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Finding Justice in South African Labor Law: The Use of Arbitration to Evaluate Affirmative Action

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NOTE

FINDING JUSTICE IN SOUTH AFRICAN LABOR LAW: THE USE OF ARBITRATION TO EVALUATE AFFIRMATIVE ACTION

*Carmen Morris Twyman**

Our society will be measured not by what we achieve for the world-class component of our society but the justice we mete out to the less sophisticated and indeed less fortunate members of society.¹

INTRODUCTION.....	308
I. SOUTH AFRICA UNDER APARTHEID	312
A. History of Apartheid	312
B. Resistance to Apartheid.....	314
C. Effects of Apartheid	315
II. THE STRUCTURE AND DEVELOPMENT OF SOUTH AFRICAN LABOR LAW	317
A. Roman-Dutch Law	317
B. History of labor law in South Africa.....	318
C. The Role of Labor law in Collapsing Apartheid.....	320
III. POST-APARTHEID EMPLOYMENT LEGISLATION	321
A. The new Labour Relations Act of 1995.....	321
B The Employment Equity Act of 1998.....	324
IV. THE ROLE OF THE LABOUR COURT IN DEVELOPING NORMATIVE VALUES	328
A. Judicial Opinion, Rules, and Precedent	328
B. Consitutional Values	329

* J.D. candidate, 2002, Case Western Reserve University School of Law, B.A., University of Virginia, 1995. This Note is dedicated to the advancement of social justice through the rule of law. I would like to thank Professor Hiram E. Chodosh for his very helpful comments on earlier drafts, Professor Calvin Sharpe for his valuable insights, and my husband, Matthew, for his support and encouragement throughout the creation of this Note.

¹ Adolph Landman, *What Role for Justice in a World Class Labour Relations System*, Paper Presented at Industrial Relations Association of South Africa National Conference, Oct. 11-13, 2000 (manuscript at 1, on file with author).

V. THE CCMA AS AN OBSTACLE TO DEVELOPING NORMATIVE VALUES	330
A. Quantity as a Factor of Quality	330
B. CCMA Ineffectiveness	331
C. Precluding the Labour Court	333
VI. THE FAILURE TO PROMOTE AND EMPLOYMENT EQUITY	334
A. The Labour Court Approach Before the Employment Equity Act	336
B. The CCMA Approach Before the Employment Equity Act	336
C. The CCMA Approach after the Employment Equity Act	338
VII. SUGGESTIONS TO MAXIMIZE THE DEVELOPMENT OF NORMATIVE VALUES	340
VIII. CONCLUSION	341

INTRODUCTION

The right to equality in employment in South Africa is a seed only beginning to sprout from the repugnant soils of the apartheid regime and a long history of vast systemic racial discrimination. The growth of this seed will most notably benefit black South Africans. Beginning with colonialism and continuing through the expansion of political and economic power of the Afrikaner *volk*, black South Africans have been exploited for the economic advancement of whites. During the period of apartheid, legislative exclusion and discriminatory state budgetary allocation ensured that blacks remained economic infants, at the bottom of the employment pyramid. The economic and social repression of blacks under apartheid created vast inequalities in employment that are still embedded in South Africa today. Blacks comprise over three-quarters of the total South African population; whites constitute just over 10%.² Yet according to the 1996 South Africa census, 50% of black African men and 69% of black African women had monthly incomes of \$120.00 or less, while 65% of white men and 35% of white women had monthly incomes exceeding \$450.00 a month.³ Even more staggering is the number a black Africans living below the poverty line: 61% of Africans are poor, compared with 1% of whites.⁴

² SOUTH AFRICAN INSTITUTE OF RACE RELATIONS, 1999/2000 SOUTH AFRICA SURVEY 6 (1999) [hereinafter SOUTH AFRICA SURVEY].

³ *Id.* at 249.

⁴ OFFICE OF THE EXECUTIVE DEPUTY PRESIDENT AND THE INTER-MINISTERIAL COMMITTEE FOR POVERTY AND INEQUALITY, POVERTY AND INEQUALITY IN SOUTH AFRICA: SUMMARY REPORT (May 13, 1998), at 2.3, available at <http://www.polity.org.za/govdocs/reports/poverty.html#2> [hereinafter POVERTY AND INEQUALITY IN SOUTH AFRICA].

The end of apartheid and the birth of a new constitution that embodies human rights give hope that the new South Africa will provide equal protection and opportunity to all citizens regardless of color. Post-Apartheid South Africa heavily relies on international human rights norms in defining its new democracy: the separation of powers, judicial independence, and an accountable executive are embedded in the new Constitution.⁵ The overall importance of human rights and the rule of law within the new constitutional system are also demonstrated by provisions for constitutional review and the creation of human rights commissions.⁶ Courts are required by the 1996 Constitution to consider international human rights law in the interpretation of the Bill of Rights. International human rights treaties and international customary law are binding law unless in contradiction to the Constitution or other laws passed by Parliament.⁷ The Constitutional Court and the Appellate Division of the Supreme Court have important human rights functions in that they determine the constitutionality of government acts, policies, and omissions.⁸ The Human Rights Commission (HRC), created by the Interim Constitution, is an independent commission with the broadest mandate to

⁵ S. AFR. CONST. (Constitution of the Republic of South Africa, Act 108 of 1996). Specifically, chapter 1, section 1 of the Constitution states:

The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- a. Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b. Non-racialism and non-sexism.
- c. Supremacy of the constitution and the rule of law.
- d. Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

Id. at ch.1, § 1.

⁶ Makau wa Mutua, *Hope and Despair for a New South Africa: the Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 67 (1997) (quoting United Nations High Commissioner for Human Rights, Centre for Human Rights, Programme of Technical Operation in the Field of Human Rights, Report of the Needs Assessment Mission to South Africa (May 6-25, 1996), at 11).

⁷ *Id.* at 66 (citing S. AFR. CONST., *supra* note 5, ch. 14, §§ 231-3).

⁸ *Id.* at 82. The Constitutional Court has jurisdiction over all questions of interpretation of the Interim Constitution, violations of the Bill of Rights, and the constitutionality of national and provincial laws, as well as administrative and executive acts. *See also* S. AFR. CONST., ch. 8, §§ 167-68. The Constitutional Court exercises judicial review, a power that the previous Supreme Court lacked under the parliamentary supremacy model of apartheid. *See* Albie Sachs, *A Bill of Rights for South Africa: Areas of Agreement and Disagreement*, 21 COLUM. HUM. RTS. L. REV. 13, 13, 33 (1989).

promote and protect rights and to exercise oversight and scrutiny over state institutions, public officials, and society at large.⁹ The Truth and Reconciliation Commission (TRC) was created to investigate and publish the abuses of the apartheid era.¹⁰

With universal human rights norms embodied in the Constitution and other legislation, judicial decisions play an essential role in the *juridification*¹¹ of South Africa. Juridification is the use of law by the government to steer social and economic life in a particular direction.¹² While the South African parliament of the apartheid era steered social and economic life towards values of inequality and separation, the new South Africa hopes to create a state that is animated by, and has respect for, human rights norms.¹³ The development of normative values through judicial decisions is an integral component of steering the social and economic life of South Africa toward the values embodied in the Constitution. Normative values reflecting equal protection and justice have the potential to affect social change, by altering the patterns of power, wealth and privilege established under apartheid.

The new Constitution of the Republic of South Africa, enacted in 1996, sets forth the achievement of equality as a legal value, prohibiting discrimination on the basis of race, ethnic or social origin, and culture.¹⁴ The Constitution also expressly allows for the creation of legislation designed to protect or advance persons disadvantaged by unfair discrimination – specifically, affirmative action legislation.¹⁵ The Labour Relations Act 66 of 1995 (“LRA”), supporting the Constitution, recognizes an employer’s right to adopt or implement employment policies and practices designed to achieve equality in employment, thereby encouraging the state and employers to implement affirmative action policies that strive

⁹ Mutua, *supra* note 6, at 82.

¹⁰ *Id.* at 82 n.102. The TRC is based on the final clause of the Interim Constitution, enacted in 1993, which calls for a mechanism to address human rights abuses during the apartheid era. *See generally* § 3 Promotion of National Unity and Reconciliation Act 34 of 1995, 1 JSRSA 1-191, 1-192 to -193 (1999) (establishing the TRC to investigate and report on apartheid-era human rights violations).

¹¹ The term *juridification* was first used by Otto Kirchheimer in the 1920’s. Jon Clark, *The Juridification of Industrial Relations: A Review Article*, 14 I.L.J. 69, 69-71 (U.K.) (1985).

¹² *Id.* at 71.

¹³ Mutua, *supra* note 6, at 68. South Africa is the first state that is the product of a period that has been characterized as the Age of Rights, the post-World War II period during which the human rights movement came of age. *Id.* at 63.

¹⁴ *See* S. AFR. CONST., ch. 2, § 9.

¹⁵ *Id.* at ch. 2, § 9(2). “To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken.” *Id.*

to redress the inequities created by apartheid.¹⁶ The Employment Equity Act of 1998 also gives effect to the young Constitution, by prohibiting unfair discrimination and compelling the implementation of affirmative action policy to redress past and present social imbalances in the workplace.¹⁷ The Employment Equity Act is a clear attempt by the South African government to use *law* to steer social and economic life towards the values of racial equality. The affirmative action legislation is designed with the intent to transform society in more than a cosmetic way, seeking substantive equality over formal equality. Judicial decisions issued by the Labour Court that interpret the Act, then, are valuable elements in the juridification and development of normative values reflecting social equality in South Africa.

This Note argues that South Africa's over-reliance on mediation and arbitration methods to resolve employment equity disputes hinders the development of these normative values. Utilization of the Commission for Conciliation, Mediation and Arbitration ("CCMA") to resolve unfair labor practices disputes involving affirmative action plans prevents the full advancement of normative values for three reasons. First, the Labour Court, the judicial body with the authority and ability to interpret the law for future application, is prevented from rendering interpretations of the Employment Equity Act because of the reduced opportunity to consider unfair labor practices disputes involving employment equity. Second, the CCMA's structure and procedures for mediation and arbitration make the CCMA more attuned to the protection of individual rights rather than the promotion of the broader normative values outlined in the Constitution and the Employment Equity Act. Third, the CCMA is characterized by an overburdened docket, insufficient resources and training, and a focus on quickly resolving disputes. Therefore, the CCMA is not positioned to instill, and pronounce with authority of national application, normative values of social equality with the same significance as the Labour Court.

The Labour Court's decisions help shape social values by defining the right to equality in employment. The CCMA resolves a disproportionate majority of disputes arising under the Employment Equity Act, thereby minimizing the opportunity for the Labour Court to interpret the Act. By shortcutting the adjudicative role of the Labour Court, South Africa risks undermining the development of normative values. The 'newness' of the Employment Equity Act, and the Act's valuable function

¹⁶ Schedule 7, § 2(2)(b) of Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-145 (1999), *repealed* by § 64 of Act 55 of 1998. "[A]n employer is not prevented from adopting or implementing employment policies and practices that are designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms."

¹⁷ Membathisi Mdladlana, *New Legislation Seeks Better Workplace*, BUSINESS DAY (S. Afr.), April 30, 1999, at 15.

in the juridification of South Africa, call out for judicial interpretation by the Labour Court to instill normative values.

Section II of this Note provides a history of apartheid in South Africa and its impact on employment equity. Section III provides an overview of the history and structure of the South African legal system and the development and role of labor law. Section IV outlines post-apartheid labor law legislation: the Labour Relations Act 66 of 1995 and the Employment Equity Act 55 of 1998. Section V evaluates the role of the Labour Court in interpreting the Employment Equity Act and imparting normative values. Section VI argues that the procedure and structure of the CCMA as a method of dispute resolution frustrates the full development of normative values by precluding, in practice, the Labour Court's opportunities to consider categories of disputes involving employment equity. Section VII demonstrates the argument that the development of normative values may be critically stunted in cases involving unfair labor practices in the promotion of employees. Section VIII offers some suggestions to maximize the positive development of normative values in South Africa through judicial decisions, without undermining the substantial contributions and value of the CCMA and its dispute resolution services.

I. SOUTH AFRICA UNDER APARTHEID

A. *History of Apartheid*

For most of the late twentieth century, being African¹⁸ under the apartheid system of South Africa meant being politicized from birth.¹⁹ Black and white South Africans rarely interacted, except as masters and

¹⁸ For the purposes of this Note, the terms "Africans" and "blacks" are used interchangeably. In traditional South African terminology blacks were called "Bantu," a term that included the San (Bushmen) and the Khoikhoi (Hottentots); persons of mixed race were called "coloureds." COUNTRY PROFILE: SOUTH AFRICA (Facts on File World News CD-ROM, current through Sept. 1998), available at <http://www.facts.com/cd/c00001.htm>.

¹⁹ NELSON MANDELA, *LONG WALK TO FREEDOM* 83 (Little, Brown and Co. 1994). According to Mandela:

An African child is born in an Africans only hospital, taken home in an Africans only bus, lives in an Africans only area and attends Africans only schools, if he attends school at all. When he grows up, he can hold Africans only jobs, rent a house in Africans only townships, ride Africans only trains, and be stopped at any time of the day or night and be ordered to produce a pass, failing which he will be arrested and thrown in jail.

Id.

servants, or rulers and subjects.²⁰ With the election of the National Party in 1948, a system of apartheid – literally ‘apartness’ in Afrikaans – was formalized and regulated by the government.²¹ Racial classifications, an essential part of the apartheid system, distinguished four main racial categories – Whites, Blacks, Coloreds, and Asians – and determined what rights members of each category could enjoy.²² The National Party used state institutions to give preferential treatment to whites, primarily Afrikaners, in virtually all areas of political, social, and economic life.²³ As a result, all non-whites were denied any share of the rights of South African nationality.²⁴

The Apartheid regime was based on racial biases and classifications. Four basic ideas comprised its core. First, the population of South Africa was comprised of the four racial groups, each with its own cultural identity. Second, Whites, as the ‘civilized race,’ were entitled to have absolute control over the state. Third, White interests prevailed over Black interests; the state was not obliged to provide equal facilities for the ‘subordinate’ races. Fourth, the white racial group formed a single nation, with Afrikaans and English-speaking components, while black Africans

²⁰ Eric Taylor, *The History of Foreign Investment and Labor Law in South Africa and the Impact on Investment of the Labor Relations Act 66 of 1995*, 9 TRANSNAT'L LAW. 611, 614 (1996).

²¹ See ROBERT ROSS, A CONCISE HISTORY OF SOUTH AFRICA 116-18 (1999) (providing a succinct synthesis of South African history, stressing economic, social, cultural, and environmental matters as well as political history).

²² The whites are descended for the most part from British, Dutch, German, and French Huguenot settlers. The people of Dutch ancestry, with a strong admixture of German and French, are known as Afrikaners and form about 60% of the white population. Colored is a complex category, but generally groups South Africans of mixed race (African, European, and Asian). Asians are almost entirely of Indian birth or descent. COUNTRY PROFILE: SOUTH AFRICA, *supra* note 18. As of the 1996 South Africa Census, Africans comprised 76.7% of the population, Whites 10.9%, Coloreds 8.9%, and Indian/Asian 2.6%. SOUTH AFRICA SURVEY, *supra* note 2, at 6.

²³ Mutua, *supra* note 6, at 71-2.

²⁴ ROSS, *supra* note 21, at 135. Non-whites (Coloreds, Indians and Asians) continue to experience social and economic inequality. However, this Note will focus its scope on the status of black Africans, as the most disadvantaged group, in relation to labor law. Poverty is concentrated among black Africans: 61% of Africans and 38% of coloreds are poor, compared with 5% of Indians and 1% of whites. Unemployment rates tend to be highest among Africans, in rural areas, among women and the youth, and among those with no previous work experience. With respect to the characteristics of the people in the poorest quintile, 93% of the unemployed poor are Africans, 56% are female, 70% are below the age of 35, 58% are from rural areas, 50% have completed primary education or less, and 72% have had no previous job experience. POVERTY AND INEQUALITY IN SOUTH AFRICA, *supra* note 4, at 2.3, 4.4.

belonged to several (ten) distinct nations – a formula that deliberately made the white nation the largest in the country.²⁵

A plethora of laws, regulations and policies were instrumental in the implementation of the Apartheid State.²⁶ A primary goal of apartheid was to ensure long-term white power by striving for white economic independence and relying less on African labor. A second goal of apartheid, contradictory to the first, was to enable the government to ensure that white farmers²⁷ were supplied with a black labor force that was disciplined and cheap.²⁸ The system of apartheid, therefore, legislatively ensured that whites were always given priority over blacks for employment opportunities. This employment inequity was further emphasized by a system of apartheid in education. Schools, under the control of the state, limited the separate education system for blacks to only those skills deemed valuable by whites for the maintenance of the white-run economy.²⁹

B. Resistance to Apartheid

African resistance to white oppression and domination has a long history in South Africa.³⁰ In this century, the resistance was spearheaded by the African National Congress (“ANC”), which was founded in 1912 with the primary mission of fighting for equality.³¹ Resistance began with the Defiance Campaign³² of the early 1950s and was followed by the

²⁵ LEONARD THOMPSON, A HISTORY OF SOUTH AFRICA 190 (1990).

²⁶ *Id.* at 190-91. In the post-1948 period, the most important of these were: the Population Registration Act of 1950 (all people classified according to a race); the Immorality Act and the Prohibition of Mixed Marriages Act (proscribing interracial sex, marriage, and other forms of intimate contact); the Group Areas Act (segregating racial groups in different areas), the Bantu Homelands Constitution (solidifying basis for black homelands); and the Reservation of Separate Amenities Act (segregation of public facilities—parks, beaches, schools, and public transportation). *Id.*

²⁷ The Voortrekkers (white farmers) settled the Transvaal region, located in the Northeastern area of South Africa, in the 1820s and 1830s. The Voortrekkers were Dutch-speaking Europeans, now known as Afrikaner. *See* ROSS, *supra* note 21, at 39.

²⁸ *Id.* at 117.

²⁹ *Id.* at 121. Blacks were limited to unskilled labor jobs; little emphasis was given to literacy. *Id.*

³⁰ AFRICAN NATIONAL CONGRESS, UMZABALAZO: A HISTORY OF THE AFRICAN NATIONAL CONFERENCE (Oct. 15, 2001), available at <http://www.anc.org.za/ancdocs/about/umzabalazo.html>. The ANC notes that Zulu tribes engaged in battles with the Boers and British colonizers over land rights as early as the arrival of settlers in South Africa in the 17th century.

³¹ MANDELA, *supra* note 19, at 148.

³² The Defiance Campaign led protests to defy racist laws and segregation of public facilities. *Id.* at 140-61.

proclamation of the Freedom Charter in 1955³³ and the formation in 1961 of the Umkhonto we Sizwe (Spear of the Nation), the military wing of the ANC.³⁴ The apartheid regime thus received notice that resistance to apartheid policy would not only increase but would become violent. In response to challenges posed by the ANC, the Apartheid State determinedly enacted security laws designed to put a stop to any avenues of dissent.³⁵ These securities laws, enacted throughout the period of apartheid, ensured that *all* due process principles of blacks were foreclosed. The laws also made it possible for the state to arrest, detain, torture, imprison, ban and kill its opponents with impunity.³⁶

C. *Effects of Apartheid*

The devastating consequences of South Africa's former racist polices are manifested in virtually every current statistical category regarding blacks in South Africa. As of 1998, over 25% of black households had total incomes of less than R500 (South African Rand) a month, an amount that equates to a little over \$100 a month. Only 2% of coloured, Indian, and white households combined, however, had household incomes below R500.³⁷ According to the 1996 South Africa Census, the unemployment rate for blacks was 42.5%, compared to only 4.6% for whites.³⁸ A 1998 study prepared for the Office of the Executive Deputy President and the Inter-Ministerial Committee for Poverty and Inequality reported that poverty is concentrated among blacks, particularly Africans: 61% of Africans and 38% of coloureds are poor, compared with 5% of

³³ The Freedom Charter served as the principal manifesto of the ANC, outlining the basic tenets of the anti-apartheid movement and emphasizing multi-racialism, equal protection, the protection and enjoyment of economic and social rights, and the ownership of land. *Id.* at 152.

³⁴ Umkhonto we Sizwe was formed after the 1960 Sharpeville Massacre, in which 60 unarmed protesters were shot to death by South African forces. The ANC was banned following the massacre, thereby depriving it of the right to non-violent peaceful protest. *Id.* at 325-27.

³⁵ Securities laws, characterized as suppressing Africans' due process rights, were enacted throughout the period of the Apartheid State. Some of the more notorious laws included the Prohibition of Interdicts Act of 1956, denying blacks access to courts to challenge the implementation of apartheid policies, and the Terrorism Act 83 of 1967. Mutua, *supra* note 6, at 74.

³⁶ *Id.*

³⁷ SOUTH AFRICA SURVEY, *supra* note 2, at 296. Some 23% of coloured, Indian, and white households had incomes of R10,000 or more, equivalent to over \$2,000 a month, while less than 1% of black households had incomes exceeding R10,000. *Id.* The U.S. dollar equivalencies were calculated according to the exchange rate as of Jan. 2, 1998. See <http://www.x-rates.com/cgi-bin/hlookup.cgi>.

³⁸ SOUTH AFRICA SURVEY, *supra* note 2, at 301-02.

Indians and 1% of whites.³⁹ These unbalanced figures are reflected in every sector of the society – the economy, administration of justice, land ownership, infant mortality, civil service, the private sector, media, defense, and the professions.⁴⁰ Apartheid distorted the employment market in a manner that clearly discriminated against the black majority.⁴¹ South Africa today is divided by the existence of two nations within its borders – one economically developed, educated, employed and white, the other underdeveloped, unemployed and mostly black.

The effects of race on the employment market are significant, even after holding constant such factors as education, age, language, province, settlement type, sector, occupation, type of employer and union membership.⁴² Whites earn an estimated 104% more than blacks in South Africa; even with the abolition of apartheid, Blacks, Coloreds, Asians and women are discriminated against in compensation, hiring and other staffing practices.⁴³ According to the 1996 report produced by the Commission on the Development of a Comprehensive Labour Market Policy, social inequalities in the employment market will continue if certain demographic groups, i.e., blacks, are systematically over-represented in low-paying

³⁹ POVERTY AND INEQUALITY IN SOUTH AFRICA, *supra* note 4, at 2.3.

[P]overty and unemployment are closely correlated: 55% of people from poor households are unemployed, compared with 14% of those from non-poor households. Poor households are characterised by a lack of wage income, either as a result of unemployment or of low-paying jobs, and typically rely on multiple sources of income, which helps reduce risk. Access to basic services such as electricity, toilets and piped water is also closely correlated with poverty.

A deprivation index has been constructed for South Africa, being a composite of 12 household indicators thought to represent critical basic capabilities such as income, nutrition, access to health services, education level, etc., as well as perception of quality of life. This index shows that some people classed as 'non-poor' by income measures are actually deprived due to lack of access to certain critical capabilities: groups of people are missed who have slightly higher incomes, but may be deprived in other ways. About 90% of the deprived people 'missed' by the income poverty indicator are Africans from rural areas, mainly in KwaZulu-Natal.

Id. at 2.4.

⁴⁰ Mutua, *supra* note 6, at 75.

⁴¹ Angus Bowmaker-Falconer et al., *Employment Equality Programmes in South Africa: Current Trends*, 29 INDUS. REL. J. 222, 223 (1997) (U.K.) (citing the Report of the Presidential Commission to Investigate the Development of a Comprehensive Labour Market Policy, Department of Labour, Pretoria, 130-40 (1996) (S. Afr.)).

⁴² *Id.*

⁴³ *Id.*

occupations and amongst the unemployed, and underrepresented in the better-paying occupations and sectors.⁴⁴

II. THE STRUCTURE AND DEVELOPMENT OF SOUTH AFRICAN LABOR LAW

A. Roman-Dutch Law

In the early sixteenth century, when Europeans discovered how to sail from their home countries to the southern coasts of Asia around the Cape of Good Hope, the southernmost point of the African continent, South Africa came to be exposed to new influences and eventually to European conquest and settlement.⁴⁵ The Vereenigde Oost-Indisch Compagnie (the Dutch East India Company, commonly known as the VOC) first colonized the Cape Region.⁴⁶ The VOC brought the general body of Roman-Dutch law, or the law of Holland, to South Africa.⁴⁷ The Roman-Dutch body of law introduced the law of master and servant, the basis for all employment contracts.⁴⁸

Roman-Dutch law is a civil legal system in nature, with an important distinction – case law prevails at common law and judicial decisions are generally binding.⁴⁹ The Roman-Dutch law tradition hails from pre-revolutionary Netherlands and has endured the changes to judicial institutions that have occurred in post-apartheid South Africa. It remains the basis of the legal system to this day. South African law differs from most modern civil law systems in a critical respect. While civil law judges engage in deductive reasoning facilitated by the apparent certainty of highly systemized civil codes, South African judges “take the lead in shaping the

⁴⁴ *Id.* at 138-140 (citing the Labour Market Commission, June 1996).

⁴⁵ ROSS, *supra* note 21, at 21.

⁴⁶ Dennis Davis, *From Contract to Administrative Law: The Changing Face of South African Labour Law*, in *ESSAYS ON THE HISTORY OF LAW* 79, 80 (1989).

⁴⁷ Historically, Roman-Dutch law was the legal system that applied in Holland during the seventeenth and eighteenth centuries and was the product of medieval Dutch law, mainly of Germanic origin, and the Roman law of Justinian. Modern South Africa's Roman-Dutch law is a legal system that has been significantly impacted by English law. H.R. HAHLO & ELLISON KAHN, *THE SOUTH AFRICAN LEGAL SYSTEM AND ITS BACKGROUND* 329-30 (1968).

⁴⁸ Davis, *supra* note 46, at 80.

⁴⁹ See generally JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* (2d. ed. 1985) (providing extensive background on the history and concepts of civil legal systems). For further discussion on the South African legal system prior to apartheid, see MICHAEL KITTNER, MARITA KORNER-DMMANN & ALBERT SCHUNK, *LABOUR UNDER THE APARTHEID REGIME* 17-21 (1989).

law.”⁵⁰ The South African legal system puts the court as an agent in determining the direction of the law.⁵¹ South African judges, therefore, play an important role in interpreting and applying new legislation. The Employment Equity Act, passed just over two years ago, and currently in the process of being fully promulgated,⁵² will indeed call for judicial interpretation.⁵³

B. History of Labor Law in South Africa

Two major industries developed in South Africa after colonization – farming the irrigated rolling hills in the upper Transvaal for agriculture and livestock and, upon the discovery of vast gold and diamond reserves, mining.⁵⁴ The development of these industries gave rise to the first significant development in modern South African labor law. First, the Industrial Disputes Prevention Act (IDPA) was enacted in 1909 in response to the rising number of organized white workers.⁵⁵ A second piece of legislation, the Mines and Works Act, was enacted in 1911 to ensure that particular jobs were reserved only for whites, and that white workers were guaranteed satisfactory wages over blacks.⁵⁶ In 1913-1914, the mining

⁵⁰ Reinhard Zimmermann & Daniel Visser, *Introduction – South African Law as a Mixed Legal System*, in *SOUTHERN CROSS: CIVIL LAW AND COMMON LAW IN SOUTH AFRICA* 1, 10 (Reinhard Zimmerman & Daniel Visser eds., 1996).

⁵¹ *Id.* at 11 (“South African judges have not been neutral conduits...but prime agents in determining the direction of the law.”).

⁵² The Employment Equity Act 55 of 1998 was passed by Parliament in September of 1998. Promulgation of the Act took four different phases, beginning with the prohibition of unfair discrimination at work in August 1999 and ending with requirements for employers who employ more than 50 employees to promote affirmative action plans in December 2000. See Mdladlana, *supra* note 17, at 15.

⁵³ The requirements of affirmative action plans are especially open to interpretation. Under the Employment Equity Act, all designated employers are required to take five basic steps towards employment equity- (1) prepare a profile of its workforce; (2) review its employment policies and practices; (3) prepare and implement an employment equity plan; (4) file a summary of the employment equity plan with the Department of Labour; and (5) report annually to the Department on progress in the implementation of its plan. These steps or obligations mimic those in other countries’ legislation (e.g. Canada, Australia). *Explanatory Memorandum to the Employment Equity Bill*, (1998) 19 I.L.J. 1345, 1354 (LAC) (S. Afr.).

⁵⁴ Ross, *supra* note 21, at 39, 54-55

⁵⁵ Davis, *supra* note 46, at 82. The IDPA intended to aid in the prevention of strikes by workers and of employer lockouts by placing severe restraints on the right to strike in exchange for the official recognition of white trade unions through conciliation boards. Not surprisingly, the IDPA specifically excluded anyone who was “not a white person.” *Id.*

⁵⁶ Karon M. Coleman, Comment, *South Africa: The Unfair Labor Practice and the Industrial Court*, 12 COMP. LAB. L.J. 178, 182 (1991).

industry responded to labor unrest and attempted to curtail the role of white labor by substituting cheaper black labor in the unskilled positions.⁵⁷

When the mining industry tried to implement wage cuts and other major modifications to the labor process, white workers implemented a general strike in the mines, known as the Rand Revolt of 1922. The South African government declared a state of martial law and sent in troops to end the dispute.⁵⁸ Following the Rand Revolt, the all white government passed the Industrial Conciliation Act, creating industrial councils and conciliation boards to ease dispute resolution and resulting in a dramatic decrease in labor unrest for white workers.⁵⁹

The first recognition of black workers' rights, and thus signs of employment equity, came in 1947 with the publication of the Industrial Conciliation (Natives) Bill. The bill granted black workers statutory recognition, so that blacks could be treated similarly to white workers, at least facially.⁶⁰ Blacks were, however, prohibited from taking part in industrial councils formed by employers and white trade unions.⁶¹ Thus, black workers had little or no bargaining power and remained at the bottom of the employment totem pole. True labor reform for black workers only arose when the economy began demonstrating large shortages of skilled (white) labor in the late 1970s, creating new employment opportunities for black workers.⁶²

C. *The Role of Labor Law in Collapsing Apartheid*

Labor law reform led the way in chiseling away the apartheid regime. In 1979, the Industrial Conciliation Amendment Act played a role in dismantling the dual labor system by including all workers, black and white, under the Labour Relations Act ("LRA").⁶³ Under the LRA, all

⁵⁷ Davis, *supra* note 46, at 84-85.

⁵⁸ *Id.* at 86.

⁵⁹ Coleman, *supra* note 56, at 182.

⁶⁰ Davis, *supra* note 46, at 91.

⁶¹ *Id.* This legislation was politically overshadowed by the controlling National Party's commitment to economically dominate blacks and repress any black opposition. *Id.*

⁶² In 1977, government figures showed vacancies for 99,000 workers in professional and technical occupations and projections made in 1980 predicted a shortage of 758,000 skilled workers by 1990. *Id.* at 92-93. In addition, a wave of strikes by workers in the early 1970s paralyzed mines and other industries and provided the impetus for major reforms, which undermined the foundation of the apartheid system. *Id.*

⁶³ The Industrial Conciliation Amendment Act was prompted by the recommendations of The Wiehahn Commission. ALAN RYCROFT & BARNEY JORDAAN, A GUIDE TO SOUTH AFRICAN LABOUR LAW 156 (1992). The Wiehahn Commission's purpose was to create a blueprint to improve the black quality of life in the interests of political and economic stability, support of the free enterprise system by blacks, and for the interest of economic growth. Davis, *supra* note 46, at 94 (quoting P.J. van der Merwe, *An Analysis of the Report*

workers gained entitlement to "full trade union rights, freedom of association and collective bargaining."⁶⁴ Black trade unions were legalized for the first time in South African history and, thus, possessed the power to push for equality in employment. Under this new system of labor law, the black trade unions thrived in membership and participation. Although the apartheid government attempted to limit black union power by passing amendments to the LRA in 1981, the effect of the amendments actually further strengthened black unions. More black trade unions became registered, and thus formally recognized, in order to avoid the large number of restrictions placed on unregistered unions.⁶⁵ The amendments also eliminated all references to race and opened the collective bargaining system to all workers. Despite the benefits of the labor reforms to black workers, however, the working conditions for blacks remained by and large unequal.⁶⁶

The Labour Relations Amendment Act 83 of 1988 explicitly endorsed the freedom to join and belong to trade unions in a legal context where, at common law, the freedom and sanctity of contract trumped all else.⁶⁷ Thus, the LRA of 1988 prohibited employers from forbidding union membership as a term of contract and dismissing or penalizing employees for belonging to a trade union or participating in its activities.⁶⁸

Although South Africa's labor laws facially treated all races equally after 1979, these laws were ineffective in improving living conditions and providing full opportunity in employment, due to the apartheid regime. In the 1980s, the international community embarked on a mass anti-apartheid movement, inhibiting South Africa from interacting in the global economy and helping to break down the pillars of apartheid. On February 2, 1990, South African President Frederik W. de Klerk formally abolished apartheid. One year later, de Klerk repealed all remaining legislative components of apartheid.⁶⁹

of the Commission of Inquiry into Legislation Affecting the Utilisation of Manpower (1979) 45).

⁶⁴ Coleman, *supra* note 56, at 185.

⁶⁵ Coleman, *supra* note 56, at 178. The 1981 Amendments altered the definition of "trade union" to include any kind of activity involving employer relations.

⁶⁶ STEVE BIKO, *I WRITE WHAT I LIKE* 62 (1978). "Townships, government designated areas where working blacks were required to live, were placed long distances from where blacks worked. Transportation conditions were long, dangerous and required laborers to be away from their homes for as much as sixteen hours a day." *Id.*

⁶⁷ EDWIN CAMERON ET AL., *THE NEW LABOUR RELATIONS ACT: THE LAW AFTER THE 1988 AMENDMENTS* 1 (1989).

⁶⁸ *Id.* at 1-2.

⁶⁹ Mr. de Klerk became President after Pieter W. Botha of the ruling National Party resigned due to ill health in 1989. Mr. de Klerk admitted that a terrible wrong had been done

III. POST-APARTHEID EMPLOYMENT LEGISLATION

A. *The New Labour Relations Act of 1995*

The election of Nelson Mandela, former political prisoner under apartheid, as President in 1994 is one of the twentieth century's most profound events; it marked the end of apartheid and the official beginning of a new era in South Africa.⁷⁰ South Africa undertook to eliminate the evils of apartheid through legislation. An Interim Constitution, a transitional document, provided for power-sharing arrangements to "mitigate" the power of the black majority.⁷¹ The Interim Constitution created a Bill of Rights and a Constitutional Court, with the view of guaranteeing a broad array of human rights.⁷² A new, liberal Constitution was enacted in 1996 to ensure equal protection for all races.

On September 13, 1995, after more than one year of drafting, negotiation among South Africa's social partners,⁷³ and mass political action by unions, Parliament passed the Labour Relations Act 66 of 1995. The Labour Relations Act reflects the values set forth in the Constitution, with a commitment to eradicate racism and promote equality.

The Labour Relations Act of 1995 ("LRA") and subsequent amendments in 1996 and 1998 mark the end of labor relations under the apartheid system. The purpose of the LRA is to advance "economic development, social justice, labour peace and the democratization of the workplace."⁷⁴ The LRA codified the protection of employees from unfair dismissal and reformed the dispute resolution system. It also established the Commission for Conciliation, Mediation and Arbitration ("CCMA"), a juristic institution that is independent of the State, any political party, trade union, employer, or employers' organization.⁷⁵

Prior to the 1995 Amendments, the Labour Relations Act dealt extensively with the termination of any employee's employment and

to the country through the imposition of the system of apartheid. See MANDELA, *supra* note 19, at 533 (paying tribute to de Klerk, his fellow 1993 Nobel Peace Prize laureate).

⁷⁰ Taylor, *supra* note 20, at 613-14.

⁷¹ Mutua, *supra* note 6, at 79.

⁷² *Id.* at 80.

⁷³ This term refers to the three parties – government, organized labor, and organized business – participating with equal representation in the National Economic Development and Labour Council (NEDLAC), a body created in 1995 consisting of four chambers: Trade and Industry, Public Finance and Monetary Policy, Labour Market, and Development. NEDLAC is a pre-parliamentary process that attempts to achieve consensus among the social partners on all legislation relating to labor, economic and development policy. D. DU TOIT ET AL., *LABOUR RELATIONS LAW: A COMPREHENSIVE GUIDE* 18-19 (3d. ed. 2000).

⁷⁴ §1 of Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-145 (1999).

⁷⁵ See *id.* §§ 112-113, at 1-173.

utilized the institution of the Industrial Court, a tribunal applying principles of equity and fairness, to resolve disputes. The Act required that all non-voluntary terminations of employment be fair, both substantively and procedurally. The failure of an employer to act in a fair manner constituted an "unfair labour practice," and resulted in either reinstatement or compensation.⁷⁶

The new Labour Relations Act of 1995 and subsequent amendments also aim to encourage collective bargaining and the settlement of disputes, but do so by improving the powers of new fora – namely, the CCMA, the Labour Court, and the Labour Appeal Court. The LRA addresses a broad range of issues, including freedom of association, union security, a variety of collective bargaining rights, bargaining councils, statutory councils, small and medium enterprises, industrial action, employee participation, unfair dismissal, and dispute resolution.⁷⁷

The CCMA maintains jurisdiction over most disputes arising under the LRA.⁷⁸ In contrast, the Labour Court only has jurisdiction over specific categories of disputes, including freedom of association rights, strikes and lock-outs not in compliance with the LRA and dismissals that are automatically unfair,⁷⁹ e.g., dismissals for participation in a protected strike, dismissals on account of pregnancy, and dismissals that amount to acts of discrimination.⁸⁰

The statutory framework for resolving disputes amounts to a system of compulsory arbitration in a substantial body of cases. Section 143 of the Labour Relations Act makes it clear that CCMA arbitration awards are final.⁸¹ Any party alleging a defect in the CCMA arbitration proceeding, however, may apply to the Labour Court for an order vacating the award.⁸² It is important to note that the LRA only provides for judicial

⁷⁶ CAMERON, *supra* note 67, at 62.

⁷⁷ Calvin Sharpe, *Judicial Review of Arbitration Awards Under the New South Africa Labour Relations Act of 1995*, 33 CASE W. RES. J. INT'L L. 277, 278 (2001).

⁷⁸ The CCMA has primary jurisdiction over disputes regarding the exercise of organizational rights, the interpretation or application of a collective agreement, wages, unfair dismissals and unfair labor practices. Schedule 4, Flow Diagrams 1-14 of the Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-199 to -213 (1999).

⁷⁹ §187 defines automatically unfair dismissals. *Id.* § 187 at 1-188.

⁸⁰ *See id.* Schedule 4, Flow Diagram 10, at 1-209.

⁸¹ §143(1) provides:

An arbitration award issued by a commissioner is final and binding and may be made an order of the Labour Court in terms of section 158(1)(c), unless it is an advisory arbitration award. *Id.* § 143, at 1-181.

⁸² §145 provides:

review rather than *appeal* of arbitration awards.⁸³ The current LRA is a comprehensive statute that applies to all employees except certain public employees involved in national security.⁸⁴

-
- (1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award-
- (a) within six weeks of the date that the award was served on the applicant, unless the alleged defect involves corruption; or
 - (b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption
- (2) A defect referred to in subsection (1), means-
- (a) that the commissioner-
 - i. committed misconduct in relation to the duties of the commissioner as an arbitrator;
 - ii. committed a gross irregularity in the conduct of the arbitration proceedings; or
 - iii. exceeded the commissioner's powers; or
 - (b) that an award has been improperly obtained
- (3) The Labour court may stay the enforcement of the award pending its decision.
- (4) If the award is set aside, the Labour Court may-
- (a) determine the dispute in the manner it considers appropriate; or
 - (b) make any order it considers appropriate about the procedures to be followed to determine the dispute.

Id. § 145, at 1-181.

⁸³ *See id.*; *See also*, Carephone (Pty) Ltd. v. Marcus N.O. and others, (1998) 19 I.L.J. 1425, 1428-29 (LAC). The Labour Appeal Court affirmed the Labour Court's judicial authority to review Commissioner arbitration awards but distinguished the review function, that of evaluating whether an award is justifiable, as distinct from an appeal function, that of evaluating whether the award is correct. *See id.* at 1434, 1440.

⁸⁴ *See* § 2 of Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-145. § 2 provides:

2: Exclusion from application of this Act

This Act does not apply to members of

- (a) the National Defense Force
- (b) the National Intelligence Agency; and
- (c) the South African Secret Service.

Id.

B. The Employment Equity Act of 1998

In order to hold employers accountable to the values of equality in employment, the government enacted the Employment Equity Act 55 of 1998 ("EEA"). The EEA deliberately sets out to achieve equity in the workplace by eliminating unfair discrimination practices. It also obligates certain employers to implement affirmative action measures to redress the disadvantages in employment experienced by designated groups, most importantly, oppressed blacks.⁸⁵ The EEA is the first major piece of race-based legislation to enter the statute book since South Africa became democratic in 1994. The EEA realizes the intent of the Constitution to protect or advance persons "disadvantaged by unfair discrimination."⁸⁶ Thus, the EEA is the legislative method of juridification, in that it limits the autonomy of employers to determine their own affairs in regards to a diverse workforce by forcing employers to eliminate racial discrimination and implement policies and practices that redress employment inequity.

The Employment Equity Act 55 of 1998 strives to correct the embedded inequalities in employment.⁸⁷ It aims to achieve equity in the workplace through the "elimination of unfair discrimination" and the implementation of "affirmative action measures to redress the disadvantages in employment experienced by designated groups."⁸⁸ The Act redresses past and present social imbalances by advancing those who have been unfairly discriminated against. Whereas early labor legislation in South Africa was designed to deal with the more severe consequences of industrialization (injuries, illness, compensation, unemployment, etc.), equity legislation is a more specific indication of the intent of the government to steer the development of normative values.

Chapter II of the EEA outlines prohibitions on unfair discrimination and legislatively mandates that "every employer must take

⁸⁵ Employment Equity Act 55 of 1998, 4 JSRSA 2-293 (1998). Specifically, section 2 states: "The purpose of this Act is to achieve equity in the workplace by –"

promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

implementing affirmative action measures to redress the disadvantages in employment experienced by

designated groups, in order to ensure their equitable representation in all occupational categories and levels of the workforce. *Id.* § 2, at 2-296.

⁸⁶ S. AFR. CONST. ch. 2, § 9(2).

⁸⁷ Employment Equity Act 55 of 1998, 4 JSRSA 2-293 (1998). The preamble to the Act recognizes that "as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income with the national labor market; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws." *Id.*

⁸⁸ *Id.* § 2, at 2-296.

steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”⁸⁹ The provisions of the statute seek to make the workforce broadly representative of the demographics of the country by prohibiting unfair discrimination on several grounds, including race.⁹⁰ The EEA compels designated employers to create and implement affirmative action plans.⁹¹ These plans include numerical goals for equitable representation and time frames within which these goals should be realized.⁹² The basic premise for regulating affirmative action is that equality cannot be achieved by merely removing all discriminatory legislation. Only by proactively reversing the negative effects of such discriminatory legislation can equality in the workplace be attained.

Affirmative action policy 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.”⁹³ These measures must (1) “identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;”⁹⁴ (2) advance diversity in the workplace;⁹⁵ and (3) “mak[e] reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer.”⁹⁶ ‘Designated groups’ means

⁸⁹ *Id.* § 5, at 2-296.

⁹⁰ *Id.* § 6, at 2-296.

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in an employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to –

(a) take affirmative action measures consistent with the purpose of this Act; or

(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

(For the purposes of this Note, discussion of the Employment Equity Act is limited to its role regarding race and employment.)

⁹¹ *Id.* § 13(1), at 2-297.

⁹² *Id.* § 20(2), at 2-298.

⁹³ *Id.* § 15(1), at 2-297.

⁹⁴ *Id.* § 15(2)(a).

⁹⁵ *Id.* § 15(2)(b).

⁹⁶ *Id.* § 15(2)(c).

black people, coloreds, women and people with disabilities.⁹⁷ Affirmative action measures may “include preferential treatment and numerical goals, but exclude quotas.”⁹⁸

Section 49 of the Act grants express jurisdiction to the Labour Court in determining the interpretation or application of the Employment Equity Act.⁹⁹ Under Section 52 of the EEA, however, any employee who feels he or she has been discriminated against or that an employer has violated the EEA’s prohibition of discrimination in the workplace can declare a dispute and refer it to the CCMA.¹⁰⁰ However, disputes alleging unfair dismissal due to discrimination cannot be arbitrated by the CCMA.¹⁰¹ An employee alleging unfair discrimination may refer it (in writing) to the CCMA, which must then attempt to resolve the dispute through

⁹⁷ *Id.* § 1, at 2-295. As defined by the Act, “black people” is a generic term that means Africans, Coloureds and Indians. *Id.* For the purposes of this Note, affirmative action policy and employment equity is discussed as regards black people.

⁹⁸ *Id.* § 15(3), at 2-297.

⁹⁹ *Id.* § 49, at 2-302. Section 49 states: The Labour Court has exclusive jurisdiction to determine any dispute about the interpretation or application of this Act, except where this Act provides otherwise. *Id.*

¹⁰⁰ *Id.* § 52, at 2-302. Section 52 provides:

- (1) If there is a dispute about the interpretation or application of this Part [employee rights], any party to the dispute may refer it in writing to the CCMA.
- (2) The CCMA must attempt to resolve a dispute referred to it in terms of this Part through conciliation.
- (3) If the dispute remains unresolved after conciliation-
 - (a) Any party to the dispute may refer it to the Labour Court for adjudication; or
 - (b) All the parties to the dispute may consent to arbitration of the dispute by the CCMA.

Id.

See also Mdladlana, *supra* note 17, at 15 (discussing employee right to refer disputes to the CCMA).

¹⁰¹ Section 10 of the Employment Equity Act provides:

- (1) In this section, the word ‘dispute’ excludes a dispute about an unfair dismissal, which must be referred to the appropriate body for conciliation and arbitration or adjudication in terms of Chapter VIII of the Labour Relations Act.
- (2) Any party to a dispute concerning this Chapter may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination.
- (3) The CCMA may at any time permit a party that shows good cause to refer a dispute after the relevant time limit set out in subsection (2).

Id. § 10, at 2-296 to -297.

conciliation.¹⁰² If conciliation fails, the matter can go to arbitration (if both parties agree) or to the Labour Court for adjudication.¹⁰³ It should be noted that whenever unfair discrimination is alleged under the EEA, the employer against whom the allegation is raised has the burden of proving that its conduct was fair.¹⁰⁴

The CCMA must interpret the EEA in compliance with the Constitution¹⁰⁵ and international law obligations,¹⁰⁶ while “taking into account any relevant code of good practice.”¹⁰⁷ The CCMA is also bound by the interpretations of the Labour Court in prior decisions.¹⁰⁸ The CCMA, in resolving unfair discrimination disputes, can be faced with evaluating an employer’s affirmative action policy. The CCMA is delegated the obligation of dispute resolution for the bulk of disputes arising under the EEA. The CCMA’s interpretation and application of the Act in arbitration awards, however, lack the legal significance of judicial decisions of the Labour Court. Arbitration decisions are not binding on future arbitrations. Further, although CCMA arbitration decisions are published, they are not widely available to other CCMA arbitrators. Thus, the substantial volume of disputes referred to the CCMA represents a gap in the Labour Court’s ability to steer the direction of the Employment Equity Act. A comparison of how many disputes touching on employment equity issues go to the Labour Court versus how many disputes are resolved through arbitration is currently unavailable. A comparison of this sort, however, could provide further evidence of this gap.

¹⁰² *Id.*

¹⁰³ Mdladlana, *supra* note 17, at 15.

¹⁰⁴ § 11 of Employment Equity Act, at 2-297.

¹⁰⁵ *Id.* § 3(a), at 2-296.

¹⁰⁶ *Id.* § 3(d). In particular, section 3 mentions those [international law obligations] contained in the International Labor Organization Convention (111) concerning Discrimination in Respect of Employment and Occupation. *Id.*

¹⁰⁷ *Id.* § 3(c). The Codes of Good Practice provide guidelines of good practice, in terms of the preparation, implementation and monitoring of affirmative action plans as required by the Employment Equity Act. The Code itself does not impose any legal obligations in addition to those in the EEA, and failure to observe the Code does not, by itself, render an employer liable in any proceeding. However, when interpreting the EEA, the relevant code of good practice must be taken into consideration. See §§ 2.2-2.3 *Code of Good Practice: Preparation, Implementation, and Monitoring of Employment Equity Plans*, available at <http://www.labour.gov.za/docs/legislation/eea/code-practice.html>. See also § 54 of Employment Equity Act 55 of 1998, 4 JRSRA 2-293, 2-303 (1999).

¹⁰⁸ § 49 of Employment Equity Act, at 2-302.

IV. THE ROLE OF THE LABOUR COURT IN DEVELOPING NORMATIVE VALUES

A. *Judicial Opinion, Rules, and Precedent*

Led by Owen Fiss, several Western legal scholars have questioned the value of utilizing alternative dispute resolution methods, i.e. mediation and arbitration, to settle disputes.¹⁰⁹ Whether adjudication or an alternative dispute resolution method is preferable is in part a question of the primary purpose one thinks the legal process should serve in a given context. In the new democracy of South Africa, constitutional reform steers social and economic life to redress past injustices, embrace equality, and champion human rights. In the context of employment equity, the legal system must acquire the ability to yield social change through the development of normative values, not merely resolve disputes between individual parties.

Influenced by the conventions of the British legal system, South African law applies the doctrine of precedent or *stare decisis*.¹¹⁰ Labour Court decisions serve the dual function of resolving the dispute between the parties and interpreting the law for future application. The Labour Court thus produces rules and precedent.¹¹¹ Rules and precedents, in turn, have considerable importance "for guiding future behavior and imposing order and certainty on a transactional world that would otherwise be in flux."¹¹² Fiss argued that rules and precedent are necessary in attaining the important value of justice. The achievement of justice is minimized when parties only

¹⁰⁹ Owen Fiss was the first and boldest legal scholar to argue that out-of-court settlements are a "capitulation to the conditions of mass society and should be neither encouraged nor praised." Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Legal scholars, continue to recognize the challenge of ensuring the vitality of public systems of justice through the growing use of alternative dispute resolution. See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 952 (2000).

¹¹⁰ Zimmerman & Visser, *supra* note 50, at 15.

¹¹¹ Although there is no official body charged with the supervision of law reporting, advocates throughout the provinces act as reporters for the various courts and compile judicial decisions, marked reportable by the judge or judges concerned, into the South African Law Reports. A number of specialized law reports, including the Industrial Law Reports and the South African Labour Law Reports, are published by the two main publishers in South Africa: Juta & Co. and Butterworths. Unreported cases may be quoted in Court and have the same precedential value as reported cases. Zimmerman & Visser, *supra* note 50, at 18-19.

¹¹² David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622-23 (1995).

seek to attain peace, as in arbitration.¹¹³ Both peace and justice are important values in the context of South African employment equity disputes. Adjudication attains both values, while mediation and/or arbitration serve only the immediate function of establishing peace between the disputants.

Utilization of the Labour Courts to resolve employment equity disputes also has the positive effect of defining a public good for one end user that is automatically disseminated to all. Luban points to the example of a lighthouse: if one shipper erects a lighthouse, other ships navigating the same waters automatically benefit from the light for free.¹¹⁴ Interpretations of the Employment Equity Act by the Labour Court serve as this "free" light; adjudication of employment equity disputes ensures that rules and values are upheld consistently and fairly in all jurisdictions.

B. Constitutional Values

In the U.S. legal system, the Courts served as the battlegrounds for dismantling segregation and terminating apartheid. Through judicial opinions, the American courts influenced the development of normative values of social justice. These normative values aid in the struggle to change social attitudes and debunk racial stereotypes. In South Africa, social change has been initiated through the new Constitution and the enactment of several Bills, such as the Employment Equity Act.

The Labour Court and the Labour Appeal Court, created by the Labour Relations Act 66 of 1995, are superior courts that have authority, inherent powers and standing in relation to matters arising under the LRA.¹¹⁵ The Labour Court has general jurisdiction and ultimate authority over equality rights of employees.¹¹⁶ Both the CCMA and the Labour Court must interpret the Employment Equity Act in compliance with the Constitution so as to give effect to its purpose.¹¹⁷ The Labour Court, as the adjudicative body with exclusive jurisdiction over the interpretation of the Employment Equity Act,¹¹⁸ is attuned to giving effect to the broad social purposes of the Constitution. The role of the CCMA, however, is to resolve a dispute between employee and employer. The CCMA is, therefore, more

¹¹³ See Fiss, *supra* note 109, at 1085 ("Parties might settle while leaving justice undone."). See also Luban, *supra* note 112, at 2623 (noting Fiss' criticism of the alternative dispute resolution proponents value of peace over justice).

¹¹⁴ Luban, *supra* note 112, at 2623.

¹¹⁵ See §§ 151, 167 of Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-182, 1-186 (1999).

¹¹⁶ *Id.* § 151, at 1-182.

¹¹⁷ § 3(a)-(b) of Employment Equity Act 55 of 1998, 4 JSRSA 2-293, 2-296 (1999).

¹¹⁸ *Id.* § 49, at 2-302.

concerned with the protection of *individual* rights than promoting normative values.¹¹⁹

V. THE CCMA AS AN OBSTACLE TO DEVELOPING NORMATIVE VALUES

A. *Quantity as a Factor of Quality*

Conventional wisdom holds that lawsuits are expensive, terrifying, frustrating, infuriating, humiliating, and time-consuming.¹²⁰ It is no surprise, then, that both judges and disputants prefer other forms of dispute resolution, which are cheaper, quicker, less public, and less consuming.¹²¹ In the explanatory memorandum that accompanied the new Labour Relations Act 66 of 1995, the previous dispute resolution system in South Africa was summarized as “lengthy, complex and pitted with technicalities.”¹²² Procedures did not allow for the independent and effective mediation of disputes, causing many resolvable disputes to wind up in “industrial action.”¹²³ In essence, the old system did not deliver justice because it was overly “technical, complex, inaccessible and legalistic.”¹²⁴

The new system for dispute resolution, the CCMA, is designed to combat the inadequacies of the old system, thereby yielding a greater return on the resolution of disputes. Since its opening in November 1996, the CCMA has proved to be an inexpensive, accessible, and easy-to-use system for all workers.¹²⁵ Individual workers from industries that were previously unprotected by unfair dismissal regulation now have easy access to dispute resolution without significant help from a union.¹²⁶

In addition, the CCMA’s simple procedures and omission of requirements for formal pleadings have ensured that illiteracy and a lack of

¹¹⁹ CCMA chairman Raymond Zondo states that “[t]he CCMA’s main objective is to provide dispute resolution service to the labour relations community.” Marcia Klein, *Lack of Funding Could Hamper Commission*, BUSINESS TIMES (S. Afr.), June 8, 1997, at 1, LEXIS, BUSFIN Library, TMLBT File.

¹²⁰ Luban, *supra* note 112, at 2621.

¹²¹ *Id.*

¹²² John Brand, *CCMA: Achievements and Challenges- Lessons From the First Three Years*, 21 I.L.J. 77, 78 (S. Afr.) (2000).

¹²³ *Id.*

¹²⁴ *Id.* at 78.

¹²⁵ *Id.*

¹²⁶ *Id.* at 78-79. Domestic workers and workers in the non-unionized sector refer 10% of the CCMA’s cases compared with only 3% by metalworkers, and 2% each by workers in large industries such as mining, chemical, clothing and textile, and banking and finance. *Id.* (citing from the 1998 CCMA Review).

skill and resources are not barriers to resolving disputes.¹²⁷ In 1998, employee disputants were represented by a union official in only 10% of CCMA hearings and by a legal practitioner in 2% of hearings.¹²⁸ These statistics indicate just how easy it is for parties to enter the CCMA and handle their disputes themselves.

The accessibility and ease of use of the CCMA, however, presents a tricky obstacle to ensuring that justice is meted out for the development of normative values in South African society. Given the broad protections against unfair dismissal and the guaranteed forum for adjudicating unfair labor practices disputes, the CCMA has been inundated with disputes since opening its doors in November 1996.¹²⁹ In 1998, the CCMA received an average of 323 cases every working day, with a total of 81,397 disputes referred to it for the year, a 35% increase over 1997.¹³⁰ In fact, the CCMA's caseload has increased by over 35% or more each year it has been in operation.¹³¹ The volume of disputes received by the CCMA demonstrates that it is the preferred employee venue for resolving disputes.

The sheer volume of cases referred to the CCMA presents two distinct problems for the development of normative values: (1) The overburdened docket and lack of resources affects the quality of service provided, detracting from the effectiveness of the CCMA; and (2) the quantity of cases being referred to the CCMA and the statistics demonstrate a reliance on the CCMA for dispute resolution and indicate that the Labour Court is being precluded from considering a sufficient sample of employment equity disputes.

B. CCMA Ineffectiveness

In evaluating the CCMA's voluminous case load and lack of financial and people resources, the International Labor Organization ("ILO") concluded that unless change is introduced to screen cases, there is a real risk that the CCMA as a whole will be perceived as inadequate and incompetent.¹³² In order to manage the flood of conciliations and arbitrations, both the case management staff and the CCMA Commissioners are under extraordinary pressure. CCMA staff members are often too busy and under-skilled to properly and efficiently manage the disputes, resulting in delay, wasteful duplication, and mistake.¹³³ Commissioners are often

¹²⁷ *Id.* at 79.

¹²⁸ *Id.*

¹²⁹ *Id.* at 82-83. Unfair dismissal disputes account for over 77% of the cases referred to the CCMA. *Id.* at 78.

¹³⁰ *Id.*

¹³¹ *Id.* at 82.

¹³² *Id.* at 83 (citing ILO Report summarizing conclusions of arbitration).

¹³³ *Id.*

forced to “cut corners” in order to get through their case load; CCMA figures indicate that the average duration of a conciliation is two to four hours, and half a day to one day for an arbitration.¹³⁴ Commissioners are required to handle up to three conciliations per day and two to three arbitrations per week. Moreover, they are required to write reasoned awards for each arbitration within fourteen days.¹³⁵ This burden has directly affected the quality of arbitration.

The scarcity of resources has also caused Commissioners to receive only very basic training. At the CCMA’s inception, those with limited legal qualifications and experience were precluded from arbitrating disputes.¹³⁶ Due to the weighty caseload, however, even the least experienced and qualified commissioners are arbitrating disputes, further escalating the risk of injustice. Judges and arbitrators alike inevitably bring their own personal value systems to adjudications. However, because the CCMA process is designed to resolve the immediate dispute between the parties, each commissioner’s personal values may play a considerable role in reaching a decision because she is not obliged to consider the larger social impact of her decision.

The function of the CCMA is to quickly resolve a dispute (within 60 days).¹³⁷ Under the LRA, the CCMA must first attempt to conciliate disputes within 30 days. However, the CCMA is averaging 60 days for conciliation due to the overburdened docket.¹³⁸ If conciliation does not resolve the dispute, the parties may move to arbitrate the dispute through the CCMA.

CCMA decisions are designed to be final, informal, efficient and cost-effective, thus focused on resolving disputes for the individual employee/employer.¹³⁹ Given the CCMA’s heavy caseload at present, it is likely that not all disputes are fully explored, or that the values embodied in authoritative texts (e.g. Constitution, EEA, and Labour Relations Act) are properly weighed. The CCMA has adopted policies of prohibiting the grant of postponements except in exceptional circumstances and truncating the

¹³⁴ *Id.* at 83-84.

¹³⁵ *Id.* at 84.

¹³⁶ Many of the experienced commissioners are white because of the lack of access to legal training for blacks under the Apartheid state. The author would like to thank Sarah Christie for her insights on the structure and functioning of the CCMA.

¹³⁷ Under the LRA, disputes must be conciliated within 30 days of the filing of the dispute. If conciliation does not resolve the dispute, it is referred to arbitration, which must be completed in 90 days. See §§ 135-136 of Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-178 (1999).

¹³⁸ Tony Leon, *Amend Labour Laws So Companies Can Compete*, BUSINESS DAY (S. Afr.), February 22, 2000, at 14.

¹³⁹ Brand, *supra* note 122, at 83.

forms of arbitration hearings to deal with the arbitration backlog.¹⁴⁰ These policies jeopardize the parties' rights to a fair hearing. The ILO observed "the pressure of attempting to complete all simple dismissal cases within the time can also induce a sense in the parties of being subjected to undue pressure in the conduct of their case and of being denied a fair hearing."¹⁴¹

While the law in South Africa does not require the CCMA to afford persons all the rights allowed to a litigant in a judicial trial,¹⁴² the law does require that a person be given a fair hearing.¹⁴³ The passage of the Employment Equity Act further complicates these issues, as it adds to the docket an unknown quantity of disputes.¹⁴⁴ The statutory time limits on conciliation and arbitration may cause the CCMA to sacrifice full discovery of facts in employment equity cases.

In conclusion, the overburdened docket, insufficient resources and training, and a focus on quickly resolving disputes increase the stakes for attaining peace between the parties at the expense of furthering the development of social norms. The CCMA system of resolving disputes achieves peace between the parties, but does not necessarily promote the social good. The entry of an arbitration award for a promotion dispute via the CCMA, while resolving the dispute or factual issues for the immediate parties, does not address the underlying legal issues of statutory interpretation that caused the dispute.

C. *Precluding the Labour Court*

The CCMA is granted specific permission under the EEA to handle disputes regarding unfair discrimination.¹⁴⁵ The EEA also provides that "it is not unfair discrimination to take affirmative action measures consistent with the purpose of [the] Act."¹⁴⁶ The CCMA must attempt to resolve the unfair discrimination dispute through conciliation, and if unresolved after conciliation, "any party to the dispute may refer it to the Labour Court for adjudication;" or the parties may consent to arbitration of the dispute.

¹⁴⁰ *Id.* at 86.

¹⁴¹ *Id.* at 87 (referencing information provided by CCMA).

¹⁴² The LRA expressly recognizes the need for informality and flexibility in the CCMA. See § 138 of the Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-179 (1999).

¹⁴³ *Id.*

¹⁴⁴ The first stage of the Employment Equity Act, prohibition of unfair discrimination, was promulgated less than two years ago, in April 1999. See generally Mdladlana, *supra* note 17, at 15 (announcing promulgation of the first stage).

¹⁴⁵ § 10(2) of Employment Equity Act 55 of 1998, 4 JSRSA 2-293, 2-297 (1998). "Any party to a dispute concerning this Chapter [Prohibition of Unfair Discrimination] may refer the dispute in writing to the CCMA within six months after the act or omission that allegedly constitutes unfair discrimination." *Id.*

¹⁴⁶ *Id.* § 6(2).

The quantity of disputes that have been referred to the CCMA for conciliation and arbitration signals that the Labour Court is not being conferred adequate opportunity to consider employment equity disputes. The CCMA claims a settlement rate for conciliations of 73%.¹⁴⁷ There are, however, serious questions about the quality of this dispute resolution, as evidence has revealed that some commissioners swiftly judge parties in conciliation on a superficial assessment of the facts and suggest a settlement which they tell the parties will be imposed upon them in arbitration if they do not agree.¹⁴⁸ Thus, the Labour Court is deprived of the occasion to render an interpretation of the Employment Equity Act because disputes are disproportionately conciliated and/or arbitrated by the CCMA.

Given the statutory limitations on the review of arbitration decisions, only a fraction of the disputes that do move on to arbitration will actually be reviewed by the Labour Court. This is because the Labour Relations Act 66 of 1995 eliminated the right to *appeal*; the Labour Court can only *review* arbitration awards.¹⁴⁹ Under a right of appeal, the Court would have jurisdiction to reverse an arbitration award based on its incorrectness; under judicial review, a reversal on the merits would exceed the Court's authority.¹⁵⁰ Even if a review of the award could help to establish social norms, many applicants lack the resources or access to seek review by the Labour Court.¹⁵¹

VI. THE FAILURE TO PROMOTE AND EMPLOYMENT EQUITY

Affirmative action policy is, by definition, discriminatory, and therefore creates an inevitable conflict in the employment situation. Under the Employment Equity Act, however, affirmative action does not constitute unfair discrimination because it meets the constitutional purpose

¹⁴⁷ Brand, *supra* note 122, at 84 (referencing information provided by the CCMA).

¹⁴⁸ *Id.* The ILO reports:

The merits of the dispute can seldom be effectively canvassed in the two hours set aside for conciliation. This leads to an approach being adopted by commissioners which amounts to an attempt to persuade the employer party to pay an agreed sum to avoid the uncertainty and inconvenience of arbitration proceedings, whilst employees trade off their right to have the case judged, with the uncertainty of outcome which that entails, for the certainty of an agreed sum of money.

Id. at 84-85.

¹⁴⁹ The right to appeal was eliminated to prevent delay and cost in enforcing rights by the opportunistic use of right of appeal. See Sharpe, *supra* note 77, at 283.

¹⁵⁰ *Id.*

¹⁵¹ The Labour Court is limited geographically. An applicant in the northern Transvaal province would have to bring her appeal to Johannesburg for review by the Labour Court.

of protecting or advancing categories of persons, historically disadvantaged by unfair discrimination.¹⁵² Still, no matter how well intentioned the affirmative action program, perceptions of unfair treatment by employees and appointees make affirmative action programs a common target for employment disputes. The most common disputes that have already arisen include situations where an employer has failed to implement an affirmative action policy or where an employee has challenged its interpretation.¹⁵³

An employer that fails to promote a white employee or refuses to appoint a white employee because of the existence of an affirmative action policy is especially vulnerable to dispute.¹⁵⁴ The white employee may dispute the employer's actions as constituting an unfair labor practice under the Labor Relations Act. Under the LRA, the employee is required to bring the dispute to the CCMA.¹⁵⁵ Resolving this type of dispute requires an evaluation of the employer's affirmative action policy, and in turn, an interpretation of the Employment Equity Act, to determine whether the employer's actions were unfair. Interpretation of the Act should incorporate an evaluation of the normative values that are embodied in the statute. Arbitration of the dispute, however, is focused on fairly and quickly resolving the dispute for the parties involved with a minimum of legal formality.¹⁵⁶

¹⁵² Martin Brassey, *The Employment Equity Act: Bad for Employment and Bad for Equity*, 19 I.L.J. 1359, 1361-62 (S. Afr.) (1998).

¹⁵³ Dispute situations may also include: the reluctant implementation or avoidance of an agreed affirmative action policy; a grievance that a person perceived to be less competent is appointed/promoted; a grievance that an outsider is appointed, leapfrogging insiders with potential; rigging of the interview process; the appointment of a black non-South African over South African citizens; an affirmative action appointment made for window-dressing; refusing to appoint a white employee on a permanent basis; the retrenchment of a white employee to make way for an affirmative action employee. Alan Rycroft, *Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies*, 20 I.L.J. 1411, 1414-15 (S. Afr.) (1999).

¹⁵⁴ See *id.* at 1415.

¹⁵⁵ The CCMA was established by the Labour Relations Act 66 of 1995. See § 112 of the Labour Relations Act 66 of 1995, 4 JSRSA 1-138, 1-173 (1999). The CCMA first attempts to conciliate the employment dispute, and if conciliation is not successful, the CCMA arbitrates the dispute. *Id.* § 135, at 1-178.

¹⁵⁶ *Id.* § 138(1), at 1-179. "The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the *dispute* fairly and quickly, but must deal with the substantial merits of the *dispute* with the minimum of legal formalities." *Id.*

A. *The Labour Court Before the Employment Equity Act*

*Public Servants Association of SA v. Minister of Justice*¹⁵⁷ was the first important decision on a promotion dispute involving affirmative action, decided by the Labour Court prior to the passage of the Employment Equity Act of 1998. In *Public Servants Association*, the Department of Justice had failed to invite thirty white males already employed by the Department to interview for the positions they had applied for because their race and gender did not match the preference established for the posts.¹⁵⁸ The Department's defense to the discrimination was that the Constitution required promoting a broadly representative public administration, and that black people and women were notoriously underrepresented in the public service. This imbalance justified the triggering of an affirmative action policy for the vacant posts.

The Labour Court found that simply labeling a measure as an affirmative action policy did not preclude the Court from reviewing the employer's "ends and means" in creating such a policy.¹⁵⁹ Instead, the employer's intent and design in invoking an affirmative action policy should be evaluated to determine whether the employer's conduct unfairly discriminated against the employee(s) seeking the appointment. Ultimately, the Court held that an employer could not use affirmative action policy as a defense unless its affirmative action measures had a clear design and purpose that was not overbroad in its application.¹⁶⁰

B. *The CCMA Approach Before the Employment Equity Act*

The CCMA took a different approach from the Labor Court in resolving the failure to promote dispute prior to the EEA. In *Herbert v. Department of Home Affairs*,¹⁶¹ a white employee failed to receive a promotion that the employee felt was warranted. The LRA entitled the employee to challenge the employer's decision not to promote under the unfair labour practice provisions of the Act, a dispute that can be resolved through the CCMA. The employer claimed that managerial prerogative

¹⁵⁷ *Public Servants Association of SA & Others v. Minister of Justice & Others*, 18 I.L.J. 241 (S. Afr.) (1997).

¹⁵⁸ *Id.* at 296.

¹⁵⁹ *Id.* at 304-05 (explaining that the end envisaged as well as means employed is reviewable; measures are not permitted to go beyond what is adequate; measures cannot be precluded merely by labeling as affirmative action).

¹⁶⁰ *Id.* at 306-07 (explaining that measures must be designed to achieve something, must give adequate protection, and must promote efficient as well as broadly representative administration).

¹⁶¹ CCMA Case No. KN10413 (April 21, 1998) (unpublished decision obtained directly from CCMA). See also Rycroft, *supra* note 153, at 1414-15 (discussing the ways in which appointment and promotion grievances are the source of labor disputes).

prevented the employee from challenging its decision. It stated that the purpose of its decision was to promote representatively and that preference would be given to candidates who were representative – in essence, a policy of affirmative action.

Under South African law, the decision to appoint or promote is part of the managerial prerogative, a concept generally acknowledged to be part of the traditional law of master and servant within the employment contract.¹⁶² The management prerogative is seen as the authority necessary to fill gaps of an employment contract when the contract is silent on a particular aspect of the numerous contingencies that may arise in the course of employment.¹⁶³ Whether management's rights are express or implied, the right to manage is recognized as a procedural right.¹⁶⁴

The CCMA arbitrator, relying on *Goliath v. Medscheme (Pty) Ltd*, found that "in the absence of gross unreasonableness which leads the court to draw an inference of *mala fides*, this court should be hesitant to interfere with the exercise of management's discretion."¹⁶⁵ Because the employer based its managerial prerogative on a policy of affirmative action, albeit a vaguely defined one, the employer's action was not found to be grossly unreasonable.¹⁶⁶ In coming to this decision, the arbitrator viewed the management decision in the context of a changing public service, the requirements of the Constitution, the Public Service Act, the collective agreement, and the demographics of the department. The CCMA arbitrator did not consider the management decision in light of the reasonableness of the affirmative action policy.

In *Gruenbaum v. SA Revenue Service*,¹⁶⁷ also decided by the CCMA, the failure to explore the implications of the governmental policy of affirmative action resulted in a finding that the exercise of managerial prerogative *was* unreasonable. At the time of the appointment in question, the department had not articulated a detailed affirmative action policy, but all advertisements carried the words that the department was "an equal

¹⁶² See *Goliath v. Medscheme (Pty) Ltd*, 17 I.L.J. 760, 768 (1996) (S. Afr.). The CCMA arbitrator found that the decision to promote is part of managerial prerogative. *Id.*

¹⁶³ ALAN FOX, *BEYOND CONTRACT: WORK, POWER AND TRUST RELATIONS* 183-84 (1974).

¹⁶⁴ "The right to direct, where it involves wages, hours, or working conditions, is a procedural right. It does not imply some right over and above labor's right. It is a recognition of the fact that somebody must be boss; somebody has to run the plant." A.J. Goldberg, *Management's Reserved Rights: A Labor View*, in *MANAGEMENT RIGHTS AND THE ARBITRATION PROCESS: PROCEEDINGS OF THE NINTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 118, 120-21 (Jean T. McKelvey ed., 1956); See also, M.S.M. BRASSEY ET AL., *THE NEW LABOUR LAW* 74 (1987).

¹⁶⁵ BRASSEY, *supra* note 164.

¹⁶⁶ *Id.*

¹⁶⁷ CCMA Case No. KN20090 (Nov. 6, 1998) (unpublished decision obtained directly from the CCMA).

opportunity, affirmative action employer.”¹⁶⁸ The employer argued that affirmative action only applied when there were two candidates with exactly the same qualifications and experience. The CCMA commissioner refused this restrictive view stating, “If this notion prevails there will, because of past discrimination, be little scope to transform the private and public sectors.”¹⁶⁹

In both of the above cases, the CCMA Commissioner assumed a role in interpreting the Employment Equity Act, jeopardizing the role of the Labour Court in developing jurisprudence based on social justice. Further, the decisions of the CCMA arbitrations conflict with the finding in the Labor Court decision of *Public Servants Association*. Under the Labor Court decision, the employer’s *intent and design* in invoking an affirmative action policy should be evaluated to determine whether the employer’s conduct unfairly discriminated against the employee(s) seeking the appointment.

C. The CCMA Approach After the Employment Equity Act

Since the passage of the EEA, the CCMA has been faced with a growing number of disputes involving promotions and appointments. However, where the employer cites an affirmative action policy as a defense, the CCMA has faltered in evaluating the employer’s affirmative action policy to determine whether the employer’s conduct was fair.

In *Imatu obo M. de Swart v. Mossel Bay Municipality*,¹⁷⁰ decided after the enactment of the Employment Equity Act, a white woman employed by the municipality was excluded from appointment to a vacant position of assistant Town Treasurer in favor of a black man, an external applicant. The woman alleged that she was an affirmative action candidate as defined in an agreement regulating equal employment practice and affirmative action entered into between the council and unions representing its employees. As such, she argued that she was entitled to be appointed on that basis and also on the basis that the agreement provided for preference to be given to internal candidates. In addition, she argued that the agreement required that an applicant’s merit be taken into account and that the successful candidate, the black man, was guilty of poor performance and misconduct in his previous employment. The dispute was an unfair labor practice dispute brought under the CCMA.¹⁷¹

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ CCMA Case No. WE 16816 (Mar. 30, 1999) (unpublished decision obtained directly from the CCMA). See also Rycroft, *supra* note 153, at 1414-15 (discussing scenarios in which affirmative action labor disputes commonly arise).

¹⁷¹ Rycroft, *supra* note 153.

The employer did not dispute that the female applicant was a competent worker, had the necessary qualifications, and had acted in the advertised post for six months prior to the appointment. The union argued that under the provisions of the Employment Equity Act, no distinction could be drawn between women and black candidates in defining affirmative action candidates. The employer, however, contended that black people were substantially more disadvantaged than white women, especially in light of the wider political context, and that both the LRA and the Constitution permitted discrimination to correct previous imbalances.

In analyzing the evidence, the arbitrator concluded that emphasis should be placed on whether *groups* are disadvantaged and not whether individuals within the groups are disadvantaged. The definition of disadvantaged persons, the CCMA found, should be seen in light of the Employment Equity Act 55 of 1998 which defines "designated groups" as: "black people, women and people with disabilities."¹⁷² The CCMA noted that a case could be made out for giving blacks priority, either on the ground of relative disadvantage suffered or on the ground of demographics, but held that in this instance no such case had been established. The Commissioner therefore concluded that the non-appointment of the white female employee constituted a breach of the employment agreement.

The CCMA did not evaluate the employer's affirmative action policy to determine whether the employer's conduct was fair. Further, because the dispute was brought as an unfair labour practice, the CCMA Commissioner failed to resolve the underlying claim of unfair discrimination.¹⁷³ The CCMA, because of its focus on quickly and amicably resolving the dispute between the employer and the employee, did not take a role in defining equality norms. Perhaps prone to his own biases in regards to affirmative action, the Commissioner¹⁷⁴ concluded that blacks did not have priority over white females in regards to affirmative action. Although the Commissioner noted a case could be made out for the black employee's interests, he avoided addressing the issue.

The outcome of the arbitration reflects that the CCMA Commissioners differ from the Labor Court in the degree of scrutiny given to disputes arising under the Employment Equity Act. For example, under a 'disadvantage scrutiny' to resolve a promotion dispute, an arbitrator tests whether the less qualified "disadvantaged" person, the black male, could show that *but for* his disadvantage, he would be at least as well qualified as

¹⁷² § 1 of Employment Equity Act 55 of 1998, 4 JSRSA 2-293, 2-295 (1998).

¹⁷³ CCMA Case No. WE 16816 (Mar. 30, 1999). The CCMA arbitrator concluded that the 'core underlying allegation' in this dispute was racial discrimination. This, the Commissioner ruled, was a matter for the Labour Court, or for private mediation and arbitration in accordance with the terms of the agreement between parties. *Id.*

¹⁷⁴ The Commissioner that arbitrated the dispute was a white male. See Rycroft, *supra* note 153, at 1415.

his white male competitor. This test has obvious problems in that it focuses on the biographical history of an individual that may not be party to the arbitration rather than on the social objective.

Under threshold scrutiny, as long as the disadvantaged applicant meets threshold minimum requirements, then the employer's decision to promote her over a white applicant is justified. But, under a relatively equal scrutiny, if one of the applicants is more qualified than the others, then the promotion should go to that individual; the employer should rely on Affirmative Action policy, favoring the promotion of a disadvantaged person, only when the qualifications are relatively equal among applicants. This test makes it difficult to transform the work force at upper management levels, given that apartheid created vast inequities in education, access to training, and certification programs.

These inconsistencies in scrutiny may result from the arbitrators' personal values, the pressure on the arbitrators to deliver expeditious decisions, and/or the lack of training or legal experience of the arbitrator. In the context of a promotion dispute, the degree of scrutiny clearly affects the development of social norms. Without clear guidance from the Labour Court at the outset of a dispute, the difference in approaches by arbitrators results in inconsistent awards. Thus, the 'newness' of the Employment Equity Act, and the Act's valuable function in the juridification of South Africa, call out for judicial interpretation by the Labour Court to instill normative values. If important disputes settle through arbitration, as in *Imatu obo M de Swart v. Mossel Bay Municipality*, the Labour Court is barred from rendering an opinion and the normative value that could have been gained is lost.

VII. SUGGESTIONS TO MAXIMIZE THE DEVELOPMENT OF NORMATIVE VALUES

Several courses of action can be taken to maximize the opportunity for the development of social norms in South Africa. First, Employment Equity disputes should be given higher priority than other types of labor disputes. Disputes involving promotions and appointments, where the employer defends its conduct under the rubric of affirmative action, must be considered with careful thought and with an understanding that the outcome of the dispute will shape social norms. The successes and failures of the CCMA pose several challenges in the new arena of Employment Equity legislation. While the creation of the CCMA has remedied many of the ills of labor law under the Apartheid regime, it has also proved to be inadequate in means. South Africa does not have the resources to make the CCMA work effectively with its present and projected caseload; the CCMA can only be expected to provide a basic service for most labor disputes.

The role of the Commission for Employment Equity ("CEE"),¹⁷⁵ established by the EEA, should be expanded.¹⁷⁶ Currently, the CEE's primary role is to monitor and regulate employer compliance with the EEA through the development of Codes of Good Practice in employment. The CEE is very narrow in focus and members of the CEE serve only on a part-time basis. Resolutions of disputes arising under the EEA are not managed by the CEE. The functions of the CEE could be expanded to include investigation of employment equity disputes, similar to the function of the Equal Employment Opportunity Commission in the United States. This would help to alleviate the additional burden that has been placed on the CCMA to resolve disputes.

Second, given that the Employment Equity Act is still in its infancy, it is important that the Department of Labour begin tracking data on how many disputes touching on employment equity issues go to the Labour Court versus how many disputes are resolved through arbitration. The percentage of CCMA arbitration decisions that are reviewed by the Labour Court should also be examined to assess the tangible impact of the CCMA dispute resolution system on the interpretation of the Employment Equity Act.

Lastly, resources should be allotted to developing the judicial institution of the Labour Court. The quality and quantity of judges that serve on the Court could be increased, and specialized training on evaluating Constitutional values should be implemented.

VIII. CONCLUSION

The use of the CCMA to resolve categories of disputes involving employment equity issues may jeopardize the ability of the Labour Courts to shape employment equity norms through its interpretations and creation of rules. The Labour Court is prevented from rendering interpretations of the Employment Equity Act because of the reduced opportunity to consider unfair labor practices disputes involving employment equity.

The Labour Court's decisions help shape social values by defining the right to equality in employment. The CCMA resolves a disproportionate majority of disputes arising under the Employment Equity Act, thereby minimizing the opportunity for the Labour Court to interpret the Act. The CCMA's growing, overburdened docket, insufficient resources and training, and focus on quickly resolving disputes, will fail to

¹⁷⁵ The CEE acts as an advisory body to the Minister of Labour. The CEE is a panel of persons representing the interests of women, people with disabilities, and representatives of NEDLAC, a consensus-seeking body comprised of political, private and public organizations. §§ 28-30 of Employment Equity Act 55 of 1998, 4 JSRSA 2-293, 2-299 (1998).

instill with the authority of national application normative values of social equality with the same significance as the Labour Court.

By shortcutting the adjudicative role of the Labour Court, South Africa risks undermining the development of normative values.

Further, the CCMA's structure and procedures for mediation and arbitration make the CCMA more attuned to the protection of individual rights rather than the promotion of the broader normative values outlined in the South African Constitution and the Employment Equity Act. The 'newness' of the Employment Equity Act, and the Act's valuable function in the juridification of South Africa, call out for judicial interpretation by the Labour Court to instill normative values.

The development of normative values, based on these interpretations and rules is fundamental to social change in post-apartheid South Africa. The development of normative values will help to revolutionize employer attitudes in treatment, training and promotion of black Africans. Normative values reflecting equal protection and justice also have the potential to alter the patterns of power, wealth, and privilege established under apartheid. With universal human rights norms embodied in the Constitution and other legislation, the judicial decisions delivered by the Labour Court should play an essential role in steering South African social and economic life in a particular direction.