Constitutional Standards for Affirmative Action in South Africa: A Comparative Overview

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1. Introduction

A major legislative development in South Africa took place with the coming into effect of the Employment Equity Act.[1] The Act seeks to implement the broad equality objectives of the Constitution of the Republic of South Africa[2] in the field of employment by prohibiting all forms of unfair discrimination in the workplace, and, in addition, requiring all so-called designated employers[3] to institute affirmative action measures in favour of black people,[4] women and people with disabilities. Affirmative action is defined as "measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer."[5] Section 6(2) of the Act also states that it is not unfair discrimination to take affirmative action measures consistent with the purposes of the Act.

The Act provides little guidance on the legal standards for valid affirmative action. The vexing equality problems that are normally associated with the implementation of similar programmes are therefore left to be resolved through judicial interpretation and application of the Act. The Employment Equity Act itself only requires the Act to be interpreted in compliance with the Constitution and the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimina-

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[1] Act No. 55 of 1998. Chapter 2 of the Act (dealing with the prohibition of unfair employment discrimination) came into operation on 9 August 1999, and chapter 3 (dealing with the affirmative action obligations of employers) on 1 December of the same year.

[2] Act No. 108 of 1996.

[3] Section 1 defines designated employers to mean (a) an employer with more than 50 employees, or (b) an employer with less than 50 employees, but with an annual turnover of an amount equal to or in access of the applicable annual turnover of small businesses specified in schedule 4 to the Act. The Act applies to organs of state, excluding the National Defence Force, National Intelligence Agency and the South African Secret Service.

[4] "Black people" is defined in section 1 of the Act as a "generic term which means Africans, Coloureds and Indians". The term "Coloureds" in the South African context refers to people of mixed racial descent.

[5] Section 15.

tion in Respect of Employment and Occupation.[6] The most important directly applicable constitutional provision for the interpretation of the Act is section 9(2), which reads as follows:

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

There is at present no judgement of the South African Constitutional Court in which the implications of this section for the validity of affirmative action has been addressed. An attempt will be made in this study to consider the implications of the Court's general equality jurisprudence for affirmative action. The point of departure is the Court's endorsement of substantive equality and the analytical tests for unfair discrimination developed to give effect to that particular understanding of equality. This will be put in a comparative relief with reference to approaches adopted in other jurisdictions.

2. Substantive Equality

The Constitutional Court has held that the wording of the equality clause of the South African Constitution is indicative of a choice in favour of a substantive understanding of equality.[7] In *President of the Republic of South Africa and Another v Hugo*[8], Goldstone J emphasised the need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is the goal, that goal cannot be achieved by insisting upon identical treatment in all circumstances. Ackermann J made the same point in *National Coalition for Gay and Lesbian Equality v Minister of Justice*[9]:

> "It is insufficient for the constitution to merely ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."[10]

The Court has sought to translate this view of equality into a practical test for unfair discrimination. Sachs J remarked in *National Coalition for Gay and Lesbian*

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[6] Section 3(a).

[7] See *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 (CC) at par. 62: "[s]ubstantive equality is envisaged when section 9(2) unequivocally asserts that equality includes 'the full and equal enjoyment of all rights and freedoms'."

[8] 1997 (6) BCLR 708 (CC) at 729F-G.

[9] 1998 (12) BCLR 1517 (CC) at 1565H-1566A.

[10] See also Langa J in *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at par. 46: "[s]ection 8 [of the interim Constitution] is premised on the recognition that the ideal of equality will not be achieved if the consequences of those inequalities and disparities caused by discriminatory laws and practices in the past are not recognised and dealt with."

Equality v Minister of Justice and Others[11] that one of the great gains achieved by following a situation-sensitive human rights approach is that the analysis focuses not on abstract categories, but on the lives as lived and the injuries experienced by different groups in society. The Court has therefore required that the investigation into the fairness of discrimination should be directed primarily at the experience of the victim of discrimination. In the final analysis it is the impact of discrimination on the complainant that determines its fairness.[12] The contextual sensitivity required by the substantive view of equality may reveal that in specific situations the impact of a discriminatory act affects men differently from women, or whites differently from blacks. In South Africa, groups are the bearers of different histories of marginalisation and oppression with ongoing results that substantially affect their present status. The grounds of discrimination mentioned in section 9 of the Constitution are laden with divergent historical experiences and degrees of disadvantage suffered, or advantages enjoyed. [13] In the *Hugo* case, Goldstone J went on to say:

> "Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context."[14]

To determine whether the overall impact of a discriminatory measure is one which furthers the constitutional goal of equality or not, a number of contextually relevant factors must be considered. These include the position of the complainants in society; their vulnerability and history (e.g. whether the group the complainants belong to has suffered from patterns of disadvantage in the past); the purpose, nature and history of the discriminatory provision[15] (whether it relieves or adds to group disadvantage); and the extent to which the discrimination affects the rights of the complainants.

3. Affirmative Action and Equality

Nowhere have the courts succeeded in bringing about a stable resolution of the debate on the relationship of affirmative action and equality. For over twenty-five years, few other themes have exposed the divisions in the United States Supreme Court more graphically than affirmative action.[16] The underlying differences are

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[11] 1998 (12) BCLR 1517 (CC) at par. 126.

[12] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at 1510E.

[13] See *id* at par. 49 where the Court stated that "[w]hat the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and oppress persons who have had, or who have been associated with, these attributes or characteristics."

[14] 1997 (6) BCLR 708 (CC) at 729G-H.

[15] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 CC at par. 14 and 26.

[16] See Irons *Brennan v Rehnquist. The battle for the Constitution* (1994) 241 *et seq.*

brought to the surface whenever the issue of the appropriate way of dealing with the legacy of past discrimination is mooted. The divisions originate from divergent perspectives on equality, which ultimately translate into conflicting sensitivities when the instrumental human cost associated with affirmative action is constitutionally evaluated. In the result, no consensus has been reached on the objectives that could justify race, gender or disability-based preferential measures, as well as the extent of the burden that such measures may legitimately place upon the rights of others.

Opponents of affirmative action do not dispute the legitimacy of remedies to compensate for identifiable individual acts of discrimination, but question the accordance of preferential treatment based on membership of a racial or gender group. This, it is contended, constitutes the very same type of discrimination that caused the need for the remedy in the first place.[17] They argue that race or gender-based allocation of societal resources causes resentment on the part of innocent members of the non-preferred groups and promotes dependence on government largess rather than self-sufficiency. In addition, beneficiaries of affirmative action are stigmatised as undeserving of the benefits that they secure and accomplishments that they achieve.[18] Amongst the present incumbent justices of the Supreme Court of the United States, Justice Thomas has emerged as a strong opponent of group-based remedies. While still chairman of the Equal Employment Opportunity Commission, he argued as follows:

> "I continue to believe that distributing benefits on the basis of race or gender, whoever the beneficiaries, turns the law against employment discrimination on its head. Class preferences are an affront to the rights and dignity of individuals – both those individuals who are directly disadvantaged by them, and those who are their supposed beneficiaries. I think that preferential hiring on the basis of race or gender will increase racial divisiveness, disempower women and minorities by fostering the notion that they are permanently disabled and in need of handouts, and delay the day when skin color and gender are truly the least important things about a person in the employment context ... Any preferences given should be directly related to the obstacles that have been unfairly placed in those individuals' paths, rather than on the basis of race or gender, or on other characteristics that are often poor proxies for true disadvantage."[19]

Those in favour of affirmative action, on the other hand, contend that the only way to compensate for the historical disadvantage of excluded groups is through the prospective race or gender-conscious allocation of educational, employment and political resources. The long history of treating blacks, women and the disabled as inferior, has left a legacy of pervasive practices of systemic discrimination, where race, gender and disability continue to operate, consciously or unconsciously, as a cause of disadvantage. Previously excluded groups continue to be

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[17] Spann *The law of affirmative action. Twenty five years of Supreme Court decisions on race and remedies* (2000) 8.

[18] *Ibid.*

[19] Thomas "Affirmative action goals and timetables. Too tough? Not tough enough!" *Yale Law and Policy Review* (1987) 403, 411.

systematically under-represented relative to their proportion of the population in the allocation of educational and employment opportunities. Mere prospective race or gender neutrality does not provide adequate compensation for past inequities, but only freezes the existing advantages that white males have over other groups.[20] True equality of opportunity is only reached if the disadvantageous social and historical conditions resulting from past discrimination, which detrimentally affect groups in the competition for employment opportunities, are eliminated through affirmative action programmes. Far from contradicting equality, such programmes are an essential means to bring about true equality of opportunity.

This notion of equality was already at work in the United States Supreme Court's condemnation of employment requirements, which were acially neutral but operated as "built-in headwinds" against disadvantaged groups, in *Griggs v Duke Power Co.*[21] Burger CJ observed that "[t]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and to remove barriers that have operated in the past to favour an identifiable group of white employees over other employees. Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[22] A majority of the court extended this reasoning to affirmative action in *United Steelworkers of America v Weber.*[23] They rejected the argument of the plaintiffs that Title VII of the Civil Rights Act 1964 should be interpreted literally to prohibit all racial distinctions. On the basis of what is essentially a purposive reading of the Act, the majority concluded that the Act was intended as "a spur or a catalyst to cause employers and unions to self-examine and to self-evaluate their employment practices and to endeavour to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."[24] The Act was, therefore, not be read as an absolute prohibition of all private, voluntary, race-conscious affirmative action efforts to hasten the elimination of such vestiges and to abolish traditional patterns of racial segregation and hierarchy.[25] The purpose of affirmative action, according to Justice Brennan in *Local 28, Sheet Metal*

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[20] Spann (note 17) 7.

[21] 91 SCt 849 (1971).

[22] *Id* at 853.

[23] 443 US 193, 99 SCt 2721, 61 LEd 2d 480 (1979).

[24] 99 SCt 2721 at 2728 (1979) (citation omitted).

[25] See also the dissent of Justice Stevens in *Adarand Contractors Inc v Pena* 515 US 200, 115 SCt 2097 at 2120, 132 LEd 2d 158 at 191–192 (1995): "[t]here is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavoured group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to 'govern impartially' ... should ignore this distinction."

Workers' International Association v EEOC[26], "is not to make identified victims whole, but rather to dismantle prior patterns of employment [and societal] discrimination to prevent discrimination in the future. Such relief is provided to the class as a whole rather than to individual members; no individual is entitled to relief, and the beneficiaries need not show that they themselves are victims of discrimination." He believed that in some cases, particularly if there has been a long history of discrimination, it may become necessary to resort to some form of preferential remedy in order to make meaningful equality of opportunity possible. In those cases, affirmative race-conscious relief may be the only means available to ensure equality of employment opportunities and to eliminate those discriminatory practices and devices, which have fostered racially stratified job environments to the disadvantage of minority citizens. He believed that affirmative action "promptly operates to change the outward and visible signs of yesterday's racial distinctions and thus, to provide an impetus to the process of dismantling the barriers, psychological or otherwise erected by past practices."[27]

Some Canadian courts have been explicit in their commitment to substantive equality when interpreting legislative affirmative action provisions.[28] In *Canadian National Railway Co v Canada (Canadian Human Rights Commission)*[29], Dickson CJ reasoned that the purpose of an affirmative action programme is to break a continuing cycle of systemic discrimination. The goal is not to compensate past victims or even to provide new opportunities for specific individuals who have been unfairly refused jobs or promotion in the past, but to ensure that future applicants and workers from the affected groups will not face the same insidious barriers that blocked their forebears. In *Ontario (Human Rights Commission) v Ontario (Ministry of Health)*[30], the Ontario Court of Appeal interpreted the affirma-

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[26] 478 US 421 at 474, 106 SCt 3019 at 3049 (1986).

[27] 478 US 421 at 448–449, 106 SCt 3019 at 3036 (1986). In *United States and Taxman v Board of Education of Piscataway* 91 F3d 1547 (3rd Cir 1996), the court held that the two purposes of Title VII of the Civil Rights Act 1964 are the prohibition of employment discrimination and the "ending of the segregative effects of discrimination". Referring to the latter, the court noted that the significance of this second corrective purpose cannot be overstated. It is only because Title VII was written to eradicate not only discrimination *per se* but the consequences of prior discrimination as well, that racial preferences in the form of affirmative action can co-exist with the Act's anti-discrimination mandate. See also *Vanguards of Cleveland v City of Cleveland* 23 F3d 1013 (6th Cir 1994) at 1019–1021.

[28] Cf., however, *Shewchuk v Ricard* (1986) 2 BCLR (2d) 324 (CA), (1986) 28 DLR (4th) 429 (BCCA) and *Aspit v Manitoba (Human Rights Commission)* (1987) 50 Man R (2d) 92 (QB), where the approach was adopted that affirmative action is an exception to the principle of equality and needs to be evaluated strictly. For a discussion of Canadian jurisprudence on the rationale of affirmative action, see Iacobucci "Antidiscrimination and affirmative action policies: economic efficiency and the Constitution" *Osgoode Hall Law Journal* (1998) 317–331.

[29] [1987] 1 SCR 1114 at 1143.

[30] (1994) 21 CHRR (Ont CA) D/259 at D/265, quoting with approval Sheppard *Litigating the relationship between equity and equality* (Study paper of the Ontario Law Reform Commission) Toronto (1993) 28.

tive action provisions of the Ontario Human Rights Code 1990[31] and the Canadian Human Rights Act 1985[32] to reinforce the important insight that substantive equality requires positive action to ameliorate the conditions of disadvantaged groups. One of the important purposes of the provisions is to protect affirmative action programmes from being challenged as violating the formal equality provisions contained elsewhere in the Code or Act. Affirmative action, according to the court, is aimed at

> "achieving substantive equality by enabling or assisting disadvantaged persons to acquire skills so that they can compete equally for jobs on a level playing field with those who do not have the disadvantage ... The purpose of s. 14(1) is not simply to exempt or protect affirmative action programs from challenge. It is also an interpretative aid that clarifies the full meaning of equal rights by promoting substantive equality."[33]

Section 9(2) of the South African Constitution is framed in a way that leaves no doubt as to what idea of equality it subscribes to and how it considers affirmative action to be related to the promotion of equality. It begins by stating that "[e]quality includes the full and equal enjoyment of all rights and freedoms" and, as was indicated earlier, the Constitutional Court has interpreted this phrase to indicate a commitment to substantive equality.[34] Section 9(2) proceeds to link affirmative action measures to the realisation of (substantive) equality by providing that "[t]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken." Such measures are permitted because they are seen as

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[31] Section 14(1). This section has now been repealed by the Job Quotas Repeal Act 1995. See the discussion of Tarnopolsky *Discrimination and the law* (1994 updated) 4–142 *et seq.*

[32] Section 16.

[33] (1994) 21 CHRR (Ont CA) D/259 at D/265. A limited form of affirmative action in favour of women was also argued for on the basis of a substantive notion of equality in *Kalanke v Freie Hansestadt Bremen* [1996] 1 CMLR 175 (ECJ). The Advocate General argued that "[t]he principle of substantive equality necessitates taking into account the existing inequalities which arise because a person belongs to a particular social group. It enables and requires the unequal, detrimental effects which those inequalities have on the members of the group in question to be eliminated or, in any event neutralised by means of special measures. Unlike the principle of formal equality, which precludes basing unequal treatment of individuals on certain differing factors, such as sex, the principle of substantive equality refers to a positive concept by basing itself precisely on the relevance of those different factors themselves in order to legitimise an unequal right, which is to be used in order to achieve equality as between persons who are regarded not as neutral but having regard to their differences. In the final analysis the principle of substantive equality complements the principle of formal equality and authorises only such deviations from that principle as are justified by the end which they seek to achieve, that of securing actual equality." See also *Marschall v Land Nordrhein Westfalen* Case C-409/95 [1998] 1 CMLR 547 at par. 29; *Badeck and Others v Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen* Case-158/97 decision of 28 March 2000 at par. 32; *Mahlburg v Land Mecklenburg-Vorpommern* Case C-207/98, decision of 3 February 2000 at par. 26; *Caisse Nationale D'Assurance Vieillesse des Travailleurs Salaries (CNAVTS) v Thibault* Case C-136/95 [1998] 2 CMLR 516 (ECJ); *Dekker v Stichting Vormingscentrum voor Jong Volwassen Plus* Case 177/88 [1990] ECR 1–3941.

[34] See also Kentridge "Equality" in Chaskalson *et al Constitutional law of South Africa* (1996 updated) 14–59.

a valid means of achieving the substantive equality of those disadvantaged by unfair discrimination.[35]

The notion of substantive equality does not only provide a mandate for affirmative action, it is also the constitutional standard to distinguish between constitutionally legitimate and illegitimate forms of affirmative action. Section 9(2) obviously does not state that all measures equipped with an affirmative action label will automatically fulfil all the substantive equality requirements of the Constitution.[36] Neither is it enough that the purpose of such measures is to protect or advance previously disadvantaged groups, since this would satisfy but one of the substantive equality requirements.[37]

The Constitution therefore protects affirmative action measures that objectively satisfy all the requirements of substantive equality. In concrete terms, an affirmative action measure will comply with the constitutional requirements for substantive equality only if it meets the rationality and fairness requirements of section 9 of the Constitution, and if not, it can be justified under section 36(1). As was indicated in par. 3 above, these requirements were developed by the Constitutional Court in a conscious attempt to give practical expression to the notion of sub-

[35] See De Waal/Currie/Erasmus *Bill of Rights handbook* (1999) 204; Kentridge (note 34) 14–59; Van Reenen "Equality, discrimination and affirmative action: an analysis of section 9 of the Constitution of the Republic of South Africa" *SA Public Law* (1997) 161–162.

[36] Cf. *Ontario Human Rights Commission v Ontario (Ministry of Health)* (1994) 21 CHRR D/259 at D/266. The majority of the Ontario Court of Appeal reversed the lower court's decision and held that section 14(1) of the Code does not preclude review of an affirmative action programme. Weiler J noted that while section 14(1) of the Ontario Human Rights Code was designed to protect affirmative action programmes from challenges based on their inherent violation of the formal equality provisions of the Code, it was also intended to promote substantive equality.

[37] Some authors have interpreted section 9(2) of the Constitution to imply that any racial- or gender-based remedial measure need not comply with the requirements of fairness and proportionality: see Ackermann "Equality and the South African Constitution: the role of dignity" *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2000) 549. It is submitted that section 9(2) only addresses the issue of the legitimacy and importance of the purpose of measures differentiating on a prohibited ground, i.e. one aspect of the fairness and proportionality inquiries only. It authorises the adoption of differential measures for a specific purpose, namely the protection and advancement of those disadvantaged by discrimination. This does not exclude the applicability of the fairness and proportionality requirements as such. It does, however, significantly affect the application of the fairness and proportionality tests, in so far as the appropriate standard of review is concerned. Briefly, the effect of section 9(2) is that in considering the "factors" of the nature of the differential measure and the importance of its purpose in the course of the fairness or proportionality inquiries, courts will be bound to take judicial notice of the legitimacy of such measures and accord their remedial purpose the high importance intended by the Constitution in the process of weighing them against conflicting or competing interests. Unlike the American approach, therefore, such measures will generally not, because of the mere fact that they differentiate on the basis of a prohibited ground, such as race, be subject to strict judicial scrutiny. This will afford the recipient of affirmative action a distinct advantage in the judicial determination of the validity of affirmative action, since such measures will generally be judged by a more lenient standard. However, because the fairness and proportionality of a differential measure do not depend on its remedial nature and purpose only, but are ultimately determined with reference to the cumulative effect of all relevant factors referred to in par. 2 above, note must also be taken of the impact of such measures on the rights and interest of those detrimentally affected by it. For a similar argument regarding the interpretation of the affirmative action clause of the Canadian Constitution, see Gibson *The law of the Charter. Equality rights* (1990) 326 *et seq.*

stantive equality when applying the equality and non-discrimination clauses of the Constitution.[38]

4. Substantive Equality Requirements Applied to Affirmative Action

4.1. Rationality

In order to pass muster under section 9(1) of the South African Constitution, a measure restricting equality rights must be rationally connected to its purpose. The "rational connection" requirement, applied to affirmative action, means that the preferential treatment of designated groups must be logically connected to the purpose of achieving "the protection and advancement of persons, or categories of persons disadvantaged by unfair discrimination".[39] Affirmative action will lack such a rational foundation if the groups protected or advanced are not disadvantaged because of discrimination, and/or the measures themselves are not rationally capable of securing the protection or advancement of such groups in relation to the disadvantage suffered.[40] In the Canadian *Manitoba Rice Farmers* case,[41] the court stated:

> "In order to justify the program under section 15(2) [of the Canadian Charter], I believe there must be a real nexus between the object of the program as declared by the government and its form and implementation ... There must be a unity or inter-relationship amongst the elements in the program which will prompt the court to conclude that the remedy in its form and implementation is rationally related to the cause of the disadvantage."

The rationality criterion has been applied in a number of South African arbitration proceedings in respect of affirmative action. In *Durban City Council (Electricity Department) v SAMWU*,[42] the arbitrator held that an affirmative action objective does not support the appointment of coloured or Asiatic persons in job categories where there is already a preponderance of these groups. The evidence in *Durban City Council (Electricity Department) v Kalichuran*[43] showed that 23 % of middle management positions in the department were held by Indians, a percentage corresponding to their representation in the labour market. The spe-

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[38] See e.g. Ackermann J in *National Coalition of Gay and Lesbian Equality v Minister of Justice and Others* 1998 (12) BCLR 1517 at par. 58–64; *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at 729F-H.

[39] See the Canadian case of *Roberts v Ontario (Ministry of Health)* (1989) 10 CHRR D/6353: "[s]pecial programs aimed at assisting the disadvantaged individual or group should be designed so that restrictions within that program are rationally connected to the programme." The rational connection requirement was also applied in respect of affirmative action in *Tomen v Ontario Teachers' Federation* (1995) 95 CLLC 145, 182.

[40] See Kentridge (note 34) 14–37.

[41] *Manitoba Rice Farmers Association v Human Rights Commission (Man)* (1987) 50 Man R (2d) 92 (QB) at 101–102.

[42] (1995) 4 ARB 6.9.23.

[43] (1995) 4 ARB 6.9.5.

cific job category in question (manager area construction electricity) could therefore not be one in respect of which affirmative action in favour of Indian candidates should apply.[44]

The approach in most jurisdictions is that employers bear the onus of establishing the rationality of their affirmative action programmes.[45] In *Antoinete McInnes v Technicon Natal*,[46] the South African Labour Court held that the onus is on the respondent employer to show that in preferring a designated group member by reason of his race, it was adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.

Institutions implementing affirmative action without having conducted a proper organisational audit or other reliable means of establishing the nature and extent of the disadvantage suffered by designated groups in their workforce, may therefore have difficulty in proving the rationality of their programmes. In the absence of reasonably reliable statistical or other means of appraisal of the problem it wishes to address, the actual congruence of an employer's affirmative action programme with the objective of promoting the substantive equality of disadvantaged groups could be a matter of mere coincidence.[47] In the absence of credible evidence of discrimination-related under-representation, or no direction as to how an employer proposes to reach a defined percentage of designated group representation in identified job categories, an employer who uses unrestrained discretion in considering race, sex, etc., will be acting arbitrarily.[48] In *United States and Tax-*

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[44] See also the American case of *Hammon v Barry* 826 F2d 73 (DC Cir 1987). A college with a predominantly black faculty staff cannot justify the exclusion of whites on the ground that society generally and white institutions in particular discriminate against blacks and that there is a dramatic under-representation of black professors. Cf. also *Mississippi University for Women v Hogan* 458 US 718 (1982) at 728: the court struck down an all-female nursing programme because the state had failed to show that women lacked opportunities in the field of nursing. A State can evoke a compensatory purpose to justify an otherwise discriminatory classification only if members of the gender benefited by the classification actually suffer a disadvantage related to the classification.

[45] Cf. *Main Line Paving v Board of Education* 725 F Supp 1349 at 1363 (ED Pa 1989): the court found that although the government stated an important objective in the desire to overcome past discrimination against women in construction contracting, the program was not substantially related to that goal because the government presented no statistical evidence to show how women were disadvantaged and because it presented no evidence that any statistical disparity was caused by gender discrimination. See also *Commission v France* Case 312/82 [1988] ECR 6315 at 6336–6337, where the European Court of Justice did not uphold the positive action justification (in terms of art 2(4) of the Equal Treatment Directive) for measures in favour of women, because of a lack of evidence that the measures in question were in any way related to the purpose of alleviating employment-related disadvantage due to women's domestic responsibilities.

[46] (2000) 9 LC 6.15.1 at par. 33. See also *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd and Others* (1998) 19 ILJ 285 (LC) at 299G.

[47] See Selig "Affirmative action in employment after *Croson* and *Martin*: the legacy remains intact" *Temple Law Review* (1990) 9.

[48] See *Lanphear v Prokop* 703 F2d 1311 (DC Cir 1983); *Lilly v Beckley* 797 F2d 191 (4th Cir 1986).

man v Board of Education of Township of Piscataway,[49] the court held that the applicable affirmative action policy unnecessarily trammelled the rights of non-minority employees because it was premised on an undefined objective (promotion of diversity) without any indication of "how much is enough". The court noted:

> "While it is not for us to decide how much diversity in a high school facility is 'enough', the Board cannot abdicate its responsibility to define 'racial diversity' and to determine what degree of racial diversity in the Piscataway School is sufficient ... The affirmative action plans that have met with the Supreme Court's approval under Title VII had objectives, as well as benchmarks which served to evaluate progress, guide the employment decisions at issue and assure the grant of only those minority preferences necessary to further the plan's purpose ... By contrast, the Board's policy, devoid of goals and standards, is governed entirely by the Board's whim, leaving the Board free, if it so chooses, to grant racial preferences that do not promote even the policy's claimed purpose. Indeed, under the terms of this policy, the Board in pursuit of a 'racially diverse' work force, could use affirmative action to discriminate against those whom Title VII was enacted to protect. Such a policy unnecessarily trammels the interests of non-minority employees."

In one South African High Court case, the arbitrary nature of the affirmative action policy in issue was strongly highlighted. The issue in *Public Servants Association of South Africa and Another v Minister of Justice*[50] concerned the decision of the Department of Justice to earmark certain posts as "affirmative action posts", while others were to be filled in terms of the provisions of the Public Service Act then in force. This decision severely prejudiced a number of white male officials in the State Attorney's Office, who were not considered for 30 vacancies which existed at the time. The only persons from within the department who were invited to the interview were women with considerably less experience than the male employees who had expressed interest in the posts. The departmental earmarking of posts was done in terms of an interim arrangement with the Public Service Commission that allowed the department to proceed with the implementation of affirmative action even before the process of rationalisation in the department was completed and in the absence of any existing management plan. Swart J argued that section 8(3)(a) of the interim Constitution required affirmative action measures to be "designed" to achieve the adequate protection and advancement of disadvantaged groups. This he construed to be the antithesis of "mere intention and of haphazard or random action".[51] In the opinion of the court, the measures adopted by the department were indeed "somewhat haphazard, at random and over-hasty".[52] The department applied affirmative action without an over-all plan or directives from the Public Service Commission and adopted mea-

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[49] 91 F3d 1547 (3rd Cir 1996) at 1564 (citations omitted).

[50] 1997 (5) BCLR 577 (T). Cf. also *Thomas auf der Heyde v University of Cape Town* (LC) Case no 603/98 5 May 2000 at par. 63.

[51] 1997 (5) BCLR 577 (T) at 640H.

[52] *Id* 643B-C.

sures that were not intended to be implemented in the absence of a management plan. No explanation was given of the basis upon which such posts were reserved.[53] The court concluded that the special dispensation so granted amounted to nothing more than an untrammelled discretion of the department to earmark posts for designated groups without any over-all plan or policy.

In *MWU obo van Coller v Eskom*,[54] it was held that an employer cannot rely on affirmative action as a defence against a claim of racial discrimination in the absence of specific measures or a programme of action to reach specified numerical objectives. It is submitted that this statement needs to be qualified. A formal pre-existing plan with refined long, medium and short-term goals and timetables will not necessarily be required before an employer may implement affirmative action. For instance, in *Johnson v Transportation Agency, Santa Clara County*,[55] the American Supreme Court noted that given the obvious imbalance in the specific job category (in which no woman had ever been appointed), it was plainly reasonable for the employer to consider the applicant's sex as a factor in making appointments, even in the absence of any refined short-term goals.[56] This, however, is a far cry from the situation in the *Public Servants Association* case, which in effect concerned a rigid quota and the complete exclusion of white males from being considered, without any meaningful investigation into the availability of suitably qualified candidates from designated groups having taken place. Although the facts of the case would clearly also have justified the form of affirmative action at issue in the *Johnson* case, it is submitted that the court correctly decided that no factual basis had been established to justify the extent of the preference afforded to designated candidates and the total exclusion of non-designated candidates. In these circumstances, the reservation of posts amounted to arbitrary action.

The rationality requirement does not call for an affirmative action measure to be narrowly tailored to the purpose it professes to serve. In terms of the Constitutional Court's understanding of the rationality requirement, affirmative action measures are therefore not irrational or arbitrary only because of the fact that they are over- or under-inclusive.[57] The over-inclusiveness or under-inclusiveness of a discriminatory measure is, however, a factor of importance for judging its fairness or proportionality.

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[53] *Id* 644D-F. See also *Badenhorst v Department of Correctional Services*, unreported arbitration award, Case No FS 1395 (referred to in *PSA v Department of Correctional Services* [1998] 7 CCMA 6.9.4): "what concerns me is the fact that there is an Affirmative Action policy, but that this policy is so wide that it does not clearly identify boundaries of the policy and/or the persons whom the policy intends to benefit."

[54] [1998] 9 BALR 1089 (IMSSA) at 1093E-F, affirmed on review in *Eskom v Hiemstra* (1999] 10 BLLR 1041 (LC).

[55] 480 US 616, 107 SCt 1442, 94 LEd 2d 615.

[56] 107 SCt 1442 at 1454 (1987).

[57] *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC) at 768G-H. See also *Jooste v Score Supermarket Trading (Pty) Limited* 1999 (2) BCLR 139 (CC) at 147D: "It is clear that the only purpose of rationality review is an inquiry into whether the differentiation is arbitrary or irrational, or manifests naked preference and it is irrelevant to this inquiry whether the scheme chosen by the legislature

4.2. Fairness

Although the South African Constitution unequivocally endorses the importance of the objective of remedying the effects of past inequality, it also requires that this has to be achieved in a fair and proportional manner. In *City Council of Pretoria v Walker*,[58] Sachs J remarked that "[p]rocesses of differential treatment which have the legitimate purpose of bringing about real equality should not be undertaken in a manner which gratuitously and insensitively offends and marginalises persons identified as belonging to groups who previously enjoyed advantage." An unnecessarily unreasonable impact on the rights of non-designated groups could render affirmative action unfair or unjustifiable. As was noted earlier, the Constitutional Court has held that the fairness of discriminatory action depends primarily on its impact on the complainant. In *President of the Republic of South Africa and Another v Hugo*,[59] Goldstone J said that each case will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not.[60]

Employers are, therefore, constitutionally enjoined to devise affirmative action programmes in a way that does not impact unfairly upon the rights or interests of non-designated groups. The United States Supreme Court requires affirmative action measures not to "unnecessarily trammel" the rights of non-preferred groups.[61] In the Canadian case of *Shewchuk v Ricard*,[62] Nemetz CJ proposed that in evaluating the overall-impact of affirmative action plans, they should be carefully scrutinised by the courts with respect to both whether they are ameliorative in fact and, if ameliorative, whether the effect of the law or programme is so unreasonable that it is grossly unfair to other individuals or groups. Applying this principle, the court in the *Manitoba Rice Farmers* case[63] held that a programme of preference for native persons in respect of licenses to harvest wild rice did not

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could be improved in one respect or another." The same point was made in *East Zulu Motors (Pty) Limited v Empangeni/Ngwelezane Transitional Local Council and Others* 1998 (1) BCLR 1 (CC) at 15J-16A: "It is not sufficient for the applicant to persuade us that a better or more coherent procedure could have been established. It is for the applicant to show us that the differentiation between the procedures is not rational."

[58] 1998 (3) BCLR 257 (CC) at para. 123.

[59] 1997 (6) BCLR 708 (CC) at 729F-H.

[60] Cf. Dellinger "Memorandum to general counsels" in: Stephanopoulos/Edley *Affirmative action review. Report to the President. Appendix B* (unpublished report July 19,1995) 19, who states that the underlying purpose of the requirement that discriminatory measures must be "narrowly tailored", are twofold. First, to ensure that race-based affirmative action is the product of careful deliberation, not hasty decision-making; and second, to ensure that such action is truly necessary, and that less intrusive, efficacious means to the end are unavailable.

[61] See *United Steelworkers of America v Weber* 443 US 193, 99 SCt 2721 at 2730, 61 LEd 2d 480 (1979); *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616, 107 SCt 1442 at 1455, 94 LEd 2d 615 (1987).

[62] (1986) 28 DLR (4th) 429 (BCCA) at 437.

[63] *Manitoba Rice Farmers Association v Human Rights Commission (Manitoba)* (1987) 50 Man R (2d) 92 (QB) at 102.

qualify for protection under section 15(2) of the Charter, because "the dominant purpose of s. 15 of the Charter is to preserve equality. In my view it follows as a matter of principle that a special law or program which is put forward under s. 15(2) cannot be justified if it unnecessarily denies the existing rights of the non-target group." After reviewing the evidence as to the size of the resource and the respective demands made upon it by members of the target group and others, the court concluded that the onus lies on the government to prove that the denial of permits to all persons in the non-target group was reasonably required to meliorate the conditions of hardship of the target group.

Whether a burden is unfair is obviously open to interpretation. As explained above, the factors that must be considered in evaluating fairness in terms of the constitutional conception of substantive equality, include the position of the complainant in society, the nature of the provision and the purpose sought to be achieved by it, and the extent to which the discriminatory measure affects the rights and interests of the complainant.[64] These factors do not provide a recipe that will guarantee complete consistency and instances of intuitive or even ideological adjudication of the fairness of affirmative action will be difficult to avoid. They do, however, identify relevant and important considerations that could provide a structured basis for a transparent, reasoned and principled analysis of the constitutionality of the affirmative action measure in question.[65]

4.2.1. Position of the complainants in society

Under the present approach of the South African Constitutional Court in equality cases, the place of a complainant in the structures of advantage and disadvantage will always be one of the central elements in the determination of how fair or unfair the challenged discrimination is.[66] Therefore, the more disadvantaged or vulnerable the group adversely affected by the discrimination is, the more likely the discrimination will be held to be unfair.[67] The complainants in an affirmative action claim will usually, but not necessarily, be members of historically advantaged groups. Designated group members may question the validity of a decision to deny them the benefit of affirmative action in favour of a non-designated group member, or complain when another designated group member is preferred

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[64] Par. 2 *supra*.

[65] Cf. the following factors, as distinguished by Dellinger (note 60) 19, that typically make up the "narrow tailoring" test as applied by the United States Supreme Court to affirmative action: (i) whether the government considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the programme's scope; (iii) the manner in which it is used, that is, whether race is a factor in determining eligibility for a program or whether race is just one factor in the decision-making process, (iv) the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (v) the duration of the programme and whether it is subject to periodic review; and (vi) the degree and type of burden caused by the programme.

[66] Per Sachs J in *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at par. 123.

[67] *Ibid.*

in the implementation of an affirmative action programme. The most likely complainants in affirmative action disputes will, however, be white males who will generally in the context of employment, as a group, be considered historically neither disadvantaged, nor vulnerable. Both public and private sector employment statistics attest to the historically privileged position of this group.[68]

Although this generalisation will apply in most employment settings, there are a number of indications from the discrimination jurisprudence of the Constitutional Court that the issue of disadvantage and vulnerability needs to be approached in a differentiated way. The Court has examined the vulnerability of groups with reference to specific contexts and has taken into account not only the historical experience of a group, but also present trends. Thus, it has been stressed that vigilance should be practised not only against discriminatory measures replicating existing patterns of discrimination, but also against those that may precipitate new patterns of disadvantage related to membership of a group specified in or contemplated by section 9 of the Constitution.[69] This approach does not allow general assumptions, in respect of the degree to which historically advantaged groups may be vulnerable to marginalisation and disadvantage, to be applied mechanically in all employment-related settings. Group relations are such that the ability to inflict group-related disadvantage is not in the same hands in all employment settings. Different conditions may apply in private and public sector employment in general, and in particular organisations within each sector.

Furthermore, the Court has repeatedly stressed that the investigation into the fairness of discrimination should be directed primarily at the experience of the victim of discrimination. It follows that complainants should not be evaluated in terms of group definitions that obscure insight into significant differences in degrees of disadvantage and vulnerability. Since the status of disadvantage and vulnerability is determined with reference to a complainant's group membership, all depends on how narrow or wide group definitions are drawn. Different profiles of disadvantage and vulnerability may emerge, depending on the definition of the group. For instance, historically the position of English-speaking white men in respect of access to civil service employment opportunities differ from that of white men generally; gay white men may show an employment-related disadvantage and vulnerability profile markedly different from men in general; older employees from non-designated groups might be in a particularly disadvantageous position in respect of employment opportunities outside their present place of employment; and the position of young white males entering the labour market for the first time in certain sectors may not necessarily be the same as that of white males in general, etc.[70] Group definitions should be flexible enough to accurately reflect

[68] See generally, *Green Paper on Employment and Occupational Equity. Policy Proposals*, General Notice 804 of 1996, 1 July 1996.

[69] *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at par. 123.

[70] It was said in *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at par. 129 that subordinate status may flow from institutionally imposed exclusion from the mainstream of society or else from powerlessness within the mainstream.

experience.[71] This conclusion is strengthened by the fact that a discrimination claim may be based on a combination of prohibited grounds.[72] It was acknowledged by the South African Constitutional court in the *Sodomy* case[73] that grounds of unfair discrimination could intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of grounds.[74] The fact that complainants are not confined to present their claims as representatives of race or gender groups only, enables them to demonstrate the unique ways in which discriminatory treatment is experienced by groups defined by a combination of attributes.

Similar considerations apply if the complainant is a member of a designated group, irrespective of whether the beneficiary of the alleged discrimination is a non-designated group member[75] or another designated group member.[76] The likeliness of a finding of unfairness will also vary with different degrees of disadvantage and vulnerability. The latter should also be determined in a differentiated way by taking into account historical patterns of discrimination, the specific employment context and present group relationships.

4.2.2. Purpose of affirmative action measures

4.2.2.1. Legitimacy and importance of affirmative action objectives

In terms of the equality jurisprudence of the South African Constitutional Court, the purpose of a measure that limits equality rights is a relevant factor determining its fairness or justifiability. The purpose of such a measure must be both legitimate and important enough in order to outweigh its discriminatory effect. The Constitutional Court has stressed the fact that a purpose, which is primarily aimed at the realisation of equality for all, will have a significant effect on the Court's evaluation of its fairness.[77] Redressing disadvantage resulting from prior

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[71] See *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at par. 126.

[72] See *Brink v Kitshoff* 1996 (5) BCLR 752 (CC) at par. 43: "Section 8(2) [of the interim Constitution] does not require that the discrimination be based on one ground only"; *President of the Republic of South Africa v Hugo* 1997 (6) BCLR 708 (CC) at par. 33.

[73] *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others* 1998 (12) BCLR 1517 (CC) at par. 113.

[74] See also *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (1) BCLR 39 CC) at par. 40.

[75] See e.g. *Durban City Council Physical Environment Service Unit v Durban Municipal Employees' Society (DMES)* (1995) 4 ARB 6.9.14.

[76] See e.g. *Motala v University of Natal* 1995 (3) BCLR 374 (D).

[77] *Harksen v Lane* 1997 (11) BCLR 1489 (CC). Goldstone J at 1510G-H noted that "if the purpose is manifestly not directed, in the first instance, at impairing the rights of the complainants, but is aimed at achieving a worthy and important societal goal, such as, for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether complainants have in fact suffered the impairment in question." See also *Brink v Kitshoff NO* 1996 (6) BCLR 752 (CC) at 769C.

discrimination is clearly a value that the South African Constitution itself strongly endorses. Section 9(2) considers this objective part of the process of realising the "full and equal enjoyment of all rights and freedoms". Redressing disadvantage in gaining access to land and security of tenure features prominently in the property clause.[78] Section 195(1)(i) of the Constitution states as one of the basic values and principles governing public administration that employment and personnel policies must be based on the need to redress the imbalances of the past to achieve broad representation. Organs of state are allowed to take into account the protection or advancement of persons or categories of persons disadvantaged by unfair discrimination in its procurement policies.[79]

This high constitutional standing of the purpose of redressing disadvantage caused by discrimination means that courts will hold the legitimacy of the purpose of a measure that falls within the ambit of section 9(2) of the Constitution, and, in a general sense, its importance too, to be beyond question. All measures with the purpose of "protection and advancement of persons or categories of persons disadvantaged by unfair discrimination", will enjoy the advantage bestowed by section 9(2). The advantage is twofold. Once it is established that a specific measure objectively falls within the category of measures "designed to protect and advance groups disadvantaged by unfair discrimination", courts will take judicial notice of the legitimacy and importance of such a purpose. Secondly, the high constitutional standing of the purpose will have a positive influence on the court's evaluation of its fairness or proportionality. In *Brink v Kitshoff NO*,[80] it was said that where differentiation is not aimed at the creation or maintenance of patterns of group disadvantage, but instead has the aim of establishing substantive equality by breaking down those structural inequalities, the court will be reluctant to declare the measures unconstitutional. In other words, affirmative action of the kind contemplated by section 9(2) may constitutionally co-exist with a degree of invasion of equality rights that would otherwise have been held too severe if the justifying basis for such an invasion had been employer objectives not as highly rated by the Constitution.

Although all bona fide affirmative action measures will enjoy the advantage described above, in the assessment of their fairness or justifiability, this does not mean that the constitutional validity of an affirmative action measure is automatically assured by its remedial purpose alone.[81] The question whether the purpose

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[78] Section 25 of the Constitution.

[79] Section 217(2) of the Constitution.

[80] 1996 (6) BCLR 752 (CC) at 769C.

[81] Some commentators seem to have interpreted s 8(3)(a) of the interim Constitution to suggest that once it is established that a measure is designed to protect and advance groups who have been disadvantaged by discrimination, no constitutional attack based on the unfairness or disproportionality of the means to achieve that purpose is possible; see Cachalia *et al* Fundamental rights in the new constitution (1994) 331; Du Plessis/Corder Understanding South Africa's transitional Bill of Rights (1994) 130; Kentridge (note 34) 14-36 – 14-37; Rycroft "Obstacles to employment equity? The role of judges and arbitrators in the interpretation and implementation of affirmative action policies" *ILJ* (1999) 1413. This also appears to have been the view taken in *George v Liberty*

of a measure is important enough to outweigh its discriminatory effect is not decided in the abstract. No legal good is pursued in a space devoid of competing interests and nothing in the Constitution suggests that the validity of affirmative action should be judged in terms of its own objectives only.[82] In *Harksen v Lane*, Goldstone J made it clear that it will depend on the facts of the particular case whether a measure pursuing a worthy societal goal, such as the furthering of equality for all, will be considered fair or unfair.[83] Thus, it follows that a court must not, in the fairness and justifiability enquiries, consider the over-all weight to be attributed to the affirmative action objective of a measure in isolation.[84] Although the legitimacy and importance of such a purpose are beyond doubt, the other legs of the fairness and justifiability enquiries demand that even important affirmative action goals ought not to be pursued in an unfair or disproportionate way.[85] The fairness of a measure differentiating on any prohibited ground depends not only on its purpose, but on the cumulative effect of all relevant factors, including the extent of its detrimental effects on non-designated groups.[86]

4.2.2.2. Proving affirmative action objectives

The advantage bestowed by section 9(2) of the Constitution on any affirmative action measure is premised on the condition that such a measure is indeed one as contemplated by the section. An employer, therefore, still has the burden to establish that the specific affirmative action measure in question is in fact designed to protect and advance those disadvantaged by unfair discrimination in order to promote their full and equal enjoyment of all rights and freedoms. Given the fact that affirmative action is an imprecise generic term encompassing many different types of policies and practices with seemingly divergent objectives, it is necessary to determine which affirmative action practices and policies have the constitutionally required objective.

Life Association of Africa Ltd [1996] 8 BCLR 985 (IC) at 1005–1006. For a different and, it is submitted, more acceptable interpretation, with reference to the analogous provision (s 15(2)) of the Canadian Charter of Rights and Freedoms, see Gibson (note 37) 299–300.

[82] See *Department of Correctional Services v Van Vuuren* (1999) 20 ILJ 2297 (LAC) (PA 6/98): "[t]he Commissioner [of Correctional Services] thus acted within his competence or powers when he made the decision. His evidence at the hearing disclosed that he did not slavishly adhere to a fixed policy or practice in making his final decision, but that to the contrary, he gave careful consideration to the particular circumstances of the respondent, the demands of representivity in that particular post in the Eastern Cape and other relevant factors."

[83] 1997 (11) BCLR 1489 (CC) at 1510G-H.

[84] See *Public Servants' Association and Another v Minister of Justice and Others* 1997 (5) BCLR 577 (T) at 641C-D: "the interests of the targeted persons or groups [must not be] taken into consideration *in vacuo*, but also with regard to the rights of others and the interests of the community and the possible disadvantages that the targeted persons or groups may suffer."

[85] See *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC) at par. 123.

[86] *Harksen v Lane* 1997 (11) BCLR 1489 (CC) at 1511C.

In *National Coalition for Gay and Lesbian Equality v Minister of Justice and Others*,[87] Ackermann J typified the kind of measures envisaged by section 9(2) of the Constitution and its predecessor, section 8(3)(a) of the interim Constitution, as "remedial" or "restitutionary". He observed that the need for such remedial or restitutionary measures flows from the fact that past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. The Employment Equity Act states as the broad purpose of affirmative action the need "to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce."[88] In *George v Liberty Life Association of Africa Ltd*,[89] Landman J remarked that "[a]ffirmative action, viewed positively, is designed to eliminate inequality and address systemic and institutionalised discrimination including racial and gender discrimination." From the wording of section 9(2), it is clear that the Constitution envisaged affirmative action as essentially a means to remedy the effects of past discrimination. This means that unlike section 15(2) of the Canadian Charter, the range of possible causes of disadvantage that might provide a basis for affirmative action in terms of this section, is narrowed down to unfair discrimination. Those who seek to uphold laws, programmes or activities as affirmative action in terms of section 9(2) of the Constitution are accordingly obliged, if challenged, to demonstrate that the object of the measure is to relieve disadvantage caused by discrimination.

All strategies aimed at levelling the playing field in the competition for jobs and employment opportunities by ameliorating ongoing discriminatory disadvantages are relatively unproblematic and clearly remedial in nature. These may include the elimination of employment barriers such as adapting testing requirements to compensate for educational disadvantage or lack of work experience[90]; reviewing recruitment, selection and promotion procedures to ensure fairness in job competition[91]; accelerated and corrective training; and the transformation of work environments that exclude or otherwise disadvantage designated groups, e.g. measures aimed at integrating career and family responsibilities (flexible work schedules, child care structures, facilitating career breaks, etc).[92]

Apart from the eradication of discriminatory employment practices and the reasonable accommodation of people from designated groups, the Employment Equity Act mentions the need to ensure "equitable representation of designated

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[87] 1998 (12) BCLR 1517 (CC) at par. 60–61.

[88] Section 2.

[89] [1996] 8 BLLR 985 (IC) at 1005–1006.

[90] See *Durban City Council (Physical Environment Service Unit) v Durban Municipal Employees' Society (DMES)* (1995) 4 ARB 6.9.14.

[91] See *Durban Metro Council (Consolidated Billing) v IMATU obo Van Zyl and Another* (1998) 7 ARB 6.14.1.

[92] See *Kalanke v Freie Hansestadt Bremen* Case C-450/93 [1996] 1 CMLR 175 (ECJ) at 181.

groups in the workplace" and to further "diversity" as additional affirmative action objectives.[93] Furthering diversity and increasing the percentage of previously excluded groups in certain job categories by affirmative action means, such as accelerated promotion or preferential appointments, although more controversial, also serve a remedial purpose as long as it is designed to reverse the consequences of disadvantage caused by prior discrimination. In other words, when designed to address historical, legal and social practices that have resulted in exclusionary or unaccommodating employment-related behaviour, attitudes and structures, which operate to the disadvantage of designated groups, furthering diversity and increasing the percentage of designated group members in affected job categories may be said to have a remedial objective.[94] Enforcing workplace integration may serve to counter-act entrenched behavioural and institutional patterns of exclusion of designated groups, such as job categories segregated in terms of race or gender, for example. In *Marschall v Land Nordrhein-Westfalen*,[95] the European Court of Justice observed that even with equal qualifications, men are still preferred over women for many positions because of "prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breast-feeding." Men also profit from the conventional "tendency to award a job to a male earner with dependants rather than to a male earner's wife".[96] The remedial purpose of increasing the number of women in a traditionally segregated job category was also emphasised in *Johnson v Transportation Agency, Santa Clara County*[97] by the American Supreme Court. The court noted that the decision to prefer a female applicant for a job was made pursuant to a plan that required sex to be taken into account for the purpose of remedying under-representation. The plan, however, clearly linked under-representation to discrimination. The court observed that the plan acknowledged the fact that women were historically concentrated in traditionally female jobs in the Agency and represented a lower percentage in other job classifications than would have been the case if such traditional job segregation had not occurred.[98] It is also notable that the Employment Equity Act refers to "equitable" representation, which suggests that it does not

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93 Section 15(2).

94 In its Recommendation on the Promotion of Positive Action for Women (No 84/635 of 13 December 1984, [1984] OJ L331/34) the European Commission stressed the necessity for action "to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures."

95 [1998] 1 CMLR 547 (ECJ) at 569–570.

96 *Id* at 551.

97 480 US 616, 107 SCt 1442, 94 LEd 2d 615 (1987).

98 The facts were that 9 of the 19 para-professionals and 110 of the 145 office and clerical workers were women. By contrast, women were only 2 of the 28 officials and administrators, 5 of the 58 professionals, 12 of the 124 technicians, none of the skilled craft workers and 1 of the 110 road maintenance workers.

envisage a "reflexive adherence to a numerical standard"[99], since the evil it intends to remedy is under-representation due to unfair discrimination.

To the extent that under-representation or a lack of diversity is not the result of unfair discrimination, the Employment Equity Act, however, seems to allow affirmative action for purposes other than the redress of disadvantage caused by discrimination.[100] The furtherance of non-remedial objectives[101] through affirmative action is also not prohibited by section 9(2) of the Constitution. The section's authorisation of the use of affirmative action for the purpose of protection and advancement of those disadvantaged by unfair discrimination, does not preclude the possibility that affirmative action may be taken for other purposes.[102] If affirmative action is taken for objectives other than that specified by section 9(2), such measures will, however, not enjoy the advantages referred to above in respect of their fairness or justifiability. The onus will be on an employer to establish that a particular non-remedial objective is a compelling enough operational or institutional objective to justify preferential treatment.[103]

Divorced from such compelling remedial, operational or institutional justification, "proportional group entitlements" based on race can, as Adam rightly observes, be achieved only at the price of racialisation of society and at the expense

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[99] *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616, 107 SCt 1442 at 1454, 94 LEd d 615 (1987).

[100] See Rycroft (note 81) 1413–1414.

[101] Canadian and American jurisprudence and legislation include the following examples of non-remedial affirmative action: a programmme of treatment for alcoholic drivers (*R v Prince* (1986) 1 YR 188 (Terr Ct)); special measures for prosecuting and rehabilitating young offenders (*R v S(C)* (1985) 26 CRR 157 (Ont Prov Ct); programmes for the relief of poverty (*Reference Re Family Benefits Act (Nova Scotia)* (1986) 75 NSR (2d) 338 (CA)); re-integration of war veterans (USA) (Veterans Readjustment Act 1974).

[102] By contrast, the present attitude of the federal courts in the United States seems to be that only a remedial objective will justify race or gender-conscious measures in terms of Title VII of the Civil Rights Act 1964 and the Constitution. See *United States and Taxman v Board of Education of Township of Piscataway* 91 F3d 1547 (3rd Cir 1996): the court held that a race-conscious decision to lay off a white teacher instead of an African-American one could not be justified by the need for racial diversity amongst the staff of the Business Department at the high school, under Title VII of the Civil Rights Act 1964. The purpose of the Act is to remedy employment discrimination, by eliminating discrimination based on race, colour, religion, sex, and national origin and by "ending the segregative effects of past discrimination." See also *Hopwood v Texas* 78 F3d 932 (5th Cir 1996) at 944–948: the court interpreted more recent Supreme Court decisions to mean that obtaining a racially diverse student body is not a compelling interest under the Fourteenth Amendment, only remedial purposes suffice.

[103] The objective of achieving representivity for its own sake, such as when a racial or gender group is guaranteed a certain percentage of jobs or university admissions, has been labelled in the United States as "racial or gender balancing" and has consistently been rejected as a legitimate affirmative action goal. See *City of Richmond v JA Croson Co* 488 US 469 at 507 (1989); *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616 at 639, 107 SCt 1442 at 1454 (1987); *Local 28, Sheet Metal Workers International Association v EEOC* 478 US 421 at 475, 106 SCt 3019 at 3051 (1986); *Regents of the University of California v Bakke* 438 US 265 at 307, 98 SCt 2733 at 2757. Cf. *Ensley Branch NAACP v Seibels* 31 F3d 1548 (11th Cir 1994) at 1570: the establishment or maintenance of parity between the racial composition of the labour pool and the racial composition of each job category as such is not a permissible remedial goal for race-conscious affirmative action by

of the notion that individuals should be accountable for their own performance or lack thereof.[104] It is difficult to see how a programme of affirmative action that explicitly operates in terms of racial or gender preferences, whilst not at least rea-

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a public employer; *Brunet v City of Columbus* 1 F3d 390 (6th Cir 1993) at 412: "Title VII does not require employers to equalize the probabilities of hiring of the average members of two groups. Rather, it requires that actual individuals enjoy opportunities for employment free from discriminatory barriers." Similarly, in *Maryland Troopers Association Inc v Evans* 993 F2d 1072 (4th Cir 1993) at 1079 the court held that avoidance of "backsliding" on progress already made, did not provide the requisite strong basis in evidence to justify continued race-conscious promotional relief. However, the furtherance of diversity in the composition of a workforce or increasing the number of members of certain groups in specific job categories may be desirable objectives in terms of the operational or institutional needs of organisations. Powell J observed in *Regents of the University of California v Bakke* 438 US 265 (1978) at 311–314 that a university may have a compelling interest in taking the race of applicants into account in its admission process in order to foster greater diversity among the student body. This would bring a wider range of perspectives to the campus and in turn would contribute to a more robust exchange of ideas – which Justice Powell considered to be the central mission of higher education and in keeping with the time-honoured First Amendment value of academic freedom. See also *Davis v Halpern* 768 F Supp 968 (SD NY 1991): citing Powell J in the *Bakke* case, the court held that a university has a compelling interest in seeking to increase the diversity of its student body. Cf., however, *Taxman v Board of Education of Township of Piscataway* 91 F3d 1547 (3rd Cir 1996). The court declared a non-remedial affirmative action plan, even one with the laudable purpose of providing black role models for pupils, unlawful under Title VII of the Civil Rights Act 1964. The goal of racial diversity, for education's sake, and unconnected to discrimination, does not support affirmative action under Title VII. Diversity was also recognised as a compelling interest justifying preferential treatment in access to broadcasting licences in *Metro Broadcasting Inc v Federal Communications Commission* 497 US 547 (1990) at 567–568. The court held that the diversification of ownership of broadcast licenses was a permissible objective of affirmative action because it serves the larger goal of exposing the nation to a greater diversity of perspectives over the nation's radio and television airwaves. Arguably, a law enforcement agency may have a public safety and operational need to diversification of its ranks in so far as that enhances its ability to effectively carry out its functions. See *Wygant v Jackson Board of Education* 476 US 276 at 314, 106 SCt 1842 at 1868 (1986): "in law enforcement ... in a city with a recent history of racial unrest, the superintendent of police might reasonably conclude that an integrated police force could develop a better relationship with the community and thereby do a more effective job of maintaining law and order than a force composed only of whites"; *United States v Paradise* 480 US 149 at 167 n 18, 107 SCt 1053 at 1064–1065 n 18 (1987): noting the argument that race-conscious hiring can restore community trust in the fairness of law enforcement and facilitate effective police service by encouraging citizen co-operation; *Detroit Police Officers' Association v Young* 608 F2d 671 (6th Cir 1979) at 696, *cert denied* 452 US 938 (1981): "[t]he argument that police need more minority officers is not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and co-operation which result only from public respect and confidence in the police." See also Seymour/Brown *Equal employment law update* (1996) 23-460 – 23-461: "[i]t is obvious that a law enforcement agency cannot assign a white officer to pose as a black person and infiltrate a criminal organization run by blacks." Cf., however, the cautionary approach in *Hayes v North State Law Enforcement Officers Association* 10 F3d 207 (4th Cir 1993) at 214, warning of the danger of promoting racial polarisation and "the stereotypical view that only members of the same race can police themselves." Regarding public service appointments, section 195(1)(i) of the Constitution provides that the public administration must be broadly representative of the South African people, with employment and personnel practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.

[104] Adam "The politics of redress: South African style affirmative action" *Journal of Modern African Studies* (1997) 245, 247.

sonably closely tailored to correct employment-related social disadvantage due to discrimination, or based on legitimate[105] and compelling operational or institutional needs of an employer, can ever be compatible with the equality framework of the Constitution.

4.2.3. Extent to which the affirmative action measure affects the rights of the complainants

The South African Constitutional Court considers the extent to which the discrimination has affected the rights or interests of the complainants a further important factor in the process of evaluating its fairness. Affirmative action inevitably imposes some burden on persons not belonging to one of the designated groups. Longstanding expectations could be disappointed and otherwise available career opportunities may be foreclosed to a significant extent.[106] The American Supreme Court has stated on more than one occasion that some burdens are acceptable, even when visited upon individuals who are not personally responsible for the particular problem that the programme seeks to address.[107] For instance, in *Wygant v Jackson Board of Education*,[108] the majority noted that "[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy."[109] In *Fullilove v Klutznick*,[110] it was said that "[w]hen effecting a limited and properly tailored remedy to cure the effects of prior discrimination ... a sharing of the burden by innocent parties is not impermissible."

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[105] Instituting affirmative action for the purpose of consolidating racially based political power, or to accommodate the racist preferences of a particular political constituency, seems hardly a legitimate purpose for affirmative action. These objectives seem to have been at work in the case of *Plaaslike Oorgangsraad van Bronkhorstspruit v Senekal* Case No 389/98 (unreported judgement of the Supreme Court of Appeal, 29 September 2000), where a town clerk was induced to resign because he was, as a white person, said to be unacceptable to the majority of black residents of the municipality. It is notable that the evidence showed that the council explicitly rejected any notions that the town clerk acted in a racist manner in the execution of his duties. The issue of the validity of the affirmative action motivation for the decision to have him replaced by a black person was, however, not raised in the case. It is submitted that had the issue been raised, the council's position would have been found a clear case of unfair and unjustifiable discrimination, in the light of the overwhelming authority rejecting the legitimacy of racist or racially stereotyped "customer preferences" as a legitimate basis for employment decisions.

[106] See *Durban Metro Council (Consolidated Billing) v IMATU obo Van Zyl and Another* (1998) 7 ARB 6.14.1 at 2: "[d]iscrimination against someone on grounds of his or her race is always hurtful to that person irrespective of whether or not in the general scheme of things such discrimination is part of an overall policy with commendable objectives. Accordingly whenever such a discrimination is applied in terms of the [affirmative action policy] this should be effected sensitively and in as least hurtful a manner as possible."

[107] Dellinger (note 60) 27.

[108] 476 US 267 at 280–281, 106 SCt 1842 at 1850 (1986).

[109] See also *Fullilove v Klutznick* 448 US 448 at 484, 100 SCt 2758 at 2778 (1980); *Franks v Bowman Transportation Co* 424 US 747 at 777, 96 SCt 1251 at 1270, 47 LEd 2d 444 (1976).

[110] 448 US 448 at 484, 100 SCt 2758 at 2778 (1980).

Although some degree of burdening of the rights of non-designated groups is inevitable, it must be fair and proportional. The more invasive the nature of the discrimination upon the interests of the affected party, the more likely it will be held unfair. In the case of affirmative action, the extent of the impact of a measure on the rights and interests of the complainants will depend on the nature of the measure, its duration and the nature of the employment rights, interests or expectations that are negatively affected.

4.2.3.1. Nature of the affirmative action measure

Affirmative action may take on many forms that may affect the rights of non-designated groups to varying degrees.[111] Oppenheimer distinguishes five "models" of affirmative action: strict quotas favouring designated groups; preference systems in which designated group members are given some preference over white men; self-examination plans in which the failure to reach expected goals within expected periods of time triggers self-study to determine whether discrimination is interfering with a decision-making process; outreach plans in which attempts are made to include more members of designated groups within the pool from which selections are made; and affirmative commitments not to discriminate.[112] Some of these measures may have a significant limiting effect on the equal employment opportunities of non-beneficiary groups, whilst the impact of others may be hardly noticeable. There is therefore no single standard of fairness applicable to all forms of affirmative action; the more invasive the nature of the discrimination upon the interests of the affected party, the more likely it will be held to be unfair.[113] The practical implications of this principle will be explained later

[111] See the three models of affirmative action distinguished by the Advocate General in the case of *Kalanke v Freie Hansestadt Bremen* Case C-450/93 [1996] 1 CMLR 175 (ECJ) at 181–182.

[112] Oppenheimer "Distinguishing five models of affirmative action" *Berkeley Women's Law Journal* (1988/89) 42, quoted in Belton/Avery *Employment discrimination law. Cases and materials on equality in the workplace* (1999) 822. In its *Guidelines on affirmative action appropriate under Title VII of the Civil Rights Act 1964, as amended* 29 CFR 1608, the American Equal Employment Opportunity Commission lists the following types of affirmative action, among others, that would be appropriate under Title VII of the Civil Rights Act 1964: adoption by employers of training programmes that "emphasize providing minorities and women with the opportunity, skill and experience to perform [in given jobs]; extensive recruiting programmes; or modifications in promotion and layoff procedures." Moreover, these guidelines provide that affirmative action plans may include goals, timetables and "other appropriate employment tools which recognize the race, sex or national origin of applicants or employees." Among the latter, the following are specifically deemed appropriate by the Commission: "a systematic effort to organize work and redesign jobs in ways that provide opportunities for persons ... lacking skills to enter, and with appropriate training to progress in a career field", "revamping selection instruments or procedures ... to reduce or eliminate exclusionary effects on particular groups in particular job classifications"; and "a systematic effort to provide career advancement training ... to employees in dead-end-jobs".

[113] *President of the Republic of South Africa and Another v Hugo* 1997 (6) BCLR 708 (CC) at 755F. The United States Supreme Court has also consistently held that programmes, which make race or ethnicity a requirement of eligibility for particular positions or benefits, are less likely to survive constitutional challenge than programs that merely use race or ethnicity as one factor to be considered under a programme open to all races and ethnic groups. See Dellinger (note 60) 23.

with reference to some of the more common forms of affirmative action, namely outreach programmes and affirmative recruitment, numerical selection goals and timetables, "plus factor" or "tie-breaker" approaches, and test score adjustment.[114]

4.2.3.2. Nature of the employment rights or interests affected

The extent to which affirmative action impinges on the rights or interests of non-designated groups will also depend on the nature of the employment rights or interests that are affected. The impact of racial or gender preferences on an employee may differ in different employment contexts, such as preferential selections for training, entry-level appointments, promotions or dismissals.

In the United States, courts have often noted that preferential selection for entry-level positions does not unreasonably trammel the rights of non-beneficiary groups, since it usually deprives them of one of a number of available positions only. In *Wygant v Jackson Board of Education*,[115] Justice Powell held that in hiring cases, the burden on innocent individuals is diffused to a considerable extent among society generally, since the hiring goals often foreclose but one of several available opportunities. The unfairness of the impact of affirmative action on the complainants does not, however, only depend on the nature of the rights or interests involved. Its fairness depends on the cumulative effect of all relevant factors.[116] Although, as a general statement, it might be true that the denial of a possible job opportunity is not as invasive as a measure that upset vested or accrued employment rights, interests or legitimate expectations, the nature of the preference afforded to designated groups may be such that it unreasonably restricts the right of equal access to job opportunities.[117] In *Local 28, Sheet Metal Workers' International Association v EEOC*,[118] Powell J therefore correctly warned against a formulaic approach that assumes that appointment goals withstand constitutional muster whereas lay-offs do not. He argued:

> "Of course, it is too simplistic to conclude ... that hiring goals withstand constitutional muster whereas layoff goals and fixed quotas do not. There may be cases, for example, where a hiring goal in a particularly specialized area of employment would have the same pernicious effect as the layoff goal in *Wygant*. The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on innocent nonminorities, not on the label applied to the particular employment plan at issue."

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[114] See par. 5 *infra*.

[115] 476 US 267 at 282–283, 106 SCt 1842 at 1851–1852, 90 LEd 2d 260 (1986).

[116] *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) at 1511C.

[117] The remark of the arbitrator (based on his understanding of American authorities) in *TWU obo Pretorius v Portnet* (2000) 9 ARB 6.15.1, that "a right that should remain as untrammelled as possible is the right to continued employment and not the 'rights' to appointment or promotion; the latter two being legitimate and largely victimless devices by which to achieve affirmative action ends", is therefore clearly too unqualified.

[118] 478 US 421 at 488 n 3, 106 SCt 3019 at 3056 n 3 (1986).

Regarding affirmative action promotions, the American Supreme Court in *In re Birmingham Reverse Discrimination Employment Discrimination*[119] held that the burden lies somewhere between that "small burden imposed on applicants for entry level positions and the large burden imposed on employees who are laid off". In *Vanguards of Cleveland v City of Cleveland*,[120] the Court of Appeals for the Sixth Circuit upheld the validity of a temporary preferential promotion scheme involving numerical targets. Evidence showed that the percentage of minority residents in the city of Cleveland was 46,9 %, whereas their proportion in the ranks of lieutenant and above was only 4,5 %. An affirmative action promotional plan was adopted which, for a specified period, required that qualified minorities should be appointed in half of the vacancies in the higher ranks. Thereafter the target had to be progressively lowered. It was found that although the plan involved a "reduction in non-minority expectations", it was fair and reasonable.[121] The court noted that the promotion goals were relatively modest and did not create an absolute bar to the advancement of non-minorities. During the first stage of the plan, all promotions were to be made by coupling the highest-ranking non-minority and minority candidates based upon the eligible list rankings. Thereafter, the employer had to maintain a specified percentage of minority fire-fighters at each grade level pursuant to the administration of future promotions examinations. The plan also provided, however, that these percentages were subject to modification if there should be an insufficient number of qualified minority candidates. Finally, the plan would remain in force for only four years.[122]

In other circumstances, the impact of a denial of promotional opportunities may be so unreasonably invasive that its unfairness will be evident. For instance, the practical result of a moratorium on the promotion of non-designated group members may be to effectively terminate the occupational prospects of older or long-term employees. Older workers generally represent a vulnerable group necessitating compelling grounds to override the detrimental effect of discriminatory employment practices. In *Metz v Transit Mix Inc*,[123] the court noted that the problems that long-term employees and older workers experience stem in large part from their development of firm-specific skills not easily transferable to a different job setting. Other factors, such as existing contractual obligations may also be relevant. The fact that the decision to promote a white male mechanic to the position of millwright was the result of an agreement with "all the moral force of a collective agreement", weighed heavily in the South African arbitration case of *TWU obo Pretorius v Portnet*.[124] The grievant was singled out for special training and had been acting in the position for a number of years. The mere "expectation" of a promotion was, however, not enough in the opinion of the arbitrator to

[119] 20 F3d 1525 (11th Cir 1994) at 1542.
[120] 753 F2d 479 (1985).
[121] *Id* at 484.
[122] *Id* 485.
[123] 828 F 2d 1202 (7th Cir 1987) at 1205.
[124] (2000) 9 ARB 6.15.1.

"trump the strictures of affirmative action." The existence of an agreement with the grievant and his representatives that he would be appointed to the post on obtaining the necessary qualifications created more than an expectation, however. In the opinion of the arbitrator, the Labour Relations Act 1995 places a high premium on collective agreements as a means of conducting orderly industrial relations. Not to enforce the agreement would have undermined the very basis of future collective bargaining.

Applying the principle that the burden imposed by affirmative action may be too high if it unsettles "legitimate, firmly rooted expectations"[125], or imposes the "entire burden on particular individuals"[126], the United States Supreme Court has also consistently held that race-based lay-offs, in contrast to race-based hiring and promotion goals, constitute too high a burden. In *Wygant v Jackson Board of Education*,[127] the court explained why the denial of a future employment opportunity is not as intrusive as the loss of an existing job:

> "Many of our cases involve union seniority plans with employees who are typically heavily depending on wages for their day-to-day living. Even a temporary layoff may have adverse financial as well as psychological effects. A worker may invest many productive years in one job and one city with the expectation of earning the stability and security of seniority ... [T]he rights and expectations surrounding seniority make up what is probably the most valuable capital asset that the worker 'owns', worth even more than the current equity in his home ... Layoffs disrupt these settled expectations in a way that general hiring goals do not ... While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden is too intrusive."

Although the decision was not based on the application of the requirements of fair or proportional limitation of equal employment rights, the South African Labour Court reached a result similar to that of the above-mentioned cases in *Antoinette McInnes v Technicon Natal*.[128] It held that "so-called affirmative action discrimination" cannot constitute a fair basis under the provisions of the Labour Relations Act 1995[129] for dismissing, as opposed to appointing, an employee. In *Van Zyl v Department of Labour*,[130] the issue that had to be decided was whether a dismissal for the sake of an increase in representivity levels falls within the scope of the operational requirements of the civil service. The commissioner argued that in terms of section 188 of the South African Labour Relations Act 1995, a dismissal can be justified with reference to operational requirements only as a result of either retrenchment (i.e. job loss as a result of economic downturn), or redun-

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125 *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616 at 638, 107 SCt 1442 at 1455 (1987).

126 *Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 (1986) at 488.

127 476 US 267 at 283, 106 SCt 1842 at 1851–1852 (1986).

128 (2000) 9 LC 6.15.1 at par. 28.

129 Sections 187 and 188, read with items 2(1)(a), 2(2)(a) and (b) of Part B of Schedule 7.

130 (1998) 7 CCMA 5.3.1.

dancy (i.e. job loss as a result of new technology or restructuring of the business). Both instances presuppose the disappearance of an existing job. The commissioner was unwilling to extend the meaning of operational grounds "to cover situations where an employee may lose his/her employment on racial grounds in circumstances where the same post is subsequently occupied by a new employee who happens to fit the racial preference."

A related question is whether affirmative action objectives may be taken into account in deciding who should be retrenched or made redundant. The United States Supreme Court addressed the issue in *Firefighters Local Union No. 1784 v Stotts*[131] and *Wygant v Jackson Board of Education.*[132] Both cases concerned the question whether the aims of a remedial affirmative action plan could take precedence over the dictates of an established seniority system in the face of a need to retrench workers due to a shrinking economy. Since a relatively large proportion of blacks were recent appointees in terms of an affirmative action programme, the strict application of the "last hired, first fired" formula would have undermined the goals sought to be achieved by the affirmative action plan. To avoid this result, an amended retrenchment plan was adopted. According to this plan, the reverse seniority order of retrenchment had to be suspended in part to protect the jobs of blacks who held certain defined classes of positions. As a consequence of this, some white employees with more seniority were laid off, while blacks with less seniority kept their jobs.

In the *Stotts* case, the court decided that it was inappropriate to deny an innocent employee the benefits of seniority for the sake of affirmative action. The court, however, made clear that actual victims of past discrimination may be awarded competitive seniority and given their rightful place in the seniority roster. Finally, the court added that even the actual victim of discrimination may not be entitled to be awarded a position similar to that wrongfully denied in the past, if the only way to make such a position available were to have an innocent non-minority employee laid off.[133]

Justice Powell concluded in *Wygant* that the heavy burden on third parties imposed by the layoff provision involved was constitutionally invalid. As indicated above, he advanced two arguments for the contention that the burden on third parties in layoffs is much heavier than its counterpart in hiring. Firstly, in hiring cases, the burden on innocent individuals is diffused to a considerable extent among society generally, while in layoff cases, such a burden falls entirely upon the shoulders of a small number of individuals.[134] The second argument is that, whereas the hiring goals often foreclose but one of several opportunities, layoffs

[131] 467 US 561, 104 SCt 2576, 81 LEd 2d 483 (1984).

[132] 476 US 267, 106 SCt 1842, 90 LEd 2d 260 (1986). See the discussion of these two and other American cases on the subject by Joubert "Afdanking of aflegging en regstellende aksie" *De Jure* (1996) 315–317.

[133] 467 US 561 at 578–579, 104 SCt 2576 at 2588 (1986). Cf. also *International Brotherhood of Teamsters v United States* 431 US 324 (1977).

[134] 476 US 267 at 282–283, 106 SCt 1842 at 1851–1852 (1986).

more typically leave those who have lost their job without reasonable immediate prospects of finding suitable comparable alternative employment.[135] In *United States and Taxman v Board of Education of Township of Piscataway*,[136] the court held that the loss of an employee's job imposes too substantial a harm to be justified by the goal of promoting diversity, even if that goal were legitimate under Title VII of the Civil Rights Act 1964. This is especially true where the dismissal would mean, as was the case, the loss of tenure.[137]

The Australian High Court advanced a different approach in *Australian Iron and Steel v Banovic*,[138] preferring to adjudicate the issue in terms of the conventional principles applicable to indirect discrimination. The court took the position that the seniority-based lay-off principle of "last hired, fist fired", would be an inappropriate basis for lay-offs in circumstances where it would have the effect of perpetuating the effects of prior discrimination in appointment. If groups that have been discriminated against in the past constitute the majority of the most recent appointees, the seniority principle will be an indirectly discriminatory redundancy selection device.[139] In the absence of any evidence to justify the "last on, first off" method's exacerbation of the adverse effects of past discriminatory practices as reasonable having regard to legitimate employment interests, the court upheld the industrial tribunal's finding of indirect discrimination.[140]

4.2.3.3. Duration of the affirmative action measure

Another factor influencing the extent of the impact of affirmative action on the rights or interests of the complainants concerns the time limit.[141] If affirmative action is a "catch-up" technique, it would be unreasonable to extend its operation beyond the point when the target group is no longer disadvantaged.[142] Racial or gender preferences which were justified at the date of their adoption may no

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[135] 476 US 267 at 283–284, 106 SCT 1842 at 1852. See also *Crumpton v Bridgeport Education Association* 993 F2d 1023 (2nd Cir 1993): modification of a consent decree creating layoff procedure with absolute preference for minority group teachers is not narrowly tailored to remedying past discrimination because sanctioning layoffs on the basis of race is an impermissible means to a legitimate end.

[136] 91 F3d 1547 (3rd Cir 1996).

[137] See also *Britton v South Bend Community School Corp* 819 F2d 766 (7th Cir 1987) and *United States v Board of Education of Piscataway* 832 F Supp 836 (DN NJ 1993).

[138] (1989) 168 CLR 165.

[139] Cf. the minority opinion of Brennan and McHugh JJ, who subscribe to the view of the United States Supreme Court. Brennan notes at par. 12: " [i]t offends justice to dismiss an employee in order to rectify the consequences of an illegality on the part of the employer. The Act does not require dismissals in a priority which will rectify those consequences; to the contrary, it prohibits them."

[140] At par. 23 of the opinion of Deane and Gaudron JJ, it was noted *obiter* that a consideration that might possibly have justified the application of the "last in, first off rule", included the employer's interest in "the maintenance of a stable workforce and one not subject to industrial disputation which otherwise might result if established patterns of industrial regulation and representation were put at risk."

[141] See *Engineering Contractors Association v Metropolitan Dade County* 122 F3d 895 (11th Cir 1997) at 927.

[142] Gibson (note 37) 334.

longer be required at some future point.[143] Since the aim of affirmative action is remedial, an affirmative action programme should not become a device by which proportional representation in the workforce is maintained. American federal courts have held that affirmative action programmes were designed to attain, not maintain a racial balance in the workplace.[144] In *United Steelworkers of America v Weber*,[145] the court held that the affirmative action plan under consideration imposed a moderate burden, *inter alia* because of the fact that the programme "ends when the racial composition of [the employer's] craft work force matches the racial composition of the local population. It thus operates as a temporary tool for remedying past discrimination without attempting to 'maintain' a previously achieved balance." In *United States v Paradise*,[146] the court noted that the race-based promotion requirement was narrowly tailored in part because it was "ephemeral" and would endure only until non-discriminatory promotion procedures were implemented.[147] On the other hand, in *Wygant v Jackson Board of Education*,[148] a school board plan that attempted to maintain a teaching work force similar in racial composition to that of the student body was struck down as unconstitutional, *inter alia* because of the permanent nature of the plan, which appeared to maintain a racial quota indefinitely. In *O'Donnell Construction Co v District of Columbia*,[149] an ordinance setting aside a percentage of city contracts for minority businesses was struck down partly because it contained no "sunset provision" and no "end [was] in sight".[150]

Legally, this cannot mean that all affirmative action programmes must have fixed expiry dates in order to be constitutionally valid. What could reasonably be required, however, is that affirmative action programmes should be subject to periodic review, either automatically or at the behest of the persons whose equality rights are being restricted.[151] As Dellinger points out, if the programme is sub-

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[143] Dellinger (note 60) 27.

[144] See *United Steelworkers of America v Weber* 443 US 193 at 208, 99 SCt 2721 at 2730 (1979); *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616 at 639, 107 SCt 1442 at 1455 (1987): "[t]he Agency's Plan was intended to attain a balanced workforce, not to maintain one"; *Taxman v Board of Education of Township of Piscataway* 91 F3d 1547 (3rd Cir 1996)) at 1564: "[t]he Board's policy, adopted in 1975, is an established fixture of unlimited duration, to be resurrected from time to time whenever the Board believes that the ratio between Blacks and Whites in any Piscataway School is skewed."

[145] 443 US 193 at 208, 99 SCt 2721 at 2730 (1979).

[146] 480 US 149 at 178, 107 SCt 1053 at 1070 (1987).

[147] See also *Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 at 487, 106 SCt 3019 at 3056 (1986): the validity of the race-based hiring goal was based partly on the fact that it "was not imposed as a permanent requirement, but [was] of a limited duration."

[148] 476 US 267 at 273, 106 SCt 1842 at 1846, 90 LEd 2d 260 (1986).

[149] 963 F2d 420 at 428 (DC Cir 1992).

[150] For examples where courts have ordered a review of the continued need for or the termination of preferential affirmative action measures, see *Ensley Branch NAACP v Seibel* 31 F3d 1548 (11th Cir 1994); *Patterson v Newspapers and Mail Deliverers' Union* 13 F3d 33 (2nd Cir 1993); *United States v City of Miami* 2 F3d 1497 (11th Cir 1993); *Detroit Police Officers Association v Young* 989 F2d 225 (6th Cir 1993); *Jansen v City of Cincinnati* 977 F2d 238 (6th Cir 1992).

[151] Gibson (note 37) 334.

ject to re-examination from time to time, the employer can react to changed circumstances by fine-tuning the programme, or discontinuing it when warranted.[152]

4.3. Justifiability

4.3.1. Introduction

Under the South African Constitution, if an affirmative action measure should be held unfairly discriminatory, it could still be possible for an employer to establish, under section 36, that it is nevertheless a justifiable limitation of the complainants' right to equality.[153] The Constitutional Court has held in *S v Makwanyane and Another* that the application of the limitation clause involves a process of "weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests."[154] In balancing different interests, the relevant factors to take into account are the nature of the right limited by the discriminatory act, the importance of the purpose of the discriminatory measure, the nature and extent of the limitation of the rights of the complainant, the relation of the discriminatory measure to its purpose, and less restrictive means to achieve the purpose of the discriminatory act.[155] In the preceding section, the purpose of affirmative action measures, as well as the nature and extent of its impact on the rights or interests of the complainants have already been discussed and will not be repeated. The remaining considerations will be addressed here.

4.3.2. Relation between the affirmative action measure and its purpose

One of the factors to take into account in terms of section 36(1) of the Constitution in ascertaining the justifiability of a measure limiting the right to equality is "the relation between the limitation and its purpose". Understood narrowly, this factor could mean the same as the rational relationship requirement discussed above. The Constitutional Court has, however, applied the criterion in a wider

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[152] *Ibid.*, 27.

[153] Section 36 provides that:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

[154] 1995 3 SA 391 at par. 104.

[155] S 36(1)(a)-(e) of the Constitution.

sense to include the consideration whether a discriminatory measure is under-inclusive or over-inclusive in relation to its purpose.[156]

4.3.2.1. Under-inclusive affirmative action measures

An affirmative action measure will be under-inclusive if it benefits only some of the groups that it is supposed to, when judged in terms of the purpose of protecting or advancing persons or categories of persons disadvantaged by unfair discrimination. In this respect, the question is often mooted whether an affirmative action plan must make equal provision for all designated groups in order to be valid. Must all groups historically disadvantaged as a result of discrimination equally benefit from a particular affirmative action programme, or may an employer be selective and concentrate on one or some of the designated groups only?[157] Applicable legislation in Canada makes it possible that an employer adopting employment equity programmes may choose to benefit any of the designated groups it desires, subject to the human rights law in the jurisdiction.[158] The validity of affirmative action plans have also been upheld in the United States, despite being under-inclusive.[159]

Section 9(2) of the South African Constitution identifies as the beneficiaries of affirmative action all persons, or categories of persons, disadvantaged by unfair discrimination. The accommodation of all disadvantaged groups will more often than not be impossible and an employer will frequently have to choose between members of such groups. Preferences for one amongst a number of suitably qualified members of disadvantaged groups cannot constitutionally be based on automatic preferences for certain categories, or combinations of categories, of disadvantage, but on careful consideration of what is reasonable and justifiable in the circumstances of each individual case. Therefore, it does not seem advisable, or indeed possible, to attempt any abstract ranking of different forms of disadvantage in order to devise an order of preference regarding designated groups. It was argued above that although the degree of disadvantage or vulnerability of the complainant group is a factor to take into account in assessing the fairness of a discriminatory act, the assessment of disadvantage or vulnerability needs to be done in a differentiated and contextualised way. In concrete individual cases, an assessment of the relative importance of different individual or collective profiles of disadvantage in a particular employment context may, therefore, be relevant for affirmative action decisions. For instance, the composition of the workforce of a specific employer may reflect that some groups are more disadvantaged than others, justifying special preferences in their favour. Since this "preference" is based

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[156] *Larbi-Odam and Others v Member of the Executive Council for Education (N-W Prov) and Another* 1997 12 BCLR 1655 (CC).

[157] See the discussion by Smith/Craver/Clark *Employment discrimination law* (1995) 92–93.

[158] Bevan *The Employment equity manual* (1994) 2–6.

[159] *Hunter v St Louis-San Francisco RR* 639 F2d 424 (8th Cir 1981).

on demonstrable need, and not on any arbitrary form of hierarchical "ranking" of the groups, it should be protected from challenges in terms of either section 9(2) or section 36(1) of the Constitution, or the Employment Equity Act.

Decisions involving selections between suitably qualified members of disadvantaged groups should therefore not be approached on the basis of any abstract *a priori* scale of preference for certain varieties of disadvantage or categories of the disadvantaged, since that would automatically shut out individuals who are not members of that group. Such an unsubstantiated preference for certain groups would constitute discrimination between groups and individuals who, being also "disadvantaged by unfair discrimination", should qualify to be considered on an equal footing for affirmative action. In *Motala v University of Natal*,[160] the court upheld the validity of different cut-off scores for Indians and Africans for admission to medical studies. This finding does not seem to have been based on a general rating of the groups in terms of degrees of disadvantage, but on an appropriate contextualised consideration of different degrees of educational disadvantage. The applicant was an Indian who was refused admission to the medical school of the University of Natal in favour of Africans with lower matriculation results obtained under the previous segregated educational dispensation. It was contended on behalf of the applicant that the Indian community had itself suffered substantial disadvantage as a result of discrimination. Accordingly, it was submitted that discrimination between members of the African community and those of the Indian community, under the policy adopted by the respondent for selection of first year medical students, was unfair discrimination. The court upheld the constitutionality of the preference on the strength of the different degrees of disadvantage suffered by each group. It stated:

> "The contention by counsel for the applicants appears to be based upon the premise that there were no degrees of 'disadvantage'. While there is no doubt whatsoever that the Indian group was decidedly disadvantaged by the apartheid system, the evidence before me establishes clearly that the degree of disadvantage to which African pupils were subjected under the 'four tier' system of education was significantly greater than that suffered by their Indian counterparts. I do not consider a selection system which compensates for this discrepancy runs counter to the provisions of sections 8(1) and 8(2) [of the interim Constitution]."[161]

In *Durban Metropolitan Council (Parks Department) v SAMWU*,[162] the grievant, a coloured man, was passed over in favour of an African for a supervisory position. The arbitrator noted that in terms of the applicable affirmative action policy, no automatic preference is given to any particular class of disadvantaged per-

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[160] 1995 (3) BCLR 374 (D) at 383B-F.

[161] See also the following observation in *Department of Correctional Services v Van Vuuren* (1999) 20 ILJ 2297 (LAC) (PA 6/98): "That the outcome was to a certain extent dictated by weighing up the comparative past inequalities suffered by the respondent and the other applicants is more of a reflection on the remaining strangeness of our society, rather than an indication of arbitrariness on his [the Commissioner's] part."

[162] (1998) 7 ARB 6.9.5.

sons. The nature of the position, the demographic profile of the department, the qualifications and work experience of the candidates were some of the relevant criteria that should determine the decision. He then went on to apply the identified criteria to the facts of the specific case:

> "Coloured employees in the Council exceed the demographic profile of the Durban Metropolitan area by one percent whereas the African component with the Council is under-represented by twenty percent. This weighs the discretion in favour of an African being appointed.
>
> Furthermore, the position of supervisor is low, standing at grade three. To swell the Coloured component at this level where the supply of labour is relatively abundant would be inconsistent with the objectives of the [affirmative action policy]. However, if the position was, say, for a Head of Department, a Coloured candidate should not be refused appointment purely on the basis that it would distort the demographics of the Council relative to the area profile.
>
> On the other hand, if the Applicant's score was markedly better than Mr Cele's, then by applying the merit principle this factor could be weighted more heavily in the Applicant's favour. Likewise, if he had acted in the position, that would have operated in his favour."[163]

4.3.2.2. Over-inclusive affirmative action measures

An affirmative action measure is over-inclusive if it benefits not only members of groups disadvantaged by unfair discrimination but also members of groups not so disadvantaged. In this respect, much has been said about the contentious issue whether affirmative action programmes should benefit only those individuals who were actually disadvantaged by past discrimination, or if it should also include non-victim members of a group, which on average suffered discrimination.[164] It is clear from its wording, though, that section 9(2) of the Constitution makes provision for both individualised and group-based affirmative action measures. The fact that it clearly refers to "persons or categories of persons disadvantaged by unfair discrimination," means that also individuals, who themselves are not actual victims of unfair discrimination, but who belong to a group, which has been so dis-

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[163] See also *Public Service Association – Gerhard Koorts v Free State Provincial Administration* CCMA FS3915 21 May 1998, discussed in Rycroft (note 81) 1426.

[164] Gibson (note 37) 308; Sloot *Positieve discriminatie: maatschappelijke ongelijkheid en rechtsontwikkeling in de Verenigde Staaten en in Nederland* (1986) 220. In *Durban City Council (Electricity Department) v Kalichuran* (1995) 4 ARB 6.9.5, the arbitrator interpreted the terms of the applicable affirmative action policy to require that in order to qualify for preferential treatment, a person must establish that he or she is the actual victim of disadvantage. *In casu* he found that the Indian applicant failed to provide any evidence of systematic exclusion based on race. See also the statement by Landman J in *George v Liberty Life Association of Africa Ltd* [1996] 8 BLLR 985 (IC) at 1005: "the constitution, the supreme law of the land, recognises that even within a racial group which has suffered discrimination there may be and indeed are persons who have had opportunities and who have not been disadvantaged to the extent of their fellows. Affirmative action in a South African context is not primarily intended for their benefit. Affirmative action as used in the Constitution is not premised on the American concept of affirmative action being 'racially based remedial action'."

advantaged, qualify for affirmative action benefits.[165] As long as such measures can be said to be designed to "protect or advance" the disadvantaged group to which they belong, they serve an objective expressly sanctioned by section 9(2). It appears then that this would leave little scope for the kind of attack on affirmative action plans that was successfully launched in the *Croson* case.[166] The court affirmed its previous approach that the beneficiaries of affirmative action plans need not be the actual victims of discrimination, but held nevertheless that the scope of the specific plan was too broad. It was intended to benefit African-American contractors, but included amongst its beneficiaries also other minority groups in respect of whom no evidence of previous discrimination had been proffered.[167] Secondly, the plan was not geographically narrowly tailored because also black entrepreneurs from anywhere in the country could reap its benefits.[168]

In *Thomas auf der Heyde v University of Cape Town*,[169] the South African Labour Court considered whether a black person who was not a South African citizen could be the beneficiary of an affirmative action programme. Jammy AJ was of the opinion that there is merit in the applicant's contention that such persons should not benefit in terms of the University of Cape Town's affirmative action policy. Although it is not required that the individual beneficiaries need to be personally disadvantaged, they must be members of groups that have been disadvantaged by discrimination.[170] The court concluded that non-citizens fall outside any of those categories.[171] This conclusion is too widely stated. Although it is true that the groups that the Constitution visualised as the beneficiaries of affirmative action are South Africans disadvantaged by discrimination, it is not inconceivable that these groups may in particular circumstances derive benefit from the appointment of black, female or disabled non-citizens, especially in so far as their appointment may contribute to the dismantling of behavioural or structural impediments in employment that operate to the disadvantage of designated groups.

4.3.3. Less restrictive means to achieve the affirmative action purpose

One factor that may indicate a disproportional effect on the rights of the complainants is the existence of less restrictive means to achieve the asserted purpose

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[165] This interpretation was adopted in the arbitration award of *Durban City Council (Electricity Department) v SAMWU* (1995) 4 ARB 6.9.23. The arbitrator also relied on the utilitarian argument that it would be impossible to implement affirmative action if each and every applicant had to go through a test as to whether he as an individual had been disadvantaged by past practices. A graduate from one of the best schools or universities in the county would, for example, find it difficult to satisfy the test of individual disadvantage. See also Kentridge (note 34) 14–39; Smith (note 157) 90. Cf. Rycroft (note 81) 1423–1425.

[166] *City of Richmond v JA Croson Co* 488 US 469, 109 SCt 706, 102 LEd 2d 854 (1989).

[167] 488 US 469 at 506, 109 SCt 706 at 728 (1989).

[168] 488 US 469 at 508, 109 SCt 706 at 729 (1989).

[169] Case no 603/98 5 May 2000.

[170] *Id* at par. 71.

[171] *Id* at par. 72.

of the affirmative action measure. In the case of affirmative action, the race or gender-based impact on the rights of the complainants may be lessened if the objective of redressing the effects of past discrimination could be addressed adequately through race or gender-neutral means, or in the event that they are unavoidable, if the objective could be achieved through a less burdensome preferential alternative.

Under the strict scrutiny test for race-based affirmative action[172], American courts have held that racial preferences must only be a "last resort option".[173] In *Croson*[174] the court struck down the reservation of a percentage of the city of Richmond's contracts for minority business enterprises, partly because the city had not considered race-neutral alternatives to increase minority participation in contracting before adopting the racial set-aside. The court argued that because minority businesses tend to be smaller and less established, race-neutral financial and

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[172] The United States Supreme Court has adopted a strict standard for governmental affirmative action under the Equal Protection Clause of the 14th Amendment to the Constitution: see Player *Employment discrimination law. Cases and materials* (1988) 95. Generally, racial or ethnic distinctions of any kind, including so-called benign discrimination, are inherently suspect and need to satisfy the strict scrutiny test of the Court: *Wygant v Jackson Board of Education* 476 US 267, 106 SCt 1842, 90 LEd 2d 260 (1986); *City of Richmond v JA Croson Co* 488 US 469, 109 SCt 706, 102 LEd 2d 854; *Adarand Constructors Inc v Pena* 515 US 200 (1995). First, the distinction must be justified by a compelling governmental interest and the means chosen to achieve the purpose must be narrowly tailored to the achievement of that goal. To establish the compelling governmental interest requirement, the government must make some showing of prior discrimination by the governmental unit involved before allowing limited use of racial classifications in order to remedy such discrimination. The government must itself have actively discriminated in employment or may seek to remedy the effects of discrimination committed by private actors within its jurisdiction, where it becomes a passive participant in that conduct and thus helps to perpetuate a system of exclusion: *City of Richmond v JA Croson Co* 488 US 469 at 492, 109 SCt 706 at 720. See also Robinson/Fink/Allen "Affirmative action in the public sector: the increasing burden of 'strict scrutiny'" *Labor Law Journal* (1998) 803–805; Skaggs "Justifying gender-based affirmative action under *United States v Virginia*'s 'exceedingly persuasive justification' standard" *California Law Review* (1998) 1176. A plan cannot be premised upon a retributive notion of societal injustice, nor upon the discrimination being practised by other employers within the industry: Player *ibid.* 317. Societal discrimination, without more, has been held to be too amorphous a basis for imposing a racially classified remedy: *Wygant v Jackson Board of Education* 476 US 267 at 274–276, 106 SCt 1842 at 1847–1848 (1986); *Regents of the University of California v Bakke* 438 US 265, 98 SCt 2733, 57 LEd 2d 750 (1978); *City of Richmond v JA Croson Co* 488 US 469, 109 SCt 706, 102 LEd 2d 854 (1989); *Shaw v Hunt* 517 US 899, 116 SCt 1894, 135 LEd 2d 207 (1996). It is submitted that this approach will be held unnecessarily restrictive in South Africa in the light of the wording of section 9(2) of the Constitution. It must also be noted that race-based affirmative action under the Constitution would not necessarily have to meet a standard as strict as that applied under the strict scrutiny test. In terms of the equality framework developed by the Constitutional Court there is no single fixed standard in terms of which the fairness or justifiability of a breach of the non-discrimination principle is measured in all circumstances. The standard depends on the interplay of the relevant factors that are taken into account when the fairness or justifiability of a discriminatory measure is appraised.

[173] *Engineering Contractors Association v Metropolitan Dade County* 122 F3d 895 (11th Cir 1997) at 926; *Contractors Association v City of Phila* 6 F3d 990 (3rd Cir 1993) at 1008. See also Robinson/Fink/Allen (note 172) 805. It appears that under the more relaxed intermediate scrutiny standard applicable to gender preferences, governmental employers are not required to implement the program only as a last resort.

[174] *City of Richmond v JA Croson Co* 488 US 469 at 507, 510, 109 SCt 706 at 729, 102 LEd 2d 854 (1989).

technical assistance and more favourable bonding requirements for small and/or new firms might have been equally effective without excluding other firms on racial grounds. The court in *In re Birmingham Reverse Discrimination Employment Litigation*[175] struck down the Birmingham preferential promotional goals, because there had not been an adequate attempt to pursue non-racial alternatives. The court pointed to the increase in black fire-fighters from 8 in 1978 to 42 in 1981 as proof that non-racial means can be effective and suggested one non-racial alternative, the elimination of seniority points as a ranking factor in promotions, and one less intrusive race-based alternative, the use of race as only one of many relevant factors in selection. By contrast, in *Peightal v Metropolitan Dade County*,[176] the court held that the employer's unsuccessful attempts to pursue non-racial alternatives, such as additional outreach programmes, high school and college recruitment programmes, were adequate. However, these attempts had only limited success because of the adverse effect of the rank-ordered fire-fighter test.

The precise scope of the obligation to consider neutral alternatives is, however, not clear. It seems that the requirement does not go so far as to require employers to first exhaust all race-neutral alternatives, but at least give them serious consideration before implementing race-based programmes.[177] *Ensley Branch NAACP v Seibels*[178] held that it is not required to exhaust every possible non-racial alternative, but there had to have been serious good faith consideration of alternatives either prior to or in conjunction with the implementation of an affirmative action plan. Because no attempt was made by the employers to develop and implement validated selection procedures over a long period of time, instead of the race-based promotional preference, the court found that there was not a serious attempt to pursue non-racial alternatives.[179] This approach gives the government employer a measure of discretion in determining whether its objectives could be accomplished through some other avenue. A court may, however, second-guess the government if it is believed that an effective race-neutral alternative is readily available and hence should have been attempted. In *Metro Broadcasting*,[180] for example, O'Connor J noted in her dissenting opinion that the specific programme was not narrowly tailored because the Federal Communications Commission has never determined that it has any need to resort to racial classifi-

[175] 20 F3d 1525 (11th Cir 1994) at 1545–1547.

[176] 26 F3d 1545 (11th Cir 1994) at 1557–1558

[177] See *Coral Construction Co v King County* 941 F2d 910 (9th Cir 1991) at 923: "while strict scrutiny requires serious, good faith consideration of race-neutral alternatives, strict scrutiny does not require exhaustion of every such possible alternative."

[178] 31 F3d 1548 (11th Cir 1994) at 1567–1568.

[179] See also *Aiken v City of Memphis* 37 F3d 1155 (6th Cir 1994) at 1164.

[180] *Metro Broadcasting Inc v Federal Communications Commission* 479 US 547 at 622, 110 SCt 2997 at 3039, 111 LEd 2d 445 (1990).

cations to achieve its asserted aims, and it has employed race-conscious means before adopting readily available race-neutral alternative means.[181]

In the light of the South African Constitution's commitment to substantive equality and different standards of review, it is safe to assume that there will not be the same level of insistence on race or gender-conscious measures to be a last-resort-option only. The focus is not on the race or gender basis of any measure as such, but on the fairness and proportionality of its impact. The proportionality principle does, however, require that effective neutral measures should be adopted, if doing so could prevent any unnecessarily race or gender-based impact on the rights of the complainants. Even if racial or gender preferences are unavoidable, the obligation remains to tailor preferential affirmative action in a way that burdens the rights of non-designated groups as little as is reasonably possible. The existence of reasonable and effective less restrictive affirmative action alternatives may therefore be a strong indication of a disproportional impact. When devising affirmative action programmes and plans, employers are enjoined to work out numerical goals, establish timetables and implement strategies that impose burdens that are no more restrictive than reasonably necessary to achieve the purposes envisaged by section 9(2) of the Constitution. The practical implications of this principle will be illustrated in the next section with reference to some of the more common forms of affirmative action.

5. Application

5.1. Outreach Programmes and Affirmative Recruitment

Affirmative action measures may include techniques to increase the recruitment of suitably qualified applicants from designated groups. Such programmes may be adopted to increase the flow of qualified applicants from designated groups for positions in which they are under-represented, to address the indirectly discriminatory effects of neutral recruitment practices, or to overcome negative perceptions amongst designated groups about an organisation's willingness to employ members of such groups. As such, they are clearly remedial and do not involve any appreciable exclusionary effect on non-designated groups. In fact, such actions may be constitutionally compelling. For instance, in *NAACP v Town of East Haven*,[182] a federal district court in the United States ordered the town of East Haven to make a concerted effort to reach out to its black community in hiring,

[181] See also *Ensley Branch NAACP v Seibels* 31 F3d 1548 (11th Cir 1994) at 1571: the city should have implemented the race-neutral alternative of establishing non-discriminatory selection procedures in police and fire departments instead of adopting race-based procedures; the continued use of discriminatory tests compounded the very evil that race-based measures were designed to eliminate; *Aiken v City of Memphis* 37 F3d 1155 (6th Cir 1994) at 1164: remanding to lower court partly because evidence suggested that the city should have used an obvious set of race-neutral alternatives before resorting to race-conscious measures.

[182] 998 F Supp 176 (DC Conn 1998).

finding that the town's neutral hiring practices resulted in a disparate impact upon black applicants. The court found that the low percentage of black residents, the nearly non-existent employment of blacks by the town, and the lack of success by blacks in seeking jobs with the town discouraged them from seeking employment. Although the town claimed a lack of qualified black applicants, the court found that the town's hiring process inadequately addressed negative perceptions in the black community and ordered the town to devise an aggressive minority hiring programme. In *Durban Metro Council (Consolidated Billing) v IMATU obo Van Zyl and Another*,[183] the South African arbitrator ruled that an executive director could validly intervene after the list of applications have been received to request wider recruitment efforts and/or a review of the grading requirements for the job, in order to increase the number of eligible candidates from designated groups.[184]

There are a number of affirmative steps to increase the flow of designated group applicants that seem appropriate and constitutionally unobjectionable. Use may be made of advertisements especially encouraging such applicants to apply. In circumstances of under-representation, both the Sex Discrimination Act 1975[185] and Race Relations Act 1976[186] in Britain permit the encouraging of a gender group or persons of a particular racial group to take advantage of opportunities for doing that work.[187] Employers may make use of recruiting sources (agencies, consultants, organisations, news media, etc.) accessible to disadvantaged groups, including encouraging employees from disadvantaged backgrounds to refer applicants. Special efforts could be made to include disadvantaged groups on human resource personnel and active recruiting programmes could be launched at secondary schools, colleges, or universities predominantly attended by students or pupils from disadvantaged communities. Programmes of remedial or supplementary training targeted at disadvantaged communities could be instituted in order to increase the pool of suitably qualified applicants from this source for future appointment or promotion.

5.2. Numerical Appointment and Promotion Goals and Timetables

A goal is a numerical target, usually expressed as a percentage, for the appointment or promotion of persons of a particular group. Timetables are the deadlines for reaching the numerical goals.[188] Section 15(2)(d) of the Employment Equity Act requires designated employers to ensure that suitably qualified people from designated groups are equitably represented in all occupational categories and lev-

[183] (1998) 7 ARB 6.14.1.

[184] However, the arbitrator held that once the process has reached the stage where applicants are short-listed and interviewed, the situation is different. If the selection committee has actually chosen two applicants from the short-listed group and recommended their appointment, it is an unfair practice for such persons to be barred from the appointment for which they have been recommended and are qualified.

[185] Section 48.

[186] Section 38.

[187] Bourn/Whitmore *The law of discrimination and equal pay* (1996) 145.

[188] Thomas (note 19) 402.

els in the workforce. The measures to bring this about may include preferential treatment and numerical goals, but not quotas.[189] A designated employer must collect information and conduct an analysis of the profile of each occupational category and level of its workforce in order to determine the degree of under-representation of people from designated groups.[190] Where the analysis has identified the under-representation of people from designated groups, the employer must indicate in its employment equity plan the numerical goals to achieve the equitable representation of suitably qualified people from designated groups within each occupational category and level in the workforce, as well as the timetable within which this is to be realised, and the strategies intended to reach those goals.

In devising numerical goals and timeframes, employers must evaluate their fairness and proportionality in relation to their effect on members of non-designated groups and the employing institution. The extent to which numerical goals may affect the rights or interests of non-designated group members and the employing institution depends on a number of factors and the complex way in which they may interact in specific circumstances. These include the size of the goal relative to the timeframe for its realisation, the employment-related position of those affected, and the financial or other relevant circumstances of the employing institution.

Where an affirmative action programme is justified on remedial grounds, the United States Supreme Court has looked at the size of any numerical goal and its comparison to the relevant labour market or industry as a starting point in considering whether it unfairly or disproportionally excludes members of the non-preferred groups.[191] This principle was expressed by O'Connor J in her dissenting opinion in *Paradise*[192] as follows: "If strict scrutiny is to have any meaning, a promotion goal must have a closer relationship to the percentage of blacks eligible for promotion. This is not to say that the percentage of minority individuals benefited by a racial goal may never exceed the percentage of minority group members in the relevant work force. But protection of the rights of nonminority workers demands that a racial goal not substantially exceed the percentage of minority group members in the relevant population or work force absent compelling justification."[193] The South African Employment Equity Act also requires that in

[189] Section 15(3).

[190] Section 20(2).

[191] Dellinger (note 60) 26. See *Engineering Contractors Association v Metropolitan Dade County* 122 F3d 895 (11th Cir 1997) at 927.

[192] *United States v Paradise* 480 US 149 at 199, 107 SCt 1053 at 1081 (1987).

[193] See also the dissenting opinion of Brennan J in *Regents of the University of California v Bakke* 98 SCt 2733 (1978) at 2792–2793: the special university admissions programme only operated to reduce the number of whites to be admitted in the regular admissions programme in order to permit admission of a reasonable percentage – less than their proportion of the California population – of otherwise underrepresented qualified minority applicants. In *Action Travail v CN Railway* (1987) 8 CHRR D/4210 (SCC), the Canadian Supreme Court upheld an affirmative action plan that required one out of every four new appointees in the blue collar category to be a woman until women comprised 13 % of that job category. By the end of 1981, women in blue collar positions in the specific region concerned, comprised only 0,7 % of that occupational category, as compared to the national average of 13 %.

determining the extent to which designated groups are "equitably represented" within each occupational category and level of the employer's workforce, two of the relevant considerations are the demographic profile of the national and regional economically active population and the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees.[194] In the United States, the court in *In re Birmingham Reverse Discrimination Employment Litigation*[195] considered the validity of a 50% black promotion goal pursuant to a consent degree in the Birmingham fire and rescue service. On the strength of the district court's finding of discrimination in hiring and evidence of discriminatory employment tests and selection procedures, the court accepted the justification for race-conscious relief. However, the 50% black promotion goal unnecessarily infringed the rights of other employees. The court referred to the fact that non-preferred white employees, who made up 411 of the 453 eligible candidates, were restricted to compete for only half of the promotional opportunities, whereas the rest were reserved for only 42 minority candidates.[196]

Courts have often rejected the notion that the determination of the reasonableness of numerical goals – even long term goals[197] – is a matter of simple general demographic comparison.[198] Job-relevant qualifications will vary amongst different groups.[199] The reasonableness of the size of the goal, therefore, also depends on the availability of qualified members of designated groups.[200] The Employment Equity Act also defines affirmative action as measures designed to ensure that "suitably qualified" people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce.[201] Courts have required that statistical comparisons of the employer's internal workforce must be made against the relevant population pos-

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[194] Section 42. See *Capital Alliance on Race Relations v Canada (Health & Welfare)* (1997) 28 CHRR D/179 (Canadian Human Rights Tribunal), where the Tribunal ordered the employer to appoint members of visible minorities into the permanent management category at a rate of 18% per year for five years in order to reach 80% proportional representation of this group in this occupational category. The Tribunal found that the employer's practices was to virtually exclude highly qualified minority employees from senior management in certain categories of employment, whilst they were concentrated in subordinate positions. The latter factor was described as "ghettoization", i.e. the clustering or concentration of visible minorities in staff jobs, or in highly technical or professional jobs from which they do not proceed into management positions, in other words, a "visibility trap".

[195] 20 F3d 1525 (11th Cir 1994).

[196] *Id* at 1542.

[197] See *Ensley Branch NAACP v Seibels* 31 F3d 1548 (11th Cir 1994) at 1570.

[198] See *Public Servants Association of South Africa and Another v Minister of Justice and Others* 1997 (5) BCLR 577 (T) at 644H-645E.

[199] Robinson/Fink/Allen (note 172) 806–807.

[200] See Player (note 172) 322.

[201] Section 15(1). The definition of "suitably qualified" in the Employment Equity Act (section 20(3)) probably has the effect that an employer must devise targets based not only on the percentage of designated group members possessing the required qualifications and experience to be able to do the job, but also on a calculation of the percentage of designated group members with the "capacity to acquire, within a reasonable time, the ability to do the job".

sessing job-essential skills.[202] To do otherwise would establish affirmative action goals which would actually over-represent the designated group and therefore unnecessarily exclude non-designated group members.[203] For instance, in *Croson*,[204] the city of Richmond sought to defend the 30% set-aside in the dollar value of prime contracts to minority subcontractors on the basis that it was halfway between the percentage of city contracts awarded to African-Americans during the years 1978–1983 (0,067%) and the African-American population of the city (50%). The court insisted on a more meaningful statistical comparison. It held that numerical targets used for racial preference must bear a relationship to the pool of qualified minorities. In the opinion of the court, the 30% target was too strongly based on general population numbers in the area, and rested on the questionable assumption that minorities will choose a particular trade "in lockstep proportion to their representation in the local population".[205] By contrast, in the *Badeck* case[206] the European Court of Justice has declared legislation, which prescribes a target for the appointment women in temporary academic positions and as assistants proportionate to the percentage of women amongst the graduates, holders of higher degrees and students in each discipline, to be compatible with the Equal Treatment Directive.[207]

The flexibility of numerical goals and timetables is another factor usually emphasised, when the extent to which it affects the rights of third parties or the employing institution, is considered. Programmes that rigidly adhere to numerically determined employment outcomes within a specified time will be difficult to reconcile with the requirements or fairness and proportionality. The function of both requirements is to ensure that no single interest, no matter how important in itself, should be insulated from being weighed against other legitimate competing considerations in order to arrive at a fair balance. Numerical goals should therefore be seen as "benchmarks" to measure progress and not hard and fast objectives

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[202] See *Aiken v City of Memphis* 37 F3d 1155 (6th Cir 1994) at 1165: the race-based numerical target for promotion remanded to lower court partly because it was premised on undifferentiated labour force statistics, with the instruction to determine whether the racial composition of the city labour force differs materially from that of the qualified labour pool for the positions in question; *Edwards v City of Houston* 37 F3d 1097 (5th Cir 1994) at 1114: the race-based promotion goals were held reasonable because they were based on the number of minorities with the required skills for the positions in question.

[203] Robinson/Fink/Allen (note 172) 807.

[204] *City of Richmond v JA Croson Co* 488 US 469, 109 SCt 706, 102 LEd 2d 854 (1989).

[205] 488 US 469 at 507, 109 SCt 706 at 729 (1989). Cf. also *Back v Carter* 933 F Supp 738 (ND Ind 1996) at 759: "[i]f the interest justifying classification is discrimination against women attorneys during the election, the classification should be tied to the percentage of women attorneys rather than to attempt to strike simple gender balancing." See also *Long v City of Saginaw* 911 F2d 1192 (6th Cir 1990) and cf. *Peightal v Metropolitan Dade County* 26 F3d 1545 (11th Cir 1994).

[206] *Badeck v Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen* Case no C-158/97, 28 March 2000.

[207] Art. 2(1) and (4) of Council Directive 76/207/EEC 9 February 1976.

that have to be met at all cost.[208] Powell J said in *Local 28, Sheet Metal Workers' International Association v EEOC*[209] that

> "[t]he requirement of ... flexibility with respect to the imposition of a numerical goal reflects a recognition that neither the Constitution nor Title VII requires a particular racial balance in the workforce. Indeed, the Constitution forbids such a requirement if imposed for its own sake ... Thus, a court may not choose a remedy for the purpose of attaining a particular racial balance; rather, remedies properly are confined to the elimination of proven discrimination. A goal is a means, useful in limited circumstances, to assist a court in determining whether discrimination has been eradicated."

In *Johnson v Transportation Agency, Santa Clara County, California*,[210] the court approvingly referred to the long-term numerical goal adopted by the employer of a work force that mirrored in its major job classifications the percentage of women in the area labour market as a benchmark for measuring progress in eliminating under-representation. One of the reasons why the court rejected the employer's numerical goals in *Ensley Branch NAACP v Seibels*,[211] is because they were treated as "absolute commandments" rather than goals.[212] Responding to the contractors' complaints about inflexibility in *Legal Aid Society v Brennan*,[213] the court stressed that a plan and its achievement were not necessarily the same thing. However goals are stated, they remain only targets reasonably attainable by means of applying every good faith effort by the contractor.

In this respect, section 15(3) of the South African Employment Equity Act unequivocally states that the affirmative action measures an employer is obliged to take include preferential treatment and numerical goals, but exclude quotas. "Quotas" refer to all preferential techniques that have the effect of reserving all or a fixed percentage of job opportunities for designated groups. This may be achieved through the setting aside of a specific number of positions for designated groups or by making designated group status the only or dominant criterion for eligibility for employment opportunities. In *Local 28, Sheet Metal Workers International Association v EEOC*,[214] O'Connor J distinguished between quotas and goals as follows:

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[208] See *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616 at 636, 107 SCt 1442 at 1454 (1987), where the court noted (quoting O'Connor J in *Local 28, Sheet Metal Workers' International Association v EEOC* 478 US 421 at 495, 106 SCt 3019 at 3060, 92 LEd 2d 344 (1986)): "[b]y contrast, had the Plan simply calculated imbalances in all categories according to the proportion of women in the area labour pool, and then directed that hiring be governed solely by those figures, its validity fairly could be called into question. This is because analysis of a more specialized labor pool normally is necessary in determining underrepresentation in some positions. If a plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to achievement of a particular percentage of minority employment or membership ... regardless of circumstances such as economic conditions or the number of available qualified minority applicants."

[209] 478 US 421 at 487, 106 SCt 3019 at 3056 (1986) (citations omitted).

[210] 480 US 616, 107 SCt 1442, 94 LEd 2d 615 (1987).

[211] 31 F3d 1548 (11th Cir 1994) at 1567.

[212] See also *In re Birmingham Reverse Discrimination Employment Litigation* 20 F3d 1525 (11th Cir 1994) at 1548–1549.

[213] 608 F2d 1319 (9th Cir 1979) at 1342.

[214] 478 US 421 at 495–496, 106 SCt 3019 at 3060, 92 LEd 2d 344 (1986) (citation omitted).

"A quota would impose a fixed number or percentage which must be attained, or which cannot be exceeded, and would do so regardless of the number of potential applicants who meet necessary qualifications ... By contrast, a goal is a numerical objective, fixed realistically in terms of the number of vacancies expected, and the number of qualified applicants available in the relevant job."

One way to avoid "mere blind hiring by the numbers"[215] is to ensure that a specific number or a hard and fast percentage of positions is not set aside exclusively for members of designated groups. The court in the *Johnson* case[216] endorsed the employer's plan, which declared that goals should not be construed as quotas that should be met, but as "reasonable aspirations in correcting the imbalance in the employer's work force". These goals were to take into account factors such as turnover, lay-offs, lateral transfers, new job openings, retirements and availability of minorities, women and handicapped persons in the area workforce who possess the desired qualifications or potential for appointment.[217] It would also be indicative of adherence to a rigid quota if, after adequate recruitment efforts were launched, a vacancy is not filled while qualified members of non-designated groups applied and are available, or if an unqualified member of a designated group is selected.

A reasonable congruence between flexible appointment or promotion goals and the percentage of suitably qualified members of designated groups in the relevant labour market will, therefore, usually be an important indication of its fairness or justifiability. The question whether the burden imposed by goals and timetables unfairly or unjustifiably affects non-designated groups or the employing institution, must, however, be established by considering those goals and timetables in terms of all the relevant requirements of the constitutional fairness and justifiability tests. More compelling affirmative action purposes may necessitate higher goals or shorter timeframes. On the other hand, the nature of the burden imposed by a goal that is moderate when judged in terms of a demographic standard, could be severe depending on the labour turnover of the employing institution, its financial position, the demands of the positions concerned, or the specific employment-related circumstances of those negatively affected.

The Employment Equity Act acknowledges that the reasonableness of the size of numerical targets depends on a complex variety of factors. Section 42 states that in assessing whether a designated employer is implementing affirmative action in compliance with the provisions of the Act, the following factors need to be taken

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[215] See *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616 at 636, 107 SCt 1442 at 1454, 94 LEd 2d 615 (1987).

[216] *Id* 480 US 616 at 635–636, 107 SCt 1442 at 1453–1454, 94 LEd 2d 615 (1987).

[217] See also *Durban Metropolitan Council (Parks Department) v SAMWU* (1998) 7 ARB 6.9.5. The arbitrator noted that "[i]f in achieving the objectives of the [affirmative action policy], the approach was purely numerical then it would be quite easy to fill the lower grades with African people. This would merely reinforce the stereotypes of the apartheid era and be counterproductive to the overall aim ... to eliminate discrimination. The nature of the position and the demographics of the department are some of the criteria which should be considered to ensure that appointments are made consistently with the [policy]."

into account: the extent to which designated groups are equitably represented in the workforce; progress made in implementing employment equity by other designated employers operating under comparable circumstances and within the same sector; reasonable efforts made by a designated employer to implement its employment equity plan; the extent to which the designated employer has made progress in eliminating employment barriers that adversely affect people from designated groups; and any other prescribed factor. More particularly, in determining the extent to which designated groups are "equitably represented" within each occupational category and level of the employer's workforce, resort must be had to the following considerations: the demographic profile of the national and regional economically active population; the pool of suitably qualified people from designated groups from which the employer may reasonably be expected to promote or appoint employees; economic and financial factors relevant to the sector in which the employer operates; present and anticipated economic and financial circumstances of the employer; and the number of present and planned vacancies that exist in the various categories and levels, and the employer's labour turnover.[218] Although the factors listed by the Act are all relevant considerations under the fairness and/or proportionality enquiries, it is submitted that it should not be treated as a closed list. All other unmentioned relevant factors, such as the effect of an affirmative action measure on the rights or interests of the non-preferred groups[219], need to be considered also.

In considering the reasonableness of numerical targets, their long or short-term nature the goals are obviously also important. Different considerations may apply. The difference between short-term and long-term affirmative action numerical goals were explained in *Ensley Branch NAACP v Seibels.*[220] Long-term goals are intended to reflect the basic purpose of the plan, they are the "final destination". As the long-term goals are reached, affirmative action ends. By contrast, the annual appointment goals are the means of achieving the long-term goals; they guide year-to-year personnel decisions. General demographic factors may be the determinative guideposts for the establishment of long-term goals, whereas it seems reasonable that labour turnover, financial and economic circumstances, or other operational needs of the employer must be allowed due deference in evaluating short-term goals. In *Johnson v Transport Agency Santa Clara County*

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[218] Cf. also section 10(2) read with s 33(1)(f) of the Canadian Employment Equity Act, which requires that the establishment of short-term numerical goals must take account of the following factors: the degree of underrepresentation of persons in each designated group, in each occupational group within the employer's workforce; the availability of qualified persons in designated groups within the employer's workforce and in the Canadian workforce; the anticipated growth or reduction of the employer's workforce during the period in respect of which the numerical goals apply; the anticipated turnover of employees within the employer's workforce during the period in respect of which the numerical goals apply; any other factor that may be prescribed.

[219] The Canadian Human Rights Commission prescribes as one of the factors for assessing goals under the Canadian Employment Equity Act, their impact on non-designated groups. See http://www.216.58.17.36/ee/Framework/Part2-Partie2.asp#E.

[220] 31 F3d 1548 (11th Cir 1994) at 1570.

California[221], the agency adopted the long term goal of female representation in all job categories that "mirrored" the percentage of women in the area labour market. However, the plan directed that annual short-term goals be formulated that would provide a more realistic indication of the degree to which sex should be taken into account in filling particular positions. Such short-term goals had to take into account factors such as "turnover, lay-offs, lateral transfers, new job openings, retirements and the availability of minorities, women and handicapped persons in the area workforce who possess the desired qualifications or potential for placement." Taking into account all these factors, the agency adopted the modest goal for 1982 of 3 women for the 55 expected openings in the skilled craft job category. In *Peightal v Metropolitan Dade County*[222], the court approved of a fire department's annual numerical goals, which were based not only on the extent of underrepresentation remaining, but also on the probable number of qualified minority applicants and the anticipated number of openings.[223]

The United States Supreme Court requires that affirmative action goals should not constitute an absolute bar to, or unnecessarily burden the employment opportunities of non-beneficiary groups. In *United Steelworkers of America v Weber*,[224] the court considered the setting aside of half of the openings in an in-plant craft-training programme for blacks a moderate goal. It constituted a short-term arrangement that only temporarily restricted the promotional opportunities of whites until the long-term goal is reached where the representation of blacks in the skilled craft positions equalled their representation in the relevant labour market. Prior to the adoption of the plan, only 1,83 % (5 out of 273) of the skilled craft workers at the plant were black, while the workforce in the area was approximately 39 % black. In the state contracting field, the court in *Fullilove*[225] considered it significant that the contracting requirement at issue reserved for minorities a very small amount of the total funds for construction work in the nation (less than 1 %), leaving non-minorities able to compete for the vast remainder. The reasonableness of a similar numerical promotional goal was accepted in the *Paradise* case[226]. The court upheld the validity of a plan that temporarily set aside 50 % of all promotions in favour of blacks until they constituted about 25 % of the officer ranks. In reaching its decision that the plan did not unnecessarily trammel the rights of white employees, the court referred to the following relevant factors: the promotional goal was flexible, temporary and "specifically tai-

221 480 US 616, 107 SCt 1442, 94 LEd 2d 615 (1987).

222 26 F3d 1545 (11th Cir 1994).

223 This does not mean that short or medium-term goals must always be lower than the long-term goals. See *United States v Paradise* 480 US 149 (1987) at 198–199. The court imposed a 50 % promotional quota upon the Alabama Department of Public Safety, until the end result of 25 % representation of blacks was reached. In her dissent in *Paradise* (480 US 149 at 198), Justice O'Connor held that the 50 % promotional goal far exceeded the percentage of blacks in the trooper force and there was no evidence in the record that such an extreme quota was necessary.

224 443 US 193, 99 SCt 2721, 61 LEd 2d 480 (1979).

225 *Fullilove v Klutznick* 448 US 448 at 515 (1980).

226 *United States v Paradise* 480 US 149, 107 SCt 1053, 94 LEd 2d 203 (1987).

lored" to eliminate the present effects of past discrimination; the promotional goal was fair in as much as it provided each of these two racial groups with the proportion of positions within the trooper hierarchy that it most likely would have obtained absent the history of discrimination in the Department; it imposed no absolute bar to white advancement; in fact, Brennan J was of the opinion that the quota would merely delay the promotion of white employees; and no lay-offs or the refusal of a future employment opportunity was involved.

Section 15(4) of the Employment Equity Act provides that an employer is not obliged to take any decision concerning an employment policy or practice that would establish "an absolute barrier" to the prospective or continued employment or advancement of people who are not from designated groups. Although this section does not explicitly prohibit such absolute barriers, it is submitted that the complete exclusion of members of non-designated groups would be constitutionally valid in the most unusual circumstances only. It is difficult to see how the complete exclusion of members of non-designated groups from employment opportunities could meet the constitutional conditions for fairness and proportionality. Both fairness and proportionality presuppose the recognition of the validity of all competing interests and their due consideration in the process of reaching a fair balance. Total exclusion of non-designated groups from the competition for job opportunities means that the interests of non-designated groups are ruled out of the equation from the outset.[227] In *Johnson*,[228] the court concluded that because gender was only a factor to consider in making the promotion decision, rather than having the position set aside for a particular race or gender, the plan did not unnecessarily trammel the rights of the male applicant. This suggests that if a plan did reserve certain positions for a particular race or gender, and required that the position be filled by a person of that race or gender only, the plan would not be valid. In *Palmer v St Petersburg Junior College*,[229] a black permanent appointee replaced a temporary white employee. The court noted that if the position had been reserved for a black employee, or if the case involved the dismissal of a white employee to facilitate the hiring of the black employee, the decision would have been unlawful. Since the case concerned only the filling of a position temporally occupied by a white person, the action was valid.

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227 Cf. O'Connor J (dissenting) in *Metro Broadcasting v Federal Communications Commission* 497 US 547 (1990) at 630 regarding the FCC's requirement that certain broadcasting licences may be transferred to minority controlled applicants only: "[t]here is no more rigid quota than a 100% set-aside ... For the would-be purchaser or person who seeks to compete for the station, that opportunity depends entirely upon race or ethnicity."

228 *Johnson v Transportation Agency, Santa Clara County, California* 480 US 616 at 638, 107 SCt 1442 at 1455 (1987).

229 748 F2d 595 (11th Cir 1984).

5.3. "Plus Factor" or "Tie Breaker"

In circumstances where designated groups are substantially under-represented in jobs as the result of past discriminatory practices or policies, an employer may adopt the strategy of considering designated group status in selection decisions. Designated group status may thus become a factor that favourably influences the selection chances of the designated group member. Such a strategy found judicial favour in *Regents of the University of California v Bakke*.[230] Justice Powell approvingly observed with reference to the Harvard student admissions plan that "[i]n such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."[231] If the strategy involves giving preference to a designated group member in situations of relative equality with competitors only, it is referred to as a "tie-breaker".

The case of *Johnson v Transportation Agency Santa Clara, California*[232] is an example of preference based on gender in circumstances of relative equality of qualifications of the candidates who competed for the same post. The Agency decided to implement a plan, which included among other features preferential promotions favouring women. More specifically, this plan provided that in making promotions in traditionally segregated job classifications in which women are significantly under-represented, the agency is authorised to consider the sex of a qualified applicant as one among several relevant factors. A woman applicant, who scored two percentage points less in a test than the male applicant in the case, was appointed on the recommendation of a board which took into account that no woman had ever been appointed in the particular job category (road dispatcher) before. The court approved this form of preferential treatment of women as a means of overcoming the effect of societal attitudes that have limited the entry of women into certain types of jobs. Justice Brennan noted that there were strong social pressures against women pursuing certain types of jobs and that in some areas there were not enough women with the requisite skills. In view of this, he felt that the agency was justified in setting flexible annual short-term goals to increase the number of women in the particular job categories. He emphasised that the gender of the applicant was but one of a number of factors that were taken into account in arriving at the decision that led to her promotion. In respect of the question whether the plan unnecessarily trammelled the rights of male employees or created an absolute bar to their advancement, the Court argued as follows:

> "In contrast to the plan in *Weber*, which provided that 50% of the positions in the craft training program were exclusively for blacks, and to the consent decree upheld last term in *Firefighters v Cleveland*, 478 U.S.501, 106 S.Ct. 3063, 92 L.Ed.2d 405 (1986), which required the promotion of specific numbers of minorities, the plan sets aside no positions for women. The Plan expressly states '[t]he "goals" established for each Divi-

230 438 US 265 at 317, 98 SCt 2733 at 2762 (1978).
231 Cf., however, *Hopwood v Texas* 78 F3d 932 (5th Cir 1996), *cert denied* 518 US 1033 (1996).
232 480 US 616, 107 SCt 1442, 94 LEd 2d 615.

sion should not be construed as "quotas" that must be met.' Rather the Plan merely authorizes that consideration be given to affirmative action concerns when evaluating qualified applicants. As the Agency Director testified, the sex of Joyce was but one of numerous factors he took into account in arriving at his decision ... [T]he Agency Plan requires women to compete with all other qualified applicants. No persons are automatically excluded from consideration; all are able to have their qualifications weighed against those of other applicants.

In addition, petitioner had no absolute entitlement to the road dispatcher position. Seven of the applicants were classified as qualified and eligible, and the Agency Director was authorized to promote any of the seven. Thus, denial of the promotion unsettled no legitimate firmly rooted expectations on the part of the petitioner. Furthermore, while the petitioner in this case was denied a promotion, he retained his employment with the Agency, at the same salary and with the same seniority, and remained eligible for promotions."[233]

The tie-breaker approach was also applied in the South African arbitration case of *Durban Metropolitan Council (Parks Department) v SAMWU*.[234] An African who scored one point less than a coloured competitor for the job of parks/nursery supervisor was appointed. The preference for the African candidate was based, *inter alia*, on the fact that Coloured employees exceeded the demographic profile of the relevant labour market by one percent whereas the African component was under-represented by twenty percent. On the other hand, the arbitrator noted that if the grievant's score was markedly better than that of the successful candidate, this factor should be weighted more heavily in the grievant's favour.[235]

Valid preferential treatment need not be limited to the tie-breaker situation. Rycroft argues that the "relatively equal test" tends to reward those privileged in the past and, whilst recognising their expertise and seniority leaves the need for transformation in specific grades unresolved.[236] In *Gruenbaum v SA Revenue Service (Customs and Excise)*,[237] the commissioner questioned the interpretation of management of its affirmative action policy to prefer an affirmative action candidate only when there were two candidates with exactly the same qualifications and experience. He held that if this approach prevails, there will be little scope, because of past discrimination, to transformation of the private and public sectors. Affirmative action candidates will invariably be less experienced precisely because of limited opportunities in the past to acquire that experience.

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[233] 480 US 616 at 638, 107 SCt 1442 at 1455.

[234] (1988) 7 ARB 6.9.5.

[235] See also *City of Durban v Naidoo* (1995) 4 ARB 6.9.1: preference given to an Indian over evenly-matched white candidate upheld. In *Thomas v East London Transitional and Local Council* unreported decision of Labour Court P145/98 (1 February 1999), the court upheld a decision to give preference to a black candidate in terms of a policy that provided that "[m]embers of disadvantaged groups will receive preference above others, other things being equal in those job categories where affirmative action applies." Cf. *Public Servants Association of South Africa and Another v Minister of Justice and Others* 1997 (5) BCLR 577 (T) at 644G, seemingly expressing a similar preference for "all other things being equal" type of affirmative action.

[236] *Ibid.* 1427.

[237] CCMA KN20090, 6 November 1998, discussed in Rycroft (note 81) 1419–1420.

Preferring members of designated groups only in situations of relative equality with competitors of non-designated groups will indeed do little to compensate for employment-related disadvantage. The question remains, however, what relevance, if any, should be attributed to substantial differences in qualifications and job experience. Must affirmative candidates be preferred automatically if they meet minimum job requirements, irrespective of how they compare with competitors from non-designated groups? Or is there a limit where the difference in qualifications will be simply too substantial to ignore? The situation-sensitiveness of the tests for fairness and justifiability dictates that a general answer would once again be misleading.[238] There may indeed be situations where preferring a designated group candidate, who only meets minimum requirements, to a substantially better qualified non-designated group member, will be fair or justifiable. For instance, if the job in question is an entry-level position which does not require any special skills, or where such skills can be attained reasonably quickly through training or on the job, and substantial under-representation of designated groups exists in the specific job category, such a preference may well be considered constitutionally unproblematic. In such circumstances the need to address the historical exclusion of designated groups in the specific job category, and to avoid the perpetuation of the exclusion of designated groups from job opportunities, will probably prevail over competing interests. If the efficiency needs of the employing institution is not significantly affected by not appointing the better qualified candidate, if it involves no notable negative financial implications, and the detriment suffered by the unsuccessful candidate does not entail unreasonable barriers to securing entry-level employment, or constitute an unreasonable impediment to his or her career advancement, etc., preferring the lesser qualified candidate would be constitutionally valid. If, on the other hand, it involves a promotion to a high level position, this fact plus a possible array of other factors may tilt the scales in the opposite direction. The transformation needs must be weighed against the substantial need to obtain the services of employees with proven discretion, responsibility and experience. The impact on the internal non-designated candidate of not being selected might be much more drastic, depending on the circumstances, and the efficiency needs of the employer are clearly more substantial. It is

[238] Rycroft *ibid.* 1427 correctly criticises the two primary tests applied in Canadian arbitral practice for determining when a consideration other than merit should tip the scale in favour of one job candidate over another. The threshold test requires that the affirmative action candidate must meet only the threshold minimum requirements of the position to be appointed, even though there may be better qualified candidates. The relatively equal test requires that if one of the candidates is notably better qualified, that candidate should be appointed, irrespective of any affirmative action considerations. However, if the two candidates are relatively equal in qualification, experience and ability, then the affirmative action candidate should be appointed. The more senior the position is, the more likely are responsibility, discretion and experience to be its requirements and therefore should be filled on the relative equality basis. In filling non-managerial vacancies, where discretion is a less important component of the job, then the threshold test normally applies. This approach is clearly too formulaic to satisfy the fairness and justifiability tests of the Constitution. The nature of the job requirements is also but one of many relevant factors to take into account when applying those tests.

submitted that in this respect the court in *Public Servants' Association of South Africa v Minister of Justice and Others*[239] correctly held that the efficiency interests of the employer must be accorded more weight in relation to the need to promote representativity in the case of high level posts, than need be the case had the position been an entry level one.[240]

A policy of affording automatic preference for suitably qualified members of designated groups would, however, not be compatible with the variety of factors that need to be taken into account for an employment decision to meet the requirements of fairness or proportionality.[241] The fairness and proportionality of an affirmative action measure cannot be established without taking into account the validity and weight of competing considerations and interests. Fairness depends on the cumulative effect of all relevant concerns, including the extent of the impact of the measure on the rights and interests of the complainant. Proportionality requires, by definition, a fair balance of competing interests. Affording automatic preferences for designated group members eliminates the possibility of affirmative action from being tested in respect of its fairness and proportionality and elevates the affirmative action objective (addressing under-representation) to the position of sole requirement for validity. In the case of *Kalanke v Freie Hansestadt Bremen*,[242] the European Court of Justice invalidated a legislative provision of Bremen, which provided that if male and female candidates shortlisted for appointment or promotion as city officials were equally qualified, the woman candidate had to be automatically preferred if women were under-represented in the post concerned.[243] The issue to be decided was whether the legislation was saved

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239 1997 (5) BCLR 577 (T).

240 *Id* at 644F-H: "[t]he respondents also saw their imperative of broad representivity as meaning that such must as soon as possible be instituted at all levels of the civil service. This led to the earmarking of posts, in some cases, at or near the very top of the pyramid in a professional department like the State Attorney's office. That is not expressly called for by the Constitution in demanding that a broadly representative public administration as a whole be promoted. I can visualise that different considerations may apply in affirmative action at entry level where, all other things being equal, blacks are preferred, to the application of affirmative action at sophisticated level where, for various reasons including the past, it may be difficult to find candidates measuring up to the qualifications, expertise and experience of the incumbents."

241 Cf. *Johnson v Transportation Agency, Santa Clara County, California* 107 SCt 1442 at 1454: the affirmative action position in question did not unduly trammel the rights of the plaintiff, *inter alia* because it set aside no positions for women; *City of Richmond v JA Croson Co* 109 SCt 706 (1989) at 720: absolute preferences based solely on the race of the applicant is not a narrowly tailored means of remedying the effects of past discrimination; *Cunico v Pueblo School District No 6917* F2d 431 at 440 (10th Cir 1990): invalidating an affirmative action appointment because "the position ... was earmarked for a black person to the exclusion of all other qualified persons"; *Gilligan v Department of Labour* 81 F3d 835at 839 (9th Cir 1996): "[i]f the district court found that gender was the exclusive factor and that the position Gilligan sought was, in fact, unavailable to him because he was male, then the Department would be guilty of illegal discrimination. No hiring official may make decisions using gender as an exclusive factor."

242 [1996] 1 CMLR 175 (ECJ).

243 In terms of the impugned legislation, under-representation was deemed to exist if women comprised less than 50 % of the incumbents of a specific job category.

by article 2(4) of the Equal Treatment Directive,[244] which provides that the Directive shall be "without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in [employment]". The court held that national rules which guarantee women "absolute and unconditional priority" for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in article 2(4) of the Directive.[245] Although the judgement may be criticised on other grounds[246], it is submitted that the same result would have been reached if the fairness and justifiability tests under the South African Constitution were applied to the facts of the case. In *Marschall v Land Nordrhein-Westfalen*,[247] on the other hand, the court found that a legislative provision which called for the conditional preferential appointment or promotion of equally qualified women in situations of their under-representation, was not incompatible with the Equal Treatment Directive. The impugned provision stipulated that "women are to be given priority for promotion in the event of equal suitability, competence and professional performance, unless reasons specific to another candidate predominate." The court explained that this provision differed from the one in the *Kalanke* case, because "it provides for male candidates who are equally qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates where one or more of those criteria tilts the balance in favour of the male candidate."[248] A conditional preference, such as the one in this case, clearly leaves more scope for the application of the tests of fairness and proportionality. It is arguable, though, that the legislative provision in question is still too limited, in so far as it restricts the range of competing concerns that may override the gender preference to those pertaining to the personal situation of rival candidates, whilst other considerations that might be relevant in terms of the fair-

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244 77/207.

245 [1996] 1 CMLR 175 at par. 22.

246 The judgement seems to have been informed by a too restricted concept of equality of opportunity and a too rigid separation of the notions of "equality of opportunity" and "equality of results", which do not allow affirmative action for the purpose of dealing more directly (through social integration and inclusion of women in the workplace) with behavioural or structural reasons for the under-representation of women in the workplace. This part of the reasoning, as espoused in the opinion of the Advocate General at para. 12 *et seq*, is clearly inapplicable to the interpretation of the Employment Equity Act in the light of the latter's stated objective of addressing also such structural impediments to equal treatment. However, in *Marschall v Land Nordrhein-Westfalen* [1998] 1 CMLR 547 at par. 31 the court stated: "[i]t follows that a national rule in terms of which, subject to the application of the savings clause, female candidates for promotion who are equally as qualified as the male candidates are to be treated preferentially in sectors where they are under-represented may fall within the scope of Article 2(4) if such a rule may counteract the prejudicial effects on female candidates of the attitudes and behaviour described above and thus reduce actual instances of inequality which may exist in the real world." See further, Klinck "Limiting affirmative action legislation: the European Court of Justice in *Eckhard Kalanke v Freie Hansestadt Bremen* Case no C-450/93, ECJ 17/10/95" *SAJHR* (1997) 638–65; Ellis *European community sex equality law* (1998) 248–260.

247 [1998] 1 CMLR 547 (ECJ).

248 *Id* at par. 33.

ness or proportionality enquiries, such as other important operational, institutional or public policy[249] concerns, are not mentioned.

The Labour Court in South Africa dealt with a similar problem in *Antoinette McInnes v Technicon Natal*[250] and, it is submitted, reached a result compatible with the principles explained above. The applicant, a white woman, was one of three candidates shortlisted for an academic position at the Technicon. A selection committee interviewed the candidates and found that two were "appointable", namely the applicant and a black man. A majority of the committee recommended the applicant. The Vice Principal Academic, however, refused approval of the appointment and referred the recommendation back to the committee with a direction that it reconsider its recommendation in the light of the Technicon's affirmative action policy. At the reconvened meeting, the selection committee reaffirmed its preference of the applicant, but recommended that the black candidate be appointed. The court found that the committee had acted upon the instruction of the Vice Principal that automatic preference had to be given to a black candidate who met the minimum requirements.[251] The court considered whether the affirmative action policy of the Technicon complied with the requirements of item 2(2)(b) of Schedule 7 of the Labour Relations Act 1995. It concluded that it did because "whilst seeking to promote the upliftment and advancement of previously disadvantaged communities, it also seeks to balance this against various other factors, such as the needs of the institution and the students. Race cannot be regarded as the sole criterion where two persons are "appointable". The fact that the appointee was a member of the African community gave him a distinct advantage, in the light of the latter group's past exclusion from employment and present underrepresentation. This factor, however, had to be balanced against the need to provide the highest standard of tertiary service to students. This could not be achieved by appointing someone at the eleventh hour where the incumbent was the far better candidate, able to continue the work she was doing and the appointee had no previous teaching experience."[252]

5.4. Test Score Adjustment

In the United States, prior to 1991, a "carefully contoured" adjustment of test scores to accomplish the objective of reducing disparate impact on minority can-

[249] Such as those considered by the European Court of Justice in *Badeck v Hessischer Ministerpräsident und Landesanwalt beim Staatsgerichtshof des Landes Hessen* Case C-158/97, 28 March 2000 at par. 35. Interests that could override the gender preference considered by the court included the promotion of persons with disabilities, or employees who interrupted their employment because of family responsibilities, or candidates who voluntarily served for a period of military service in excess of the compulsory period.

[250] (2000) 9 LC 6.15.1.

[251] *Id* at par. 35(4).

[252] *Id* at par. 38–40.

didates was considered to be a valid aspect of an affirmative action plan.[253] The Civil Rights Act 1991[254] now states that it shall be an unlawful employment practice for a respondent in connection with selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cut-off scores for, or otherwise alter the results of employment-related tests on the basis of race, colour, religion, sex or national origin.

It is submitted that both the Constitution and the Employment Equity Act in South Africa could allow test score adjustment, when it is designed to make reasonable allowance for employment-related disadvantage, such as educational deficiency or lack of work experience as a result of prior discriminatory practices. In order to be constitutionally valid, such an adjustment must then be rationally related to the purpose of remedying the effects of past employment-related discrimination and must not be disproportionally invasive of the rights of non-designated group members. In *Motala and Another v University of Natal*,[255] two purposes seem to have been advanced in justification of the university's racially differential admission system for medial studies, namely to compensate for educational disadvantage suffered under the previous racially separated educational system and to increase the number of doctors in the black community. The court, it is submitted, correctly found that both purposes could be legitimately pursued under section 8(3)(a) of the interim Constitution. The judgement, however, does not seriously investigate either the rationality or proportionality of the means chosen to advance these goals. Only Indian candidates who obtained six distinctions in the matriculation examinations were considered for admission and out of the total of all admissions, forty places were reserved for Indian students. The respondent correctly contended that in order to compensate for the educational disadvantage of especially blacks, official school results could not be the determining criterion for assessing potential success at university studies. However, no evidence was produced to explain how the different cut-off points in the scores of the different races were related to the measurement of potential and thus to the remedying of educational disadvantage. In fact, the respondent seems to have conceded the inherent arbitrariness of its policy by admitting that it could not find a satisfactory means of executing its objective of assessing students in terms of potential.[256] In-

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253 Player/Shoben/Lieberwitz *Employment discrimination law* (1988) 177. See *Tangren v Wackenhut Service* 658 F2d 705 at 707 (9th Cir 1981); *Bushey v New York State Civil Service Commission* 733 F2d 220 at 229 (2nd Cir 1984); *San Francisco Police Officer Association* 812 F2d 1125 (9th Cir 1987). In *Peightal v Metropolitan Dade County* 26 F3d 1545 (11th Cir 1994), the court rejected a reverse discrimination complaint of a white applicant ranked 28th on a test score who was overlooked in favour of a lower scoring minority applicant. The court found the departure from rank-ordering did not place an undue onus on the plaintiff because reliable evidence showed that the test had an adverse impact on blacks, Hispanics and women and that it was not a valid predictor of subsequent job performance.

254 42 USCA §2000e-2(l).

255 1995 (3) BCLR 374 (D).

256 *Id* at 379I-380C.

stead, a "policy decision" was taken to base the selection process exclusively on the relevant groups' representation in the general population.

6. Conclusion

With its equality jurisprudence only in its infancy stage, affirmative action will provide a difficult challenge to the South African Constitutional Court. The course it takes will have to steer carefully between the compelling transformational needs of the country and the equally important imperative to keep all governmental social reform projects within the confines of the Constitution. Employment equity and affirmative action, like many other projects of transformation translated into law, will put under pressure the fragile compromises that are the current cement keeping the South African constitutional state together. It is therefore of vital importance that social transformation through systems of employment equity be brought within the normative framework of the Constitution itself. In this way the Constitution maintains its function of balancing the need to effect fundamental socio-political transformation with the needs of security, continuity and national integration. Without such a proper constitutional contextualisation for employment equity, it tends to be experienced as a polarising accentuation of especially racial divisions. Only time will tell whether the Constitutional Court has succeeded in maintaining the authority of the Constitution over this and other projects of transformation. It is submitted that it has started off on the right foot by endorsing the notion of substantive equality and developing standards to determine unfair discrimination sensitive and open-ended enough to accommodate the complex array of competing interests at stake in affirmative action disputes.