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Actual past discrimination or group membership as a requirement to benefit from affirmative action: A comparison between South African and American case law

Summary

This note analyses the South African and US positions with regard to the issue of whether actual past discrimination is required as a prerequisite to benefit from affirmative action or whether membership of a designated group will suffice. The focus is on employment law. Categorisation of affirmative action beneficiaries and criticism of the same are covered. The consequences of over- and under-inclusiveness will briefly be addressed. This is done against the background of the various notions of equality. It seems that the US courts (following the notion of equality of opportunity) had initially been unwilling to accord Blacks and women the benefit of a conclusive presumption of victimization, notwithstanding wide acceptance of the fact that discrimination had adversely affected them. A showing of actual past discrimination was required until the late 1980s when case law made it clear that this was not necessary any longer. At present, however, the pendulum has moved back again and a strong evidentiary basis must be made out that discrimination had in fact taken place and that it had an impact on the group as a whole. In SA where affirmative action has been implemented only since 1999 (in contrast to the 40 years of experience of the US), the courts quickly made it clear that membership of a designated group and not actual disadvantage is what is required. This interpretation is in line with the notion of substantive equality, as embraced by the Constitution and the EEA. Hopefully, this approach will successfully address SA's history of systemic and pervasive discrimination. Although the use of categories of beneficiaries will no doubt also lead to over-inclusion, it should be kept in mind that the situation in SA is different to that of the US, in that a majority must be affirmed.

Feitelike vorige diskriminasie of groeplidmaatskap as 'n vereiste vir regstellende aksie: 'n vergelyking van hofsake van Suid-Afrika en die Verenigde State van Amerika

Hierdie nota ontleed die Suid-Afrikaanse en Amerikaanse posisies met betrekking tot die kwessie of werklike vorige benadeling of lidmaatskap van 'n aangewese groep getoon moet word ten einde begunstig te word onder regstellende aksie. Daar word gefokus op die reg in die werkplek. Kategorisering van begunstigdes van regstellende aksie en kritiek hierop word aangespreek. Die gevolge van onder- en oorinsluiting word kortliks bespreek. Dit word gedoen teen die agtergrond van die verskillende begrippe van gelykheid. Dit blyk dat die Amerikaanse howe (teen die agtergrond van gelyke geleenthede) aanvanklik nie 'n vermoede van benadeling ten gunste van swart mense en vroue wou toepas nie, nieteenstaande breë aanvaarding dat hulle wel deur diskriminasie benadeel is. Bewese werklike vorige benadeling was vereis tot in die laat 1980s voordat regspraak aangedui het dat dit nie langer nodig was nie. Die pendulum het tans egter teruggeswaai

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en sterk bewyse moet voorgelê word dat diskriminasie wel plaasgevind het en dat dit 'n impak op die groep as 'n geheel gehad het. In Suid-Afrika waar regstellende aksie eers vanaf 1999 geïmplementeer is (in teenstelling met Amerika se 40 jaar van ervaring), het die howe dit gou duidelik gemaak dat lidmaatskap van 'n aangewese groep — en nie werklike benadeling nie — voldoende is. Hierdie interpretasie volg die begrip van substantiewe gelykheid, soos onderskryf deur die Grondwet en die Wet op Gelyke Indiensneming. Hopelik sal dié benadering die Suid-Afrikaanse geskiedenis van sistemiese en deurlopende diskriminasie suksesvol aanspreek. Die gebruik van kategorieë van begunstigdes sal sonder twyfel ook lei tot oor-insluiting, maar dit moet in gedagte gehou word dat die posisie in SA anders is as dié van Amerika, in dié sin dat regstellende aksie vir 'n meerderheid toegepas word.

1. Introduction

Many similarities[1] exist between the United States (US) and South Africa (SA) for purposes of a comparison of affirmative action. Both countries have an African component of the population that has suffered from discrimination and have other ethnic minorities such as Native Indians, Hispanic and Asian Americans, and coloureds and Indians respectively. Both countries reflect a struggle for freedom, justice and equality, and illustrate how the legal system can operate as a tool to oppress blacks as well as reduce oppression. Although racial discrimination has never been official government policy in the US as in SA, it is nevertheless a problem that has run equally deep in the US. These similarities and some recurring themes will make a useful comparison. But substantial differences[2] between the two countries of course also exist. These include that (a) the groups which benefited under affirmative action in the US, are minorities, where in SA they constitute the majority and (b) because of the secure political and economic power of whites in the US, accommodation of the demands of minorities had not substantially diminished white power, in contrast to SA where the opposite is a reality.

The purpose of this note is to analyse the South African and US positions with regard to the requirement of whether actual past discrimination is required as a prerequisite to benefit from affirmative action or whether group membership will suffice. I will consider US and South African legislation and case law. The focus is on employment law but case law outside this context is considered as many US cases relating to for example, education and distribution of of government contracts, initially played (and still play) an important role in developing the content of and limitations to affirmative action, and consequentially influenced (and still influence) affirmative action in employment law. Categorisation of affirmative action beneficiaries and criticism of the same are also covered. This is done against the background of the various notions of equality.

Basically the contrasting notions of equality are: (a) a *formal* approach to equality which implies that discrimination is outlawed (equality in *treatment*); and (b) *substantive* equality which implies that in addition to discrimination

1 Higginbotham 1999:188-89.

2 Higginbotham 1999:189-90. See also Delgado 1991:1230 who points out that around 2050 Caucasians will cease to be the largest segment of the US' population. This may have consequences on the categories of beneficiaries of affirmative action.

which is outlawed, positive measures are taken to protect or advance people from groups disadvantaged by unfair discrimination (equality in *outcome*).[3]

2. United States

2.1 Legislative background

Equality made it into the Constitution[4] of the US only after the American Civil War with the addition of the Fourteenth Amendment[5] to the Constitution. The main purpose of this amendment was to make former slaves citizens of both the US and the state in which they lived and to forbid the states to deny equal protection of the law to any person.[6] Almost a century later, affirmative action in the US had been legalized by Title VII of the *Civil Rights Act*.[7] The Act was

3 See De Waal, Currie & Erasmus 2001:223; Basson *et al* 2002:304 and Du Toit *et al* 2000:431. See also Dupper 2002:279-80 whose exposition I rely on. The two approaches are fundamentally different. The formal approach views any action that explicitly uses, for example, race as a criterion for decision-making as unlawful, whether directed against or in favour of a disadvantaged group. It rejects positive action (or affirmative action) as morally reprehensible to the same degree as pernicious discrimination on grounds of race. It holds that the law is neutral and focuses on the rights of the individual as individual. The substantive approach rejects the emphasis on individualism and focusses on groups and equality of results. It holds that the emphasis on formal equality of individuals ignores the extent to which opportunities are determined by individuals' social and historical status, including race and gender. It rejects the idea of a neutral state and maintains that a refusal to intervene is itself a positive statement of state support for continuing societal discrimination. Discrimination against groups who have been historically disadvantaged is considered to be qualitatively different from discrimination aimed at remedying that disadvantage. A measure that favours relatively disadvantaged groups at the expense of those who are relatively well-off is not discriminatory since the consequence of such a measure, is in the end, a more equal society. The substantive model does not require actual disadvantage, but group membership to benefit from affirmative action. In the middle of these two models we find equality of opportunity. This notion holds that true equality can not be achieved if individuals begin the race from different starting-points. It focusses on the individual but recognises that structural discrimination distorts the life chances of individuals because of their group membership. Race and sex based policies may therefore be used as transitional remedial measures but only to equalise the starting points of players in society. At this point, the emphasis returns to the individual. This model grants relief to the group as a whole, rather than to individual members. It appears that no individual is, however, entitled to affirmative action and beneficiaries need only show group membership, as opposed to actual discrimination.

4 Drawn up by the Constitutional Convention of 1787 and ratified by the various states from 1787 to1790.

5 Ratified in 1868.

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

7 Of 1964. 42 USC 2000e-2. Subsequently amended by the *Civil Rights Act* of 1972 and the *Civil Rights Act* of 1991.

passed in response to a nationwide civil rights movement and represented a watershed in the struggle for economic justice in the US.[8] Title VII seeks *equal opportunity* through the elimination of discrimination on the grounds of race, colour, religion, national origin and sex in federal, state and local governments and in the private sector. The equal opportunity clause of Title VII states:[9]

> It shall be an unlawful employment practice for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Although Title VII did not impose affirmative action duties on employers as such, it authorizes courts, upon a finding that a respondent has intentionally engaged in an unlawful employment practice, to:[10]

> (1) ... enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ... or any other equitable relief as the court deems appropriate ...
>
> (2)(A) No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin ...

President Lyndon B Johnson's Executive Order No 11246[11] embodied the basic principles of Title VII and gave content to affirmative action. It firstly prohibits discrimination in hiring and employment decisions of (larger federal) government contractors on the basis of race, colour, gender, religion and national origin. The Order secondly requires such contractors to take affirmative action for minorities and women where there is under-representation in the workforce.[12]

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8 See Weiss 1997:70.

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

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

11 Issued in 1965. President Johnson held that 'we seek ... not just equality as a right and a theory, but equality as a fact and as a result' ('To Fulfill These Rights', Commencement Speech at Harvard University, 4 June 1965).

12 Section 202(1).

Title VII protects both genders and all races. In contrast to this, the beneficiaries of affirmative action in terms of Executive Order 11246 are more limited. They are preferred groups which are minorities and women. Minorities are defined to mean Blacks, Hispanics, American Indian or Alaskan Native, and Asian or Pacific Islander.[13] In the US, affirmative action initially focussed on providing remedies for African Americans in the workplace who could demonstrate that they had suffered direct personal discrimination.[14] This is most probably due to the fact that the main aim of Title VII was to advance blacks who had historically been discriminated against. In the 1970s, affirmative action policies regarding women were developed due to a move away from the traditionally patriarchal society. More recently, other groups, in particular Hispanic Americans (the largest immigrant group) have become more demanding and have sought to benefit from such policies. Generally then, affirmative action programmes in the US have covered most groups historically discriminated against under the law.[15]

2.1.1 Criticism on affirmative action categories

Criticism has been levelled at affirmative action categories. Firstly, they are overinclusive in that it deems all people in a category to be disadvantaged.[16] In other words, within a protected group, some people may not have been disadvantaged. Secondly, it is often found that better-off people within the categories are benefited while those most in need are not.[17] Disadvantaged

13 See EEOC Standard Form 100. Rev. 4-92, Employer Information Report EEO-1, 100-117, Instruction Booklet section 4 of the Appendix for detailed definitions.

14 Little 1994:271.

15 In practice, we find affirmative action in three forms in the US: voluntary affirmative action taken by employers, court-ordered remedies or consent decrees (where the parties actually consent to affirmative action and it is then made an order of court) to prevent or settle lawsuits, and set-asides of federal or state contract dollars for certain groups (Gutman 2000:232). In addition to these, a wider range of additional programmes had been instituted with the aim of creating greater equality between the races with preferences being awarded to small businesses owned and controlled by socially and economically disadvantaged individuals (McCrudden 1996:369).

16 La Noue and Sullivan1998:913 and 918. Banton 1994:73-4 supports this notion. He holds that as a means of combatting discrimination, law works through the creation of protected classes, but this may result in only rough justice, since not all members of a class are equally placed. The creation of privileged classes has been intended to secure equal treatment for individuals in the long run, but as it is never possible to define the classes so exactly that only the most deserving benefit, the short-run results may be open to criticism.

17 Bacchi 1996:27. Kennedy 1997:62 argues, however, that even if affirmative action frequently aids those blacks who need it least, it is unpersuasive as an objection to affirmative action because (a) it ignores the large extent to which affirmative action has opened up opportunities for blue-collar black workers; and (b) it assumes that affirmative action should be provided only to the most deprived strata of the black community or to those who can best document their victimization (while in many circumstances affirmative action has developed from the premise that special aid should be given to strategically important sectors of the black community —

people display degrees of disadvantage. For example, enormous cultural and economic differences exist among Asian-Americans of Laotian, Indian, Japanese and Pacific Islander ancestry which had not been taken into account when creating the US categories.[18] Hispanic Americans, namely people from Spain, Argentina, Cuba and Mexico are perhaps more similar than those in the Asian American category but they also have important cultural differences.

It has been argued that affirmative action should be limited to African-Americans or African and Native Americans due to the severe degree of oppression under the law because of slavery and genocide.[19] Yet affirmative action for descendants of black slaves and Native Americans constitutes a shrinking share of affirmative action's beneficiaries.[20] Also, preferential treatment has been extended beyond the original descendants of black slaves to blacks from Africa, the Caribbean and elsewhere due to political reasons. The argument that only African-Americans should be covered is based on the fact that this group is most deserving of affirmative action because they were historically most oppressed, and the equal protection clause of the Fourteenth Amendment was designed primarily to protect freed black slaves. Census and other reliable data illustrate that prejudice and covert discrimination against African-Americans, relative to Native, Hispanic and Asian-Americans, continue.[21] Present negative effects of past discrimination are, therefore, most prevalent for blacks.[22] The third point of criticism is that affirmative action is underinclusive in that it does not recognise that people of other minorities (and even white people) may also have been disadvantaged. Fourthly, some criticism has been levelled at affirmative action categories to be more bureaucratic conveniences than demographic realities.[23] Lastly, changes in immigration patterns and in

for example, those with the threshold ability to integrate the professions) and (c) the fact that the black middle class has primarily benefited indicates only the necessity for additional social intervention to address unmet needs in those sectors of the black community left untouched by affirmative action.

18 La Noue and Sullivan 1998:917 hold that the overinclusiveness of this category 'masks' differences within the category. These people immigrated from many different parts of the globe, at different times and under very different circumstances.

19 Higginbotham 1999:215; Delgado 1997:69-70 note 4; Schuck 2002:27 points out that this would minimize some objections to affirmative action, but would be tricky to implement and would still violate the non-discrimination and merit principles.

20 Schuck 2002:26.

21 Brest and Oshige 1995:877-900.

22 Higginbotham 1999:215. See also Brest and Oshige 1995:899-900 who argue that African-Americans are the 'paradigmatic group' for affirmative action. Although other groups have also suffered from widespread prejudice and mistreatment, no other group compares to African-Americans in the confluence of the characteristics that argue for the inclusion in affirmative action programmes.

23 La Noue and Sullivan 1998:914. It has been argued that (a) the original construction of the affirmative action group categories took place in the recesses of bureaucracies when regulations and reporting forms were developed (b) debates did not take place in public and records about these decisions are limited (c) once the bureaucracies had fixed the group categories, these were not only replicated in all federal affirmative action programmes, but the same categories also appeared in hundreds of state, local and private programmes as well and (d) no independent examinations took place to see whether the federally defined groups fit any theory of social justice

the socio-economic status of groups, as well as in particular local conditions, often made national generalizations about groups that should benefit from affirmative action, incorrect or irrelevant.[24] In the same line, centuries of intermarriage render the conventional categories meaningless.[25] I will refer to these points of criticism in the discussion of case law below, where applicable.

2.2 Case law

In the analysis that follows the focus will be on leading US Supreme Court decisions. The emphasis is on majority decisions but minority views of particular importance will be referred to.

The debate in the US on the interpretation of whether beneficiaries of affirmative action have to show actual disadvantage or mere group membership, took place in the context of the debate on the design and the *purpose* of affirmative action programmes. The case of *Regents of the University of California v Bakke* [26] (the first case on affirmative action to reach the court) illustrates the controversy when blacks were given preference because of *historic* discrimination, rather than past personal discrimination. The special admissions programme of the Davis medical school set aside 16 out of 100 seats for the entering class exclusively for racial minority applicants defined as Black, Native, Hispanic and Asian-Americans. Bakke (a white male with scores higher than those of any of the students admitted under the programme and twice denied admission) alleged that the admission plan violated Title VII and his Fourteenth Amendment right to equal treatment under the law. Powell J (who gave the opinion of the court) interpreted equal protection as requiring that the same protection be

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or equity. The point about bureaucratic convenience is illustrated by examples of affirmative action plans in Dade County, Florida which were used to advantage Hispanics often in ways that disadvantaged the older, less prosperous black population, although many Hispanics were former Cuban political refugees who were middle-class and had no history of disadvantage in the US. Also, the minority business enterprise (MBE) programme in Richmond, Virginia included Hispanics, Asian Americans, Native Americans and Eskimos and Aleuts, although the 1987 census recorded no firms owned by Eskimos and Aleuts in the Richmond Metropolitan Statistical Area and very few firms owned by Asian Americans and Hispanics. Very interestingly, note that Herbert Hammerman (the then chief of the reports unit of the EEOC) recalls arguing against the inclusion of Asian and Native Americans in the forms because there was no statistical evidence of discrimination against the first mentioned as a group, and Native Americans living on reservations were excluded from Title VII. Very importantly also, La Noue and Sullivan 1998:923-4 point to the fact that recent research shows that discrimination does not necessarily explain all discrepancies in social and economic outcomes in the US community and suggest that different sociological research be done to provide better insight.

24 La Noue and Sullivan 1998:914.

25 Schuck 2002:26-7. In the 2000 census, 7 million Americans indicated that they consider themselves multiracial and wished to be identified as such (if they must be racially identified at all). Also, 25% of those in the US who describe themselves as both black and white consider themselves white, as do almost half of the Asian-whites and more than 80% of Native (Indian)-whites.

26 98 S. Ct. 2733 (1978).

given to every person regardless of race. This implies equality of treatment or formal equality. He held that:[27]

> Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest ... Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups ...
>
> ...[i]t is the individual who is entitled to judicial protections against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group ...

Blackmun J (dissenting) held an opposite viewpoint. He required that in order to treat some persons equally, they must be treated differently. This view represents substantive equality.[28]

In this case the court focussed its equal protection analysis on the *remedial* and *diversity* justifications for affirmative action programmes. The court held that an affirmative action programme might be constitutional if properly created but found the special programme of the college unconstitutional under the Fourteenth Amendment. To determine constitutionality, Powell J reasoned that the details of the plan should be reviewed under the strict scrutiny test in which government had to prove that the classification is necessary to serve a 'compelling' governmental interest and is 'narrowly tailored' to satisfy that interest.[29] The court considered the special admissions programme's purposes[30] but found no evidence that any of the purposes would actually have been achieved by the programme. In essence the court approved of the diversity purpose and held that race could be taken into account in an admission programme as a 'plus' where there was a compelling state interest furthered by doing so, such as remedying past discrimination. Race could, however, *not* be the *only* criterion for admission.[31] The plan was found to disregard the individual's rights as guaranteed by the Fourteenth Amendment.[32] Although these rights were not absolute, an individual was entitled to a demonstration that the challenged

27 At 2752-3(10).

28 At 2807. Different approaches to equality have been observed throughout the development of case law in the US, with mostly, equality of opportunity coming up trumps.

29 At 2757(11).

30 Namely, reducing the historic deficit of traditionally disfavoured minorities in medical schools and in the medical profession; countering the effects of societal discrimination; increasing the number of physicians who will practice in communities underserved; and obtaining educational benefits that flow from an ethnically diverse body (at 2757(12)- 61(14)). It held that the state certainly has a legitimate and substantial interest in ameliorating or eliminating the disabling effects of discrimination. But the remedying of the effects of 'societal discrimination' in this instance was found to be 'an amorphous concept of injury that may be ageless in its reach into the past' (at 2757-8(12)).

31 At 2762(15)-(16).

32 At 2763(16).

classification is necessary to promote a substantial state interest when a state's distribution of benefits 'hinges on ancestry or the colour of a person's skin'.[33]

The court also touched on the problem of which groups to prefer in affirmative action. Powell J held that:[34]

> The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgements. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the state and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which could not. Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence — even if they otherwise were politically feasible and socially desirable.

Powell J also commented that:[35]

> [t]he University is unable to explain its selection of only four favored groups – Negroes, Mexican-Americans, American Indians, and Asians — for preferential treatment. The inclusion of the last group is especially curious in the light of the substantial numbers of Asians admitted through the regular admissions process.

Following on *Bakke, United States Steelworkers v Weber*[36] the court interpreted the design of a voluntary affirmative action programme in depth. The majority made it clear that Title VII permitted equality of opportunity while the dissenters' approach was that of equality of treatment. The court upheld the plan (under which the beneficiaries were not necessarily chosen from among those who have been victimised) under Title VII and laid down specific criteria by which the design of affirmative action programmes would be judged for the next twenty years or so. Firstly, the legitimate expectations of whites should not unnecessarily be trammelled. No white person could be fired to replace a black person and there should not be an absolute bar to the advancement of white employees. Secondly, the plan must be temporary with either a specified date or goal which will terminate the plan. The plan must only continue for as

33 At 2763(16).
34 At 2751-2(7).
35 At 2758 fn 45.
36 443 US 193 (1979).

long as necessary to correct the problem. Thirdly, the plan must be flexible and could not be used to maintain a fixed percentage of minority employees, but only to eliminate manifest racial imbalances in the workplace.[37]

In some cases it was held that remedies are not available to individuals who have not actually been illegally discriminated against. For example, in *Firefighters Local Union No. 1784 v Stotts* [38] the Supreme Court had to decide on the legality of an affirmative action plan, (the purpose of which was to remedy past discriminating hiring and promotion practices) which was in conflict with a *bona fide* seniority system.[39] A formal approach to equality, emphasising the individual or victim specificity[40] was followed. But again, Blackmun J (dissenting) raised the issue that the affirmative action plan appeared to be more group-based than individual based as it was to provide a remedy for the discriminated-against group as a whole, rather than to any of its individual members.[41] He held that the discrimination sought to be alleviated by race-conscious relief is the class-wide effects of past discrimination, rather than discrimination to its individual members. The distinguishing feature of race-conscious relief is that no individual member of the disadvantaged class has a right to claim relief, and individual beneficiaries need not show that they were themselves victims of discrimination.[42] It was held that an affirmative action plan could not take precedence over a legitimate seniority system. The majority made it clear that mere membership in the disadvantaged class was insufficient to warrant a seniority award. Each individual had to prove that the discriminatory practice had an impact on him.[43] But even when an individual showed that the discriminatory practice had an impact on him, he was not automatically entitled to be awarded a position similar to that wrongfully denied in the past, if the only way to make such a position available was to have an innocent non minority employee laid off.[44] The majority held that this was consistent with the policy behind Title VII which limited the court's actions in awarding relief only to those individuals who proved that they had been actual victims.[45] This policy, the court held, was repeatedly expressed by the proponents of the *Civil Rights Act* during the congressional debates.[46] Responding to opponents' fears that employers could be ordered to hire and promote people in order to achieve a racially balanced workforce even though these people had not been victims of illegal discrimination, Senator Humphrey explained the limits on a court's remedial powers as follows:[47]

37 At 208.
38 104 S. Ct. 2576 (1984).
39 Note that s 703(h) of Title VII protects *bona fide* seniority systems.
40 Giampetro and Kubasek 1988: 179.
41 *Firefighters Local Union No. 1784 v Stotts* at 2606.
42 *Firefighters Local Union No. 1784 v Stotts* at 2606.
43 At 2588(11).
44 At 2588(11).
45 At 2588(12) and (13).
46 At 2588(11).
47 At 2589(12) and (13).

> No court order can require hiring, reinstatement, admission to membership or payment of back pay for anyone who was not fired, refused employment or advancement or admission to a union by an act of discrimination forbidden by this title. This is stated expressly in the last sentence of section ... 706(g) ... Contrary to the allegations of some opponents of this title, there is nothing in it that will give any power to ... any employer to require ... firing ... of employees to meet a racial "quota" or to achieve a certain racial balance ...

An interpretative memorandum of the bill entered into the Congressional Record likewise made clear that a court was not authorised to give preferential treatment to non-victims.[48] Further similar assurances were provided by supporters of the bill throughout the legislative process.[49]

Subsequent to *Stotts*, however, the Supreme Court found in two instances that beneficiaries need not show actual past discrimination. In *Local No 93 International Association of Firefighters v City of Cleveland*, [50] the validity of a consent decree requiring race-conscious promotion quotas and numerical goals under Title VII was questioned. The court upheld the right of the city to agree on an affirmative action plan (which was remedial in nature) with the Vanguards (a union representative of blacks and Hispanics) and to incorporate that plan into a consent decree. Title VII , it was held, should not be construed too narrowly. Section 706(g) did not preclude entry of a consent decree, such as was entered in this case, that might benefit individuals who were not the actual victims of discriminatory practices. Two judges of the minority held that no relief could be granted to non victims under any circumstances. Another judge held that relief might be granted to non-victims if there was an egregious violation and where the relief did not involve quotas. The minority also emphasized the fact that the preferential plan did not require the hiring of unqualified blacks, the termination of white employees and did not impose any unsurmountable impediments to the promotion of non-minorities.

Similarly, in *Local 28 of Sheet Metal Workers v EEOC* [51] the Supreme Court held that there need not be a showing of actual discrimination against the individual as long as the affirmative action plan met the appropriate requirements and the person fit into the category of employees the plan was designed to benefit. The (white) union argued that the affirmative action programme exceeded the scope of remedies available under Title VII because the court extended the remedy to individual blacks and Hispanics who were not identified as actual victims of unlawful discrimination. The court stressed the fact that the affirmative action plan at issue was designed to provide collective and not individual relief. While no individual was entitled to relief, beneficiaries need not show that they were themselves victims of discrimination.[52] Brennan J (for the majority) examined the history of Title VII afresh and came to a radically different conclusion than in *Stotts* above. He held that the language

48 At 2589(12) and (13).
49 At 2589(14).
50 106 S. Ct. 3036 (1986).
51 106 S. Ct. 3019 (1986).
52 At 3071.

of section 706(g) plainly expressed Congress' intent to vest courts with a broad discretion to award 'appropriate' equitable relief to remedy unlawful discrimination. He rejected the union's argument that the last sentence of section 706(g) prohibits a court from ordering an employer or union to take affirmative action to eliminate discrimination which might 'incidentally' benefit individuals who were not actual victims.[54] He held that the last sentence, on face value, addressed only the situation where a plaintiff demonstrates that a union or an employer has engaged in unlawful discrimination, but the union or employer could show that a particular individual would have been refused admission even in the absence of discrimination, for example, because that individual was unqualified.[55] In these circumstances, he held, the section confirmed that a court could not order the union or employer to admit the unqualified individual.

It was confirmed that the availability of race-conscious affirmative action relief under section 706(g) as a remedy for a violation of Title VII also furthers the broad purposes underlying the statute. Congress, the court held, enacted Title VII based on its determination that racial minorities were subject to pervasive and systemic discrimination in employment. The crux was to open employment opportunities for Negroes in occupations which had been traditionally closed to them. It was to this problem that Title VII's prohibition against racial discrimination in employment was primarily addressed. Title VII was designed to achieve *equality* of employment *opportunities* and remove barriers that have operated in the past to favour an identifiable group of white employees over other employees.[56] An approach of equality of opportunity was thus followed.

It was held that in most cases, the court need only order an employer or union to cease engaging in discriminatory practices and award make-whole relief to the individuals victimised by those practices. In some instances, however, the court held, it might be necessary to require affirmative action steps to end discrimination effectively. Where an employer or union has engaged in particular longstanding or egregious discrimination, affirmative action to hire and admit qualified minorities was applicable as the only effective way to ensure the full enjoyment of the rights protected by Title VII.[57] Further, where the union or employer formally ceased to engage in discrimination, informal mechanisms might obstruct equal employment opportunities. An employer's reputation for discrimination might, for example, discourage minorities from seeking employment. In these circumstances affirmative action might be the only means available to assure equality of employment opportunities and to eliminate those discriminatory practices and decisions which have fostered racially stratified job environments to the disadvantage of minority citizens. The court's examination of the legislative history of Title VII indicated that, when examined 'in context', it did not indicate that Congress intended to

53 At 3034(5).
54 At 3034(4) and 3043(5).
55 At 3035(5).
56 At 3035(5).
57 At 3035(5). See the cases that are referred to.

limit relief under section 706(g) to only actual victims of discrimination.[58] Rather, the court found that these statements were intended largely to reassure opponents of the bill that it would not require employers or unions to use racial quotas or to grant preferential treatment to racial minorities in order to avoid being charged with unlawful discrimination. It was also held that the court's reading of the scope of the district court's remedial powers was confirmed by the contemporaneous reading of the EEOC and the Department of Justice.[59] It was observed that the affirmative action remedy would, nevertheless, have only a marginal impact on the interests of the white union members.[60] The minority had similar views to those held in the *City of Cleveland* case referred to above.

The problem around the question on which groups should be included in affirmative action programmes was again looked into in *Fullilove v Klutznick*.[61] In this case a set-aside of federal funds for a minority business enterprise (MBE), authorised by the *Public works Employment Act* of 1977, was attacked as being unconstitutional. Although the court found the set-aside valid and constitutional, Stevens J (dissenting) stated:[62]

> The statutory definition of the preferred class includes "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts". All aliens and all nonmembers of the racial class are excluded. No economic, social, geographical or historical criteria are relevant for exclusion or inclusion. There is not one word in the remainder of the Act or in the legislative history that explains why any Congressman or Senator favoured this particular definition over any other or that identifies the common characteristics that every member of the preferred class was believed to share.

Later on, in *City of Richmond v Croson*,[63] the need to justify the inclusion of particular groups in affirmative action programmes, was held to be constitutionally justified. For the first time, a majority embraced strict scrutiny, and held, in striking down the city's MBE programme:[64]

> There is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, Indian, Eskimos, or Aleut persons in any aspect of the Richmond construction industry ... it may well be that Richmond has never had an Aleut or Eskimo citizen. The random inclusion of racial groups that, as a practical matter, may never have suffered from discrimination in the construction industry in Richmond suggests that perhaps the city's purpose was not in fact to remedy past discrimination.

58 At 3038(5).
59 At 3044-5(5). These institutions steadfastly maintained that race-conscious remedies for unlawful discrimination were available under Title VII and sought court orders and consent decrees containing such provisions. The court's interpretation of Title VII was also confirmed by the legislative history of the Equal Opportunity Act of 1972 which amended Title VII in several respects.
60 At 3051-2(7).
61 488 US 488 (1980).
62 At 535.
63 486 US 469 (1989).
64 At 506.

Note that after *Croson*, the MBE programme was limited to African-Americans as they were found to be the only group which had actually been discriminated against. Native American-owned firms have been dropped from MBE programmes all over the US because their numbers were too small for statistical analysis or to gain political support.[65] As a result of *Croson*, state and local governments have been required to do self-studies to determine whether there is strong evidence that their selection of employees and contractors has been discriminatory. If this was found, it was required to check whether the affirmative action programmes were narrowly drawn to remedy that particular discrimination.[66]

Although clear when perusing further case law that the basics of *Bakke, Weber, City of Cleveland* and *Sheet Metal* had not significantly changed, it does appear that support by the judiciary for affirmative action has generally waned and stronger proof of discrimination was required as the case law developed.[67] Generally, a distinction was made in cases between the standard for review for affirmative action plans for federal government, and the standard for local and state governments. While the first mentioned's plans were required to pass only intermediate scrutiny, the last mentioned's was required to pass a strict scrutiny test.

In the last of a series of cases which dealt with the standard of scrutiny for affirmative action plans, *Adarand Constructors v Pena*,[68] laid down the strict scrutiny rule for all government-sponsored affirmative action plans. In this case it was claimed that the federal government's practice of giving contractors a financial incentive to hire subcontractors from 'socially and economically disadvantaged individuals', and particularly the use of race-based (rebuttable)

65 La Noue and Sullivan1998:917.

66 Oppenheimer 1996:943. Note that these studies have almost never showed specific instances of discrimination in the awarding of prime contracts, let alone 'the patterns of deliberate exclusion' *Croson* required if race conscious remedies were to be employed. Nor have many examples of discrimination in the awarding of subcontracts by prime contractors been discovered. Such studies are therefore increasingly attempting to demonstrate that discrimination in the broader economic environment keeps minorities and women from forming businesses in the first place (La Noue and Sullivan 1998: 919).

67 See, for example, *Wygant v Jackson Board of Education* 476 US 267 (1986) (where 'generalised societal discrimination' and minority 'role model' justifications were rejected as justification for race-conscious remedies and 'convincing evidence' of past discrimination and narrowly tailored remedies were required); *Johnson v Transportation Agency Santa Clara County, California* 480 US 1442 (1987) (where the existence of a 'manifest imbalance' was found to justify the appointment and promotion of women as a way of correcting such imbalances); *United States v Paradise* 480 US 149 (1987) (where a 'narrowly tailored' race-conscious remedy to deal with 'specific' discriminatory practices was found to be justified in pursuit of a 'compelling governmental interest' to eradicate longstanding egregious discrimination in a state police department) and *City of Richmond v Croson* 488 US 469 (1989) (where 'strong proof' of discrimination [with numerical disparity was found to be insufficient] in the cause and result of the discrimination had to be shown to redress 'specific identified' discrimination under strict scrutiny).

68 115 S. Ct. 2097 (1995).

presumptions (in favour of Black, Hispanic, Asian Pacific, Subcontinent Asia and Native Americans, and other members of groups designated from time to time) in identifying such individuals, violates the due process clause of the Fifth Amendment.

O'Connor J (for the majority) emphasised the fact that it is the individual that is protected and not groups.[69] She held that all racial classifications, including affirmative action plans on race-conscious preferences, were permitted only if they met the exacting standards of the strict scrutiny test for equal protection analysis.[70] This test was defined to mean that when a government regulation treats one race differently from another, the regulation must be strictly scrutinized to determine whether it meets a compelling governmental interest which could not be met by a less restrictive alternative.[71] In other words, it had to be narrowly tailored. Thomas J (concurring) held that:[72]

> Government cannot make us equal; it can only recognise, respect, and protect us as equal before the law.

O'Connor refrained from deciding the constitutional merits of the programme and referred the case back for further proceedings consistent with the finding.[73]

Observers perceived *Adarand* to place all affirmative action programmes in constitutional jeopardy because it was believed that many affirmative action programmes would not be able to stand up to strict scrutiny.[74] It was, however, also pointed out that many uncertainties remained after *Adarand*.[75] President

69 At 2112-3.
70 At 2113 and 2117.
71 At 2113 and 2117.
72 At 2119(9).
73 On remand, the district court held:

> I find it difficult to envisage a race based classification that is narrowly tailored. By its very nature, such a program is both underinclusive and overinclusive. This seemingly contradictory result suggests that the criteria are lacking in substance as well as in reason. The statutes and regulations governing the SCC [subcontracting compensation clause] program are overinclusive in that they presume that all those in the named minority groups are economically, and in some acts and regulations, socially disadvantaged. The presumption is false, as is its corollary, namely that the majority (Caucasians) as well as members of other (unlisted) minority groups are not socially and/or economically disadvantaged. By excluding certain minority groups whose members are economically and socially disadvantaged due to past and present discrimination, the SCC program is underinclusive (*Adarand v Pena District Court* (1997) at 1580 as cited by La Noue and Sullivan 1998:925).

74 Barker 1999:519; Oppenheimer 1996:943; McCrudden 1996:376; Powell 1997: 236. During this time, California's Proposition 209 to end affirmative action in public employment, education and contracting was also passed in its 1996 referendum. Similar ideas had been mooted in the other states but had not been passed as yet.
75 Interpretative Memorandum by the US Department of Justice, 28 June 1995. For example, the detailed requirements of strict scrutiny were unclear, it was unclear

Clinton has argued that affirmative action must be 'mended but not ended'.[76] Government instructed all federal bodies to review their affirmative action policies in the light of *Adarand*. It laid down that any affirmative action programme had to be dismantled or reformed if it created (a) a quota (b) preferences for unqualified individuals (c) reverse discrimination, and (d) continued after its purpose has been achieved.[77] It was announced that government contracts would be reformed so that they were specifically targeted on contractors from deprived areas, even if they were white.[78]

Recently, two cases *Barbara Grutter v Lee Bollinger, et al* [79] and *Jennifer Grutz and Patrick Hamacher v Lee Bollinger et al* [80] which dealt with white students who had been refused admission to the University of Michigan, attracted great attention. The cases were seen as the most important since *Bakke*.[81] In the first mentioned case, the court held that, although diversity can constitute a compelling state interest, the admissions policy of the literature, science and arts college, which automatically distributed 20 points to every minimally qualified member of an under represented minority (African-, Hispanic and

what would constitute sufficient evidence of discrimination to justify affirmative action as a remedial tool, and it was not clear whether other goals such as diversity could justify affirmative action.

76 Curry 1996:277.

77 McCrudden 1996:374.

78 McCrudden 1996:374.

79 123 S Ct 2411 (2003).

80 123 S Ct 2325 (2003).

81 'Group Support University of Michigan Affirmative Action Case' http://www.nytimes.com/2003/02/18/education/18AFFI.html at 1. Many prominent businesses, universities, law schools, education groups, military leaders, academia, the legal profession, politicians and union federations have filed *amici curiae* briefs to support the University's admissions programmes. The supporting briefs seem to amount to a broad endorsement of affirmative action policies by leading sectors of society at a time when affirmative action is most in jeopardy. In essence, the briefs argue that consideration of race and ethnicity in an individualized admissions process serves compelling interests, that strict scrutiny is satisfied by properly designed admissions policies that consider race and ethnicity and that explicit use of race and ethnicity in an individualised admissions process is fully capable of satisfying the narrow tailoring requirement. The briefs hold that racial and ethnic diversity have become an essential feature of success in the US, whether in a university offering an education that challenges students to know others from different backgrounds and perspectives, or a medical school that sees minority doctors opening new avenues of research, or military leaders who seek well-educated minorities to fill the officer corps. With regard to business and employment, it is argued that a consideration of race and ethnicity grows naturally out of the needs of the professions and of American business. Because the US population is so diverse, and because of the increasingly global reach of American business, the skills and training need to succeed in business today, demand exposure to widely diverse people, cultures, ideas and viewpoints. Such a workforce, it is argued, is important to companies' continued success in the global market place. It appears that businesses are mainly concerned with their ability to recruit women and minority applicants. If affirmative action policies in colleges and professional schools are undercut, a lot of pressure will be put on companies to compete for a very small number of minorities.

Native Americans) was not narrowly tailored and in violation of the Fourteenth Amendment.

In contrast, the special admissions programme of the law school in the second case, which uses race as a 'plus' factor for students of colour, was found to be narrowly tailored and not in violation of the Fourteenth Amendment. The admissions programme allowed race as only one factor in the pool of possible means to achieve diversity. The process allowed for a highly individualized, holistic review of each applicants' file. It was found to be narrowly tailored to serve the compelling interest of attaining a diverse student body.[82]

3. South Africa

3.1 Introduction

In SA the meaning of the concept of 'disadvantage' in affirmative action has been clarified in a fairly short time.[83] This happened against the background of the Constitution,[84] the *Employment Equity Act*[85] (EEA) and academic writing.

3.2 Legislative background and academic opinion

The notion of substantive equality was embraced in the Constitution.[86] It provided for the right to non-discrimination and for affirmative action measures in its equality clauses.[87] Government decided to introduce the EEA to give effect to these provisions in the employment context. It follows the constitutional model of substantive equality in that its purpose is to achieve equity in the workplace by promoting equal opportunities and fair treatment in employment through two strategies. First, the elimination of unfair discrimination, and second, by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their

82 Political support for affirmative action under President Bush has, however, waned and Government has filed a brief opposing the programmes. In essence, it argues that the admissions plans could be deemed unconstitutional as they are disguised quota systems and race-neutral ways of attracting minorities had been overlooked ('Bush in Hofsaak oor Regstellende Aksie' Rapport, 19 January 2003 and 'A Crucial Decision on Race' http://query.nytimes..../abstract.html?res=F30914FF3B550C768DDDA80894BD40448 2003/02/18 at 1. It has been observed that this stance will be seen as the President's commitment to moving his party and the country beyond a segregationist past).

83 See McGregor 1 2002:808 for a detailed discussion.

84 Constitution of the Republic of South Africa Act 108 of 1996.

85 55 of 1998.

86 See De Waal *et al* 2001:200–201; Du Toit *et al* 2000:431.

87 Section 9(3) and (4) provide for nondiscrimination. Section 9(2) holds that equality includes the full and equal enjoyment of all rights and freedoms. It states that 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.

equitable representation in all occupational categories and levels in the workforce.[88] Affirmative action measures must include measures designed to further diversity in the workplace.[89]

Affirmative action measures have to be implemented to achieve employment equity for 'suitably qualified'[90] people from 'designated groups'.[91] The term 'designated groups' is defined to mean black people, women, and people with disabilities.[92] The EEA does not explicitly specify whether personal, actual disadvantage (which would represent an approach of equality of opportunities) or whether membership of a designated group (which would represent a substantive approach to equality) is sufficient for a person to benefit from affirmative action. However, seen against the background of substantive equality and following academic opinion, it soon became clear that membership of a designated group was sufficient.

During the debate on the implementation of the EEA, support for group experience was mooted. For example, Rycroft notes that the EEA is over-inclusive and assumes that all people from the designated groups are disadvantaged. An alternative understanding is that as it is difficult to calculate degrees of disadvantage, it is better to focus on the broad social purpose of the EEA — representivity, regardless of whether a person in a designated group comes from a wealthy background and has received the best education.[93] Also, it is an unnecessary and wasteful experience to prove historical discrimination, for it exacerbates conflict and division.[94] It focuses upon the wrongs of the past rather than the hopes of the future, and promotes an unhealthy social ethic — the endeavour to prove that one is a victim, which should not be the focus of an affirmative action enquiry:[95]

> The aim should not be for individuals or groups to have to prove victim status but rather to promote the social objective of reasonably fair and equitable representation of all social groups within all categories of employment in the private and public sectors. That involves a different orientation: not towards proof of victimization, but rather to proof of ability to perform the work (or at least of potential to do so within a reasonable period of time — with appropriate training, assessment on the job, mentoring, evaluation procedures, etc, if necessary).

This is supported by du Toit. He supports the notion of group experience as touchstone for affirmative action.[96] He comments that the proposition that Blacks should be deemed not to have suffered disadvantage unless they can prove the contrary, appears fundamentally misplaced:[97]

88 Section 2.
89 Section 15(2)(b).
90 Section 20(3).
91 Sections 2, 3 and 15.
92 Section 1.
93 Rycroft 1999:1423-26.
94 Rycroft 1999:1425.
95 Rycroft 1999:1425.
96 2001:13.
97 Du Toit 2001:13.

> South Africa's past policy of apartheid has been branded as a "crime against humanity" and its devastating effect on black communities has been documented so amply as to require no additional proof.

He submits that disadvantage should be presumed in favour of Blacks, with rebuttal possible on relatively narrow grounds only, such as in the case of a Black South African born and educated outside South Africa who at no stage suffered disadvantage of the kind that the Constitution and the EEA set out to undo.[98] He argues that similar presumptions should apply to women and people with disabilities in that they should not be required to prove facts which are not in any real dispute.[99] These views were supported by Ockert Dupper[100] who confirms that individual disadvantage as a requirement to benefit from affirmative action is not in line with the notion of substantive equality that underpins South Africa's legislative provisions on affirmative action. The author also points to the overinclusiveness of affirmative action in that the EEA assumes that all members of the designated groups are disadvantaged, and observes, that as the EEA's focus is on group results, some people who are not 'needy' may receive benefits. Some key cases relating to the interpretation of the issue of disadvantage will now be discussed.

3.3 Case law

In *George v Liberty Life Association of Africa Ltd* [101] the Industrial Court held that the purpose of affirmative action should determine the beneficiaries. This entails that previously disadvantaged people must be assisted to overcome their disadvantages so that our society could be normalized. The focus had to be on the disadvantaged, and in the South African context, disadvantage is linked to race and gender.[102] But the court accepted that within a race group that had suffered discrimination, there were people who have had opportunities for advancing themselves and who had not been disadvantaged to the same extent as their fellows.[103] It was held that 'affirmative action in a South African context [was] not primarily intended for their benefit'. The court accepted that an employer who applied affirmative action by preferring, in the case of transfer or promotion, a candidate who had 'personally been historically' unfairly discriminated against to someone who had not suffered such deprivation, did not commit an unfair labour practice.[104] It seemed that the court proposed that disadvantage was to be measured by individual experience and attached to individuals, not groups of people.[105]

98 See McGregor 1 2002:812 for doubts expressed in this regard.
99 Du Toit 2001:14.
100 Dupper 2002:286.
101 (1996) 17 ILJ 571 (IC). Decided in terms of the definition of an 'unfair labour practice' in the *Labour Relations Act* 28 of 1956 and the interim Constitution.
102 At 593I.
103 At 592A and 593I-J.
104 At 594D.
105 Van Niekerk 1997:2–3.

Auf der Heyde v University of Cape Town [106] showed a move away from the emphasis on individual disadvantage. Here, it was reasoned that whilst there was case authority[107] to the effect that beneficiaries had to show that they actually had been disadvantaged in order to qualify for affirmative action, academic opinion was that the term 'disadvantaged' should not be construed so narrowly as to require that each potential beneficiary had to show that he or she had actually been disadvantaged.[108] Although the notion of substantive equality was not specifically addressed, the judge relied on Kentridge[109] who argues that beneficiaries of affirmative action should be 'members of groups that "have been disadvantaged by general societal discrimination, whether direct or indirect" '. Even though this judgement was not properly argued, it appears to be in line with the EEA and the academic writing canvassed earlier.

Stoman v Minister of Safety & Security [110] clarified the issue of disadvantage fully. The court accepted the notion of substantive equality as recognized by the Constitution and sanctioned by the Constitutional Court.[111] It held that in this sense equality was about more than mere non-discrimination.[112] When a society had emerged from a long history of discrimination that had taken place individually, and systematically, it could not be assumed that people were on equal footing and that measures distinguishing between them amounted to unfair discrimination.[113] The applicant (a white male which was denied promotion) had submitted that there was no proof that Sethlare (the person promoted), as an individual, had actually previously been disadvantaged by unfair discrimination. In fact, it was argued that because he already held a relatively high rank in the police service, he could not be regarded as such a person. This

106 (2000) 8 BLLR 877 (LC), decided in terms of the residual unfair labour practice definition of the Labour Relations Act 66 of 1995 and the final Constitution.

107 No case was mentioned but the implicit reference may have been to *George v Liberty Life* supra.

108 At 894A-B para 71.

109 Kentridge 'Equality': 14-60 commenting on the Constitution, states that the legitimate beneficiaries of affirmative action are those 'disadvantaged by unfair discrimination' — people who are, or who have been, disadvantaged by measures that impair their fundamental dignity, or adversely affect them in a comparably serious manner. She argues that a restrictive interpretation of the words 'disadvantaged by unfair discrimination', would be at odds with the conception of substantive equality espoused by the Constitution. The Constitution appreciates the systemic and self-perpetuating nature of discrimination in the country and the need to redress such discrimination through positive measures. She argues that the words 'disadvantaged by unfair discrimination' clarify that it is not necessary to prove present unfair discrimination against the beneficiaries of an affirmative action policy. Past unfair discrimination, the effects of which are currently felt, is sufficient. It is not necessary that each beneficiary of such measures be shown to have been disadvantaged by unfair discrimination. The purpose of affirmative action measures is to give their beneficiaries access to 'full and equal enjoyment of all rights and freedoms'. The Constitution looks to the future, not simply at the past.

110 (2002) 23 ILJ 1020 T.

111 At 1029B-H.

112 At 1029C.

113 At1029D.

view was seen as fraught with logical difficulties.[114] It was held that the intention of the legislature with the constitutional recognition of measures designed to protect and advance previously disadvantaged persons or categories of persons could not have been to make such measures dependant on the individual circumstances of each particular case.[115]

In *Stoman* it was accepted that African people were discriminated against severely under apartheid, as was the position with other non-white race groups although not necessarily to the same extent.[116] It was also accepted that the detailed circumstances of individual members of any group might differ.[117] Whereas some individuals might have had access to relatively better educational and other facilities, others might have been unfortunate enough to have been subjected to the worst possible discriminatory practices that had occurred during a certain era. It was maintained that it would be impossible to make this particular distinction. Also, in the present case, it would have made very little sense to say that as Sethlare had already been promoted to a rank just below that to which he was now appointed, he was not disadvantaged.[118] The judge held that the emphasis was certainly on the group or category of people of which the particular individual happened to be a member, or, put negatively, of which a specific person such as the present applicant was not a member.[119] In the present instance, the group in question (blacks) had been disadvantaged by unfair discrimination. It was concluded:[120]

> The aim is not to reward the fourth respondent [Sethlare] as an individual, but to advance the category of persons to which he belongs and to achieve substantive equality in the SAPS [South African Police Service] as an important component of South African society. Similarly, the aim is not to punish or otherwise prejudice the applicant as an individual, but to diminish the over-representation which his group has been enjoying as a result of previous unfair discrimination.

It is submitted that against the background of substantive equality the court in *Stoman* correctly applied the concept 'disadvantage'. Although the respondents relied on the EEA, the judgement seemingly interpreted the concept in the context of the Constitution only. But I believe that this interpretation will

114 At 1035C-D.
115 At 1035D-E.
116 At 1035F. Reference was made to *Motala v University of Natal* (1995) 3 BCLR 374 (D)where the affirmative action programme of the university contained a special selection system for first-year medical students. It was challenged for favouring African over Indian applicants. In this instance, the court held that while there was no doubt that Indians in South Africa had been decidedly disadvantaged by apartheid, it was clear that the degree of disadvantage to which African pupils had been subjected under the four-tier education system was 'significantly greater' than that suffered by their Indian counterparts (at 383C-D).The selection system therefore conformed to the interim Constitution (at that stage) and was held not to be discriminatory (at 383D).
117 At 1035F.
118 At 1035G-H.
119 At 1035H.
120 At 1035H-J.

hold true also for the EEA as, firstly, it is in line with the notion of substantive equality as embraced by the Act, and academic opinion, and secondly, personal past discrimination and disadvantage, as a requirement for benefiting from affirmative action measures, cannot be inferred from the EEA. The notion of 'degrees of disadvantage', as touched on in *Stoman*, is not likely to be applied to affirmative action in the employment context. It appears that the test of 'equitable representivity' of people from designated groups in the various categories and levels in the workforce will be applied when competing claims by members of different designated groups has to be adjudicated.[121] This test is compatible with the purpose of the EEA.[122]

4. Conclusion

Much criticism had been levelled at the experience of affirmative action in the US. The people who benefited from it were mostly middle-class blacks and women whom it was not intended to benefit.[123] In other words, affirmative action showed to be overinclusive. With regard to actual disadvantage or group membership to be shown for beneficiaries of affirmative action, the US courts had initially been unwilling to accord women and blacks the benefit of a conclusive presumption of victimization, notwithstanding wide acceptance of the fact that discrimination had adversely affected them.[124] A showing of actual past discrimination was required until the late 1980s when case law made clear that this was not necessary any longer. At present it is clear that a strong evidentiary basis must be made out that discrimination did in fact take place and that it had an impact on the group as a whole. It seems that the US courts have mainly taken an equal opportunities approach to equality. Although it has been held that Title VII allows only measures that promote equal opportunity, understood in the sense of equal *treatment*,[125] in practice however, administrative agencies have interpreted the concept of affirmative action broadly. The EEOC guidelines, for instance, define affirmative action as 'action appropriate to overcome the effects of policies or bars to equal opportunity'.[126] Another example is OFCCP regulations which set out the purpose of affirmative action programs under the contract compliance program to 'ensure equal employment opportunity by institutionalising the contractor's commitment to equality in every aspect of the employment process'.[127]

121 See also Du Toit 2001:14; Dupper 2002:287-290 for further arguments against the notion of 'degrees of disadvantage'.

122 See, for example, McGregor 2 2002:268; Rycroft 1997:1426.

123 See, for example, Kennedy 1994:415; Curry 1996:77; Kennedy 1997:62; Colamery 1998:78; Higginbotham 1999:209; Urofsky 1991:21-23 and 185; Charlton and Van Niekerk 1994:39; Judges 1991:1043; and Banton 1994:74.

124 Belton 1988:126.

125 Faundez 1994:37.

126 29 CFR 1608: Affirmative Action appropriate under Title VII of the *Civil Rights Act* 1964 as amended.

127 Office of Federal Contract Compliance Regulations 41 CFR which require a contractor, as a condition of having a federal government contract, to implement affirmative action with every good faith effort.

Despite the criticism, there has been many calls for affirmative action to continue as there is still strong evidence of pervasive racism in all areas of the American society.[128] It seems that society is aware of this as seen in the overwhelming support for affirmative action expressed by the US community in the *amici curiae* briefs filed in the University of Michigan cases. Some observers, however, believe that, if affirmative action is to be continued, the focus will change to designated economic class rather than race or gender as the primary eligibility standard.[129] This will lead to a redefinition of the beneficiaries of affirmative action on the basis of redistribution of wealth. If this is the case, affirmative action in the US may turn out to be a dynamic concept that can adapt with the evolving needs of society.

South Africa is in its infant stage in the implementation of affirmative action, in contrast to the US which has almost 40 years of experience. It is clear that group membership and not actual disadvantage is required. This is in line with the notion of a substantive approach to equality as embraced by the Constitution and the EEA. It is hoped that this will effect equality of outcome, as opposed to equality of treatment or opportunity which would not address South Africa's history of systemic and pervasive discrimination. Although the creation of categories of beneficiaries will no doubt also lead to overinclusion,[130] the situation in South Africa is different to that of the US, in that mainly a majority must be affirmed and a substantive approach to equality is followed (contra the US' equality of opportunity). Political power and support for affirmative action by a majority in South Africa will probably lead to a more liberal and vigorous application of affirmative action, in contrast to America where presidential support has been inconsistent. The consequences of the success or failure of affirmative action in South Africa will also reflect greatly on the economy, foreign investment and global competitiveness because of the fact that a majority must be affirmed.

128 See, for example, Oppenheimer 1996:997; McGinley 1997:1048; Hepple 1997: 604 (who holds that this is due to lack of social change); Brest and Oshige 1995: 900; Benoit 1999:399; Giampetro and Kubasek 1988:194; Fallon 1996:1915; and Kennedy 1990:756.

129 West 1998:119; Fallon 1996:1913; Judges 1991:1045; Malamud 1996:1847 and Cronan 2001:343-5. See also Bacchi 1996:27 who refers to *Iris Young Justice and the Politics of Difference* (1990). Young points out that the argument that the poor ought to be targeted rather than categories like 'women' or 'blacks' is tied to an understanding of inequality as economic in nature. She argues that this paradigm is inadequate and identifies five factors which stand outside of or alongside poverty. These are exploitation, marginalization, powerlessness, cultural imperialism and violence. On these grounds, Young defends affirmative action for blacks, the elderly, Native Americans and women among others. Others argue that all groups which have been discriminated under the law and are presently still underrepresented, irrespective of the degree or longevity, must be covered. These would include racial and ethnic minorities, women, disabled people and gay and lesbian people.

130 As is already clear from case law.

Flowing from the discussion above, three issues can be raised for South Africa at this early stage. Firstly, will the various groups (blacks, coloureds and Indians) constituting the category of 'black people' 'mask' differences between each other, with the last two mentioned groups (possibly) ending up constituting minorities? Secondly, will diversity (as a requirement of affirmative action in terms of the EEA) or as a need (of society and/or the economy generally), require affirmative action to be continued (for minority groups) in future, even after the purposes of the EEA may have been achieved? In the US, as seen above, diversity has been argued successfully as necessary to the continued success of business in the global market place. Thirdly, will South Africa eventually move to class-based affirmative action with the purpose of redistributing wealth? This may be probable if affirmative action proves to be overinclusive (as in the US and indicated by South African case law so far), with no recognition of degrees of disadvantage and its benefits reaching only the better-off in the designated groups and not those most in need of it, namely the poor.

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