal is often gradually replaced by that of substantive equality, under pressure of political or social motives (see chapter 2 pars 3.1.3; 3.1.4 above). Moreover, in practice it is found that national legislation usually starts with an affirmative action policy that is aimed at a particular disadvantaged group. Yet, the policy often expands to other groups. This is particularly true of the US (see chapter 5 par 3.8 above).

action has a tendency to become permanent.[195] This has been observed in Malaysia, India and Pakistan, all with legal cut-off dates, but with affirmative action continuing far beyond those dates.[196]

Moreover, it has been conceded that the privileges of affirmative action are not easily removed, even in situations where the political majority has conferred these privileges and can, in theory, withdraw them (as, for example, in the US).[197] In this regard, it has been argued that affirmative action is a 'continuous process' in which one allocation of goods determines the outcome of another in a seemingly endless chain.[198] Also, because of the different ways in which inequality can be measured and because of the different types of inequalities present in particular societies, it is doubtful whether the ideal state of equality will ever be reached, or, for that matter, will be *recognised*, if achieved.[199] Lastly, it is not clear whether government or the courts will eventually pronounce on the equalisation of the workplace.[200]

195 See Van Wyk Thesis 13; UNESC Final Report Prevention of Discrimination par 106.

196 Van Wyk Thesis 13.

197 *Ibid*.

198 Faundez *Affirmative Action* 1.

199 Van Wyk Thesis 13-4. In the workplace, the efficacy of affirmative action can be measured in terms of the number of jobs, promotions or wage increases which beneficiaries have obtained over a period of time (Faundez *Affirmative Action* 47). This procedure will yield a numerical result, which, although helpful, may be ambiguous. Affirmative action often has other objectives such as contributing to the eradication of racism, facilitating the integration of minorities in society at large or promoting self-respect among programme beneficiaries (*ibid*). While it is possible to systematically evaluate whether affirmative action has achieved these other objectives, it is not likely that the result of such an evaluation can be expressed numerically (*ibid*).

200 In this regard, see, for example, *George* (1996) 17 ILJ 571 (IC) at 593C-F.

In conclusion, what seems clear, though, is that the rationale for affirmative action will have to be revisited continuously, and particularly in the longer term, both to affirm the principle of substantive equality, which recognises equality for all, and to ensure that the measures in fact reach their original, intended beneficiaries.[201]

201 See chapter 1 par 1 above. It is important to realise that some individuals will deserve higher rewards because they make more valuable contributions (Banton *Discrimination* 78-9). For example, because groups differ in their cultures, there will be some that invest more in their children's upbringing so that they, in turn, command a higher price for their labour. Such groups will have higher average incomes.