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CONFERENCE ON:

AFFIRMATIVE ACTION IN A NEW SOUTH AFRICA

PORT ELIZABETH

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Accountability is key
Consultation is fundamental
[with women's, disabled group advisory cttees]
Training & development - critical
Equity means treating people equally but not necessarily the same [flexible work patterns]
Equity is ever evolving as imbalances change to balances

50/50 hiring.
No incumbents out.
Terminal point.
Not hiring of unqualified persons.
Operated in expanding economy. Key to success.

Sexism grows up not in context of invisibility but in context of intimacy.
Racism is more easily confronted, requiring reformulation of outer society, sexism - of male personality.

4 Principles of a.a.: Underutilisation
Temporary
Narrowly tailored
Not unduly trample on rts. of others

Equality and Affirmative Action

by Asbjorn Eide*

"Quotas have a ceiling - we want goals."

1. Scope and conclusions of this paper

1.1 The scope of the paper

The purpose of affirmative action is to advance equality in the enjoyment of human rights within societies where there has been in the past systemic discrimination, whether social or political. This paper is primarily a conceptual analysis of the issue of affirmative action. Other participants will address the approaches chosen in different.

Being conceptual, this paper seeks to locate the issue of affirmative action in its normative and its sociopolitical context. The normative context needs to be examined because the purpose of affirmative action is to advance equality in the enjoyment of human rights. Therefore, it has to be seen in the light of the contemporary international system of human rights, and has to be compared with other approaches used to advance equality. A major part of the paper is devoted to an examination of this normative context of affirmative action.

"Put people in the position they would have been but for apartheid

* Director, Norwegian Institute of Human Rights; Member, United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities.

A comprehensive, systems-based result-oriented approach.
It is more than just the right thing to do - it makes good business sense.

AA is not social resp. for good times
It must be legislated. Need a.a. task force;
Research - global; in SA - what is the picture;

The sociopolitical context should be explored because different societies, with very different social, ethnic and political conditions, can justifiably place their emphasis on different approaches. The main concern should be to reach the goal, which is equality in the enjoyment of human rights; how it is to be done depends on pre-existing conditions of inequality and other factors to be taken into account. South Africa is an extreme case because of the legacy of apartheid which has created a severely divided society with a legacy of inequality in the enjoyment of rights probably deeper than in any other part of the world. This inequality has, though the use of state and law, been based on racial distinctions; consequently, there is a correlation between race and social class which is unsurpassed anywhere in the world, through social and economic inequality exists in many other places.

For reasons of space, however, I shall have to limit myself to this brief hint about the need to relate to differences in sociopolitical situations when choices among approaches towards equality are discussed.

clarify - what is a.a. - how will it impact advisory service to individ. comps. Need AA Commission to

1.2 Provisional Conclusions

Affirmative action is not the only way to seek equality in fact. It is fraught with difficulties and often controversial, but justified and necessary in some circumstances where systemic

monitor a enforce.

Quotas will have to be set. Business understands figures. That is what it is all about.

discriminations in the past have created serious inequalities in the present.

For that reason, special measures adopted for a transitional period is recognized in international human rights law as fully legitimate. In some situations, states are even under an obligation to take affirmative action.

Nevertheless, it is important also to explore other ways to advance equality, to complement affirmative action and over time to make affirmative action unnecessary.

Affirmative action must not be confused with minority or group rights, even though there is sometimes a slim borderline between affirmative action and group rights. Combination of affirmative action and group rights is possible under some circumstances, however.

Minority or group rights can never legitimately be used to preserve privileges, since the overriding purpose is to create equality in fact.

2. Affirmative Action in its Conceptual Framework:

2.1. "Born free and equal in dignity and rights".

The principles of equality and non-discrimination are among the

pillars of contemporary human rights: The Universal Declaration Article I asserts that "all human beings are born free and equal in dignity and rights...". It has deep historical roots in European, and Western, culture.[2]

The Universal Declaration transformed this idea to the universal level, to be applied in all cultures and in all political systems, intended to include equality between men and women as well as between members of different races, nationalities and creeds and any other group of people.

To translate this into legal, political and cultural reality, however, has been a long and complicated process filled with conflicts, in which also members of the legal profession have found themselves on different sides of the fence - and where human rights have been part of the arsenal used for competing

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[2] The Declaration of Virginia, made on June 12, 1776, stated that "all men are equally free and independent", the American Declaration of Independence, adopted three weeks later on July 4, 1776 held "these truths to be self-evident: That all men are created equal...", and the French Declaration of the Rights of Man and the Citizen in its article 1 states that" Men are born and remain equal in respect of rights..."

Leaving aside the obvious point that those older and venerated declarations, in distinction to the more modern Universal Declaration, used sexist language ("all men are ..., tout les hommes naissent et demerurent libres et egaux...", and that this reflected deeply patriarchal cultures of discrimination between men and women,) it might appear that the declarations reflected a commitment to equality. But how profound? Thomas Jefferson was himself a slave-owner.

positions. This can be observed both at national, regional and universal levels. The struggles are far from ended.

Great improvements have been made in most parts of the world in these regards since the Universal Declaration was adopted. The 1960s saw major advancements in the elimination of racial discrimination in a number of countries, including the United States. South Africa was a major exception to this development; hopefully in the 1990s also that country will join the family of civilized nations where human equality is the overriding principle.

In the 1970s and 1980s the realization of equality between the sexes became a major concern in the West and major achievements were made, both in law and in fact.

2.2. Equality versus freedom.

The issue of freedom versus equality goes to the core of social relations and political ideologies.

In several texts referred to in the notes above, "equality" is coupled with the word "freedom". Their relationship, as explored in philosophy and politics, deserves some words as a background to the place of these concepts in the law. They remain obscure de lege lata. What scope they should have in the future, as well as their implications, are questions which

Freedom

require careful analysis de lege ferenda. Libraries could be filled with books and treatises on these issues. Already Cicero noted that "real freedom can only exist when it is equal for all".[3] In this brief paper, only some very general perspectives may be approached before we proceed to the more concrete issues.

Take three of the many meanings of freedom: One is to have a wide range of significant options (or opportunities) open; the other is to be independent of others in deciding on the use of the options; the third is to be free so set one's own values and priorities, and to live by them.

Equality could then be understood in the same vein: To have an equally wide range of significant opportunities available as do others; to be equally independent of others, or to be equally free to determine one's own values and priorities.

2.3 Equality and Law: Three Stages

The terms "equality before the law", "equal protection of the laws", and "non-discrimination by way of law" express related but distinct ideas. However, they seem to have developed in that order at different stages during the 18th, 19th and 20th

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[3] Quoted after Manfred Nowak, CCPR-Kommentar (1989) p. 492; against the view which opposes equality and liberty.

centuries.[4] All are enshrined in the International Bill of Human Rights, in particular the Universal Declaration (art. 7) and the Civil and Political Covenant, CCPR, (art. 26).

The range of human rights was considerably extended from the 18th century notion of "natural rights" to the international systems of the 20th century. The concern with equality expanded correspondingly.

The scope of state legislation was rather narrow in the 18th century. Equality before the courts, which interpreted and applied customary law, was therefore a priority. The other priority was to avoid arbitrariness in the use of power by the executive; hence the concern with legality. Interference by the state with the freedom of the individual should be made by general law which should be equally applicable to all, hence "equality before the law".

During the period of economic liberalism in the early and middle part of the 19th century, the state was not expected to interfere much into the private sphere, roughly coinciding with the domain regulated by private law. Social or material inequality was not held to be something with which the state should interfere. The private sphere was extensive, including most economic activities, where inequality became rampant. At its extreme, some even held

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[4] Opsahl, "Equality in Human Rights Law", Festschrift Ermacora (1988), 51 ff, see also Nowak op.cit., 493

that slavery was within the private sphere since slavery is a form of property. This, however, was very difficult to reconcile with the notion that everyone was born and should remain free. In the course of the 19th century, slavery was prohibited to persons who might otherwise have been treated like slaves. From this and similar concerns emerged the notion that everyone should have the right to "equal protection of the laws".[5] Since slavery had in recent centuries been based on race, its initial focus was on equal protection regardless of race.

To implement this concern, there was also a need felt to ensure the impartiality of the judicial system. That turned out to be a long and difficult process, however. The social recruitment of judges and jurors was - and to some extent still is - drawn from a narrow section of society; the racial composition of the judiciary in mixed societies has until very recently been overwhelmingly biased towards the dominant group, and until the last two decades the judiciary in most societies have been almost exclusively male.

Industrialization made social relations more complex, and the scope of legislation extended greatly. Protection had to be

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[5] The Constitution of the United States, Fourteenth Amendment, section 1, is the origin of this formula, which later has appeared in many national and international instruments. See in particular the very thorough study by Polyvios G. Polyviou, The Equal Protection of the Laws, (Duckworth 1980), which mainly deals with its judicial enforcement in America, India and Canada.

provided against disability resulting from industrial accidents, against deprivation of income caused by illness, by old age, or by unemployment. To some extent the burden was placed on the employer. Equal protection by law thus got a more extended meaning, encompassing also economic and social rights. Over time the welfare state emerged. The economic and social rights were also extended, culminating with the wide list in the Universal Declaration: The right to work, the right to education, the right to health, the right to participate in the cultural life of the society. The centerpiece of it all is found in article 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

If states are to conform to the requirements of the Universal Declaration and corresponding convention, they have to take steps including legislation to deal with social, economic and cultural rights. In so far as they do, the protection provided by law must be made without discrimination. The one major qualification to this is when affirmative action is required in order to accelerate the achievement of equality in fact.

Anti-discrimination legislation affects not only activities operated by the state, but also private activities. Most employment opportunities exist in the private sphere; giving effect to the right to work requires the state, i.a., to prohibit policies of discrimination by private employers. Other examples could be added.

The scope of the principle of equality and non-discrimination - and the corresponding obligations by states - in regard to the private sphere remained controversial for some time and was the subject of considerable dispute at the beginning of the 1960s both in the United Nations, the Council of Europe, and in national systems including the United States. The increasing attention to equal dignity for all brought about major advances in the middle of the 1960s, culminating with the Civil Rights Act (1964). These developments led, i.a., to the adoption of the United Nations Convention on the Elimination of Racial Discrimination (1965), the most widely ratified of all human rights instruments. The victories gained in the normative approach to the elimination of racism also affected the drafting of the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979.

Common to these is that they take a new step, beyond the two already taken in the past, which limited themselves to equality before the law, and equal protection of, or by, the law. The two

Equality

new conventions require elimination of discrimination, and open up for affirmative action, which amounts to a call for the creation of equality by way of law (see further below, section 3). To fulfill their obligations under these two conventions, the states are required to be rather active.

2.4 Approachs to equality of opportunity and equality in participation.

The purpose of affirmative action is to enhance equality. But the vague "right to equality" can be approached also in other ways, depending on the nature of the pre-existing inequality.

We will in the following examine four different but interrelated approached to equality, in order to help assess when it is appropriate to use which approach. Hence, the following human rights approached will be examined: Non-discrimination (section 2.5 below), application of economic and social rights based on need (2.6) affirmative action narrowly understood (section 3) and special rights - minority rights. (section 4)

2.5 Non-discrimination

The most authoritative definition of racial discrimination is found in the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), art. 1 para. 1:

"In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life".

A closer look is required at the concept of non-discrimination and its opposite: Discrimination. A definition influenced by developments both within the United Nations and the Council of Europe, has been given by Tomuschat:[6] Discrimination is invidious treatment which introduces unreasonable classifications within the specific context of the rights concerned. We shall look more closely at the implications of this definition. There are three elements involved: Somebody must be subjected to invidious treatment, it must result from the introduction of a classification, or distinction; that classification must be unreasonable.

Not all distinctions, or classification, constitute discrimination. The first requirement for a distinction to constitute discrimination is that it leads to invidious

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[6] Christian Tomuschat: "Equality and non-discrimination under international law", Festschrift fur Hans-Jurgen Schlochouer, Berlin (Walter de Gruyer) 1981, at p. 715, where this definition appears as a summing-up rather than as a proposal advanced by the author.

treatment. This means that it is negative to the person concerned. Treatment positive to that person is not discrimination in regard to her or him, but may have a discriminatory effect in regard to others and therefore, in relation to them, be discriminatory. Preferential treatment of some is, or can be, discrimination in regard to others.

What should be given attention here is that invidious treatment, according to the formulation used by Tomuschat, is discrimination only when it introduces unreasonable classifications.

Whether the distinction made is reasonable must be seen both in light of the right concerned, the purpose for which the distinction is made, and whether the classification made had no more harmful (invidious) consequences for the category of persons concerned than what is necessary in order to achieve the purpose of the classification. What is reasonable is to some extent culturally determined, in particular regarding various aspects of the distinctions made between men and women.[7]

There is a substantial jurisprudence by national courts, reflecting the evolution in social relations, on what are

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[7] A formula from international human rights case law is that distinctions must pursue a legitimate end, and the means be proportionate to this end.

"unreasonable" classifications. One major illustration is the finding by the US Supreme Court in 1954 that the "separate but equal" doctrine was invidious and hence constituted discrimination (Brown v. Board of Education): "Separate educational facilities are inherently unequal".[8] Many classifications have been held in the past to be acceptable but are no longer so, often related to the evolution in society in general.

2.6. Application of economic and social rights based on need.

One approach to the restoration of equality is simply to implement, without discrimination, the economic, social and cultural rights which form an integral part of the contemporary international human rights system.

A particular feature of the South African society, unmatched in practically any other society, is the strong correlation between race and social position. It has been the deliberate intention to block non-whites from access to higher and appropriate education, to jobs and to land; as a consequence, social position is closely related to race.

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[8] 347 US 483 (1954), see e.g. Polyviou, op. cit. above (note 4), 307-311.

Recreation of equality in a deeply unequal society can be done in several ways. It can be based on objective measurements of need, irrespective of racial, ethnic or other group identity. If so, it is not affirmative action, but simply a realization of economic and social rights to everyone based on individual merit.

The notion of a "New Deal" which was popularized during President Roosevelt's administration in the United States (from 1933) exemplifies some of the possible approaches. Admittedly, however, it did not substantially improve the relative conditions of the black population, probably because discrimination was still strong in many parts of the United States.

Where base resources (land, capital) are profoundly unevenly distributed, they can be redistributed. While this may have positive functions, it can also lead to disruptions in the economic life. This is not the place to go into that complex and controversial matter.

Another approach is to redistribute part of what is produced in society, through direct and indirect taxation and in other ways. This leaves the primary position of property intact, however unjust it may be, because of the efficiency connected with a continuation of past arrangements, but the redistribution can provide possibilities for more equality in opportunity.

Such redistribution can be directed towards support, based on needs, for achieving the qualifications for equal competition in society. This can take many forms, from free education not only at primary but also higher levels of education, including where required, grants to cover living expenses on a basis of need. The industrial and post-industrial societies have developed their own particular solutions. In the welfare states found in Western and Northern Europe, and to some extent in other parts of the world, there is at the basis a free market economy, but combined with the transfer of some part of the product, through direct and indirect taxation, in order to ensure equal opportunities for all. There are also some constraints on over-aggressive processes of private capital accumulation. These constraints result from social reform movements which have been made possible through wide and pluralist political participation. The operation of free unions have also been essential in this connection. The outcome has therefore been a focus on protection or creation of equal opportunity through targeted support to those who, for one reason or another, did not have an equal starting base for participation in the economic and social life of the society, combined with a social safety net for those who, for some reason or another still fail to secure their needs through their own endeavors.

Definition of a.a.

3. Affirmative action in the narrow sense

The concept of affirmative action is nowhere authoritatively defined. One author[9] claims that it was first used in the U.S. debate on civil rights in the early 1960s, more precisely in President Kennedy's Executive Order No. 10925, to describe public policies aimed at overcoming present effects of past discrimination. As previously noted, it consists in preferences given to members of a group, typically defined by race or sex, and is held to be justified exactly because members of that group have in the past been discriminated, not because of their individual characteristics but because they belonged to the group concerned[10].

A provisional working definition of affirmative action, based on CERD article 1 para. 4, could run as follows:

Affirmative action is preference, by way of special measures, for certain groups or members of such groups (typically defined by race, ethnic identity, or sex) for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms.

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[9] Nathan Lerner: Group Rights and Discrimination in International Law. Martinus Nijhoof Publishers, Dordrecht/Boston/London 1991, at p. 163.

[10] Wojciech Sadurski, as quoted by Lerner, op.cit (note 8) at p. 163.

A closer look at the different elements of the definition is required. To start with, affirmative action is preference to be given to members of race, ethnic group or sex. As such it appears to be directly in conflict with the definition of racial discrimination in CERD art. 1 para. 1. Affirmative action is therefore also sometimes (and in a derogatory way) referred to as "reverse discrimination".

This brings us to the second element of the definition: It can be used only for the purpose of securing adequate advancement of such groups or their individual members in order to ensure equal enjoyment of human rights and fundamental freedoms. It is typically justified in situations where there has in the past been systematic discrimination, in order to reach the goal now required by contemporary international law: Equal enjoyment of human rights and fundamental freedoms.

It follows, therefore, that such measures cannot be continued after the purpose has been achieved: When equal enjoyment, across racial, ethnic or sex lines, of human rights, has been achieved, continued preference for members of the previously discriminated group would constitute unjustified discrimination since it would from then on lead to unequal enjoyment of human rights.
This is also stated in CERD art. 1 para. 4 in the end:
"..provided, however, that such measures do not, as a

consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the object for which they were taken have been achieved."

Affirmative action is therefore intended to create equality, but is different both from non-discrimination (above, 2.5) and from targeted support to individuals based on their individual need (above, 2.6) to obtain equality in opportunity.

There are "soft" and "strong" versions of affirmative action. The "soft" versions are extensions of the principle of non-discrimination: Latent social discrimination creates obstacles to members of groups affected by such discrimination. In evaluation of their merits, some preference shall be given in order to compensate for such latent discriminatory attitudes.

Stronger versions of affirmative action are aimed at an accelerated creation of a balanced society - a society, that is, where there is equality in participation at all levels, in political life, in professions, in the economy and in other fields. Typical versions of this is the establishment of quotas for access to education at higher levels, to civil service, to professions, and in employment. Such approaches to affirmative action suspend or modify traditional criteria of merits as a basis of access, but can be justified when there were, in the past, discriminatory practices which deprived members of those

groups from equal opportunity and blocked for them the application of criteria of merit.

Since, however, affirmative action is based on belongingness to a definable group, and gives preference to such members over members of other groups, it can lead to group conflict. This is why it should not be continued beyond the time when the purpose of equality has been pursued, and the measures adopted for affirmative action should not have more harmful (invidious) consequences for the members of the other group than what is necessary in order to achieve the purpose of the affirmative action.

4. Special rights - minority rights.

Affirmative action shall not lead to the maintenance of separate rights for different racial groups. This is made clear both in CERD art. 1 para. 4 and in art. 2 para. 2. There is, however, a different issue much discussed in the development of international human rights law: The rights of ethnic, religious or linguistic minorities. While this is a subject of great magnitude, going far beyond the scope of this paper, the issue is often confused with that of affirmative action. There are also some relationships between the two. Some words, therefore, may be in order.

Minorities

From a human rights perspective, three issues are important. Firstly, members of minorities should enjoy all the core human rights (civil, political, economic, social and cultural) in the same way as all others, without discrimination. For this to happen, non-discrimination measures are essential, as discussed above. Secondly, minorities should be allowed to preserve their dignity as members of a particular community based on religion, language or culture. This may or may not require special measures. Thirdly, in some cases dependent or weak groups may need protection for the material basis of their culture and lifestyles. This will undoubtedly require special measures.

A necessary component of democracy is the application of the principle of equality and non-discrimination. When applied to members of minority groups it means that they are equally entitled, as are others, to form their own associations, to have their own contacts for information and movement with related groups in neighboring countries. In brief, they are entitled to respect for and protection of their identify. Whether they are also entitled to material support for that preservation, depends on the particular situation.

Minorities, however, are no more than other groups entitled to have privileges. Some claims by minorities are for privileges, not for equality; such claims can of course not be supported by the human rights system. There are also situations where the

minority claims to be discriminated against, while reality is that they react against justified efforts to redress a past inequality where that minority had a privileged position. Such misuse of the concept of minority rights need to be confronted.

The Structure and Operation of an Affirmative Action Program: An Outline of Choices and Problems[1]

Marc Galanter[2]

The following is a schematic presentation of the choices involved in constructing an affirmative action program, indicating some of the major problems and trade-offs that accompany certain choices or combinations of choices. Obviously this kind of schematic treatment, abstracting from the complexities, conflicts and passions of real social settings, embalms the subject. But the goal of this exercise is not to convey the full complexity of the real world, but to simplify it so that we can see what might otherwise be obscured. It is an X-ray, not a portrait.[3]

To provide a common shorthand, I shall construct a model of a society and its affirmative action policy. Imagine the XYZ

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1. Prepared for the Conference on Affirmative Action in a New South Africa, Port Elizabeth, Oct. 10-13, 1991. An earlier version of this paper was presented to the Conference "Human Rights in the Post Apartheid South African Constitution" at Columbia University, Sep. 25-28, 1989

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3. The analysis presented here is distilled from my Competing Equalities: Law and the Backward Classes in India. Berkeley: University of California Press, 1984; Delhi: Oxford University Press, 1984, Paperback edition with new preface 1991.

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society composed of three groups, clusters or sections of people: the Xs, Ys, and Zs. Each of these groups is itself a composite, made up of sub-sections with their own history; the groups have a somewhat different geographical distribution, so there are areas in which each is a majority; Xs, Ys and Zs are in most but not all cases visually distinguishable from one another.

In recent centuries, the Xs have dominated the society; they have severely restricted the Zs' opportunities for political participation, economic activity and educational advancement; the opportunities of the Ys have also been restricted, but not as severely. These restrictions have accentuated original differences in power, wealth and education so that the present distribution of power, wealth, and education is quite unequal, with the Xs having the most of all these valued goods, the Ys considerably less, and the Zs far less than that.

The XYZ society is in the process of conferring on itself a new political dispensation in which previous relations of domination by the Xs are relinquished and a new regime of "equal rights" is established. Aware that, given the accumulated inequalities of resources, a regime of formal equality may perpetuate or even accentuate the differences in wealth and power and accomplishment, they seek a program of affirmative action that will permit the Ys and Zs to catch up without abandoning the notion of open merit competition for the various rewards society has to offer. [By merit I refer not to a moral entitlement but to impersonal group-indifferent measurement of qualifications

thought to be relevant to the post in question. Just what constitutes merit in this sense may be controverted.]

The xyz planners envision three sorts of affirmative action programs. (1) a program for medical college admissions for Ys and Zs; (2) a program for recruitment of entry-level clerks in the civil service; (3) a pre-school tutoring program in which enrichment and preparation for school are provided to pre-school children. Consider the kinds of decisions that have to be made in designing these programs.

I. DESIGNERS: first there is the questions of who is to make AA policies?

A. Are they to be written into the Constitution? They can be established in a hard-to-amend constitution; or even entrenched beyond the ordinary process of amendment

1. AA provisions in a constitution may <u>mandate</u> programs;

2. or they may <u>authorize</u> various bodies to enact such programs

B. To extent that constitution authorizes AA programs, these can be fashioned by:

1. Central Government. Power to make AA programs may be vested or exclusively in a central government; or shared with other bodies.

2. Provincial/Local governments -- can have AA powers, exclusive or shared

3. Decentralized: each agency, university, etc. can have its own AA programs or not.

C. How long should such provisions last?

1. such programs may be without time limits;

2. or time-bound, but subject to extension;

3. or time-bound and unextendable

II. MONITORS. What mechanisms will there be for dealing with disputes and complaints that arise from the working of the AA policies?

A. Review by courts (All courts; or higher courts only; or a specialized court for AA issues?) Will court give individual relief or void whole scheme?

B. Ombudsmen (a general ombudsman; or a separate one for AA problems?)

C. Administrative process

D. Political process

Should complaints by putative beneficiaries (that schemes are insufficient, underfunded, not implemented) be treated the same as complaints that schemes are unfair to others (excessive, arbitrary, etc.)

III. SELECTION OF BENEFICIARIES

A. How will the eligible classes of beneficiaries be selected?

1. Globally for all programs; or program-by-program?

2. Who will do the selection? Legislative bodies? Or a special body (standing, one-time, periodic)?

3. What provisions for review/modification of selection?

B. Will the beneficiaries of these policies be selected by

1. Membership in named communities (groups, tribes, etc.)

a. By what criteria will these be selected?

i. historic subordination

ii. aggregate economic, educational disadvantage

iii. isolation

b. Will there be disqualification for well-off individuals or sub-sections within the group?

2. Geographic criteria

3. Economic criteria (income, occupation, etc)

IV. DETERMINATION OF INDIVIDUAL ELIGIBILITY

A. If eligibility on economic grounds

1. Whose income or occupation? Parents?

2. Are there authoritative records? If not, how certify?

3. Is there machinery to record changes in a regular fashion?

B. If eligibility on group membership grounds

1. Does one become a member of the group by birth or affiliation? What about children of mixed unions?

2. Can membership be gained by marriage? Conversion? Adoption? "Assimilation?"

3. Can membership be lost by marriage? Divorce? Conversion? Adoption? Assimilation?

4. Does membership depend on the views or rules of the group itself? On the perceptions of others? On some general rules for recognizing such membership?

5. How is group membership going to be certified?

a. Will membership be recorded as a public record?

b. Will self-report be unchallengable?

c. Will membership be determined by public standards?

C. What agency decides eligibility questions?

1. Should it apply clear-cut mechanical rules or engage in individualized weighing?

Assume that these questions were resolved to the planners' satisfaction, at least for the moment, and our three AA programs were established. How should they operate?

V. HOW MUCH?

A. What portion of national resources should be spent on such programs? For example, what portion of medical college places should be reserved for the individualized and Zs?

B. Should it be a fixed portion? Should the specified portion be <u>over and above</u> those members of the beneficiary groups that are selected on "merit? Or should it be a guaranteed minimum that includes those selected by merit? [Note that the latter arrangement is self-liquidating. If the performance of the beneficiary group improves, the net reservation will decrease correspondingly. But such programs may lead

to an exaggerated public estimation of the amount of AA benefits that are conferred.]

C. Should the portion be proportionate to the proportion of Ys and Zs in the population? Or the portion of Ys and Zs in the pool otherwise eligible to compete? Or should its magnitude be determined by other factors, such as the need for Y and Z doctors or educated leaders?

D. Should a specified portion be avoided and Ys and Zs instead be given "bonus points" in the admission process?

E. Should a specified portion be accompanied by (or displaced by) special efforts at recruitment, coaching, etc.

F. Should there be a lower floor on admissions? On performance in medical college? Should there be prefential treatment at later stages as well as at admission?

VI. DISTRIBUTION WITHIN THE BENEFICIARY GROUPS

A. The medical admissions program is one that will benefit the best off among the Ys and Zs-- those with a prior endowment of education, family stability, etc. Only the minority of Yx and Zs who are able to negotiate the various hurdles of school, college, etc. will be able to utilize this benefit. It is a high-echelon benefit that can only be used by those who have considerable resources. (Such benefits are more visible and politically controversial.) In contrast the pre-school program is a low-echelon benefit that is available to almost all Ys and Zs and requires little in the way of matching resources or prior preparation to use it. The government clerks program is a middle-echelon benefit, somewhere in-between.

B. Should distribution between and within the Ys and Zs be entirely by "merit"-- i.e., impersonal tests that measure the probability of high performance. Or should these benefits be distributed more widely, merit notwithstanding, among the beneficiary groups? E.g., by apportioning it among component groups within the Ys? Or by reserving some portion for candidates from the most disadvantaged backgrounds?

C. Should receipt of benefits be conditioned to assure that there will be some flow-through of benefits through the individuals beneficiaries to the Z community? For example, by a requirement that Z doctors spend a specified period providing medical service to Zs, or that they remain in the country, etc.

VII. RELATIONS BETWEEN MULTIPLE GROUPS OF BENEFICIARIES

A. Should benefits for multiple groups of beneficiaries be administered separately or together?

B. Should benefits for the (most deprived) Zs and the (less deprived) Ys be proportional in extent or amount tó the relative severity of their deprivation?

C. What happens to benefits that are not utilized by the specified group -- do they revert to the general pool or go to the other beneficiary groups?

D. Are members of one beneficiary group exempt from being discomfited by AA for others? Are Ys who make it on the bottom of the merit list to be bumped in favor of Zs who are entitled by AA provisions -- or are they exempt from bumping?

VIII. TERMINATION. METHODS OF REDUCING OR TERMINATING AA INCLUDE:

A. Closing out programs after specified periods of time or achievement of specified levels of accomplishment.

B. Reduction of the level of benefits-- for example, by awarding fewer bonus points or by reserving a smaller portion of places. (Again this can be done automatically if reservations are guaranteed minimums rather than over and above places gained on merit. See V. B, above.)

C. Reduction of the number of beneficiaries.

1. By eliminating well-off individual members (or families) within the beneficiary groups (for example, by a progressive income ceiling for benefits.)

2. By eliminating well-off beneficiary groups.

D. Affirmative Action programs involve the use of discredited group criteria in order to remedy a state of affairs in which group membership is a key determinant of individual performance. To the extent that, in conjunction with other policies of enlarging opportunity, this policy succeeds, the overriding effect of group membership is diminished. Thus AA policies are transitional. (The notion that

permanent protection is required mirrors the discredited hierarchic ideology that group forever measures inherent human ability.) But such programs are difficult to terminate, for they generate a sense of entitlement in the beneficiaries (and pressure for inclusion from others.) If beneficiaries are to be numerous, preservation of the transitional character of AA requires that methods of termination be part of the program design and be constitutionally protected.

IX. JUSTIFICATIONS FOR AFFIRMATIVE ACTION POLICIES.

Although they are often entwined in practice, we can separate out three sorts of justifications for affirmative action policies, which I label the non-discrimination, the general welfare, and reparations themes.

A. <u>The non-discrimination theme</u> Affirmative action may be viewed as an extension of the norms of equal treatment, an extension invited by our awareness that even when invidious discriminatory standards are abandoned there remain subtle and tenacious forms of discrimination and structural factors which limit the application of new norms of equality. Aspiring members of previously victimized groups encounter biased expectations, misperceptions of their performance, and cultural bias in selection devices; they suffer from the absence of informal networks to

guide them to opportunities; entrenched systems of seniority crystallize and perpetuate the results of earlier discriminatory selections. Thus norms of non-discrimination in present distributions are insufficient to erase or dislodge the cumulative effects of past discrimination. AA operates to counter the residues of discrimination and to overcome structural arrangements which perpetuate the effects of past selections in which invidious discrimination was a major determinant. In this non-discrimination view affirmative action serves to assure personal fairness to each individual applicant. Group membership is taken into account to identify those individuals who require special protection in order to vindicate their claim for selection on "merit" grounds. (The justification for much American affirmative action is often cast in these terms--as an extension of classical individualistic non-discrimination principles.)

B. The general welfare theme On the other hand, affirmative action may be advocated, not as a device to assure fairness to individuals, but as a means to produce desired social outcomes--for example, to reduce group disparities, afford representation, encourage the development of talent, and so forth. Arrangements for reservations in British India were justified on such "functional" grounds as are the

various preferences for "Oriental" Jews in Israel today. Americans are familiar with the "balanced ticket" and other arrangements by which shares are apportioned among various constituencies in the expectation that abrasive disparities are kept in bounds, participation is spread out, representation is secured, and responsiveness is assured. The units in such functional "welfare" calculations are groups rather than individuals. The chances of individuals are affected by the rearrangement of the chances of groups. But the purpose is not to rectify discriminatory selection among individuals, but to introduce a standard quite apart from personal desert.

The contrast of non-discrimination and welfare themes is displayed in imaginary alternative proposals for admitting more member of Group Z to medical colleges. The non-discrimination proposal might argue that selection procedures be revised to eliminate subtle bias which impinged on individual Zs -- for example, culturally biased tests or differences in networks for acquiring recommendations. The general welfare proposal might argue that more Zs should be admitted in order to equalize the distribution of medical services or for the representation of Z views in making health policy or to afford non-Z doctors the experience of fellowship with Zs. The goal of

general welfare style AA is not a non-discriminatory selection of Zs among individual applicants, but a selection that optimizes social goals. Such a selection might diverge from that which would be dictated merely by the prospects of individual performance on the job, because it defines the job to include symbolic, representational, and educational aspects that may not be included in the job description.

C. The reparations theme In some cases, affirmative action policies have another root-- that a history of invidious treatment has resulted in accumulated disabilities which are carried by certain groups. No matter how fair and unbiased the measures now employed for distributing benefits, the victims of past injustice will not fare well in terms of current performance. To distribute benefits by neutral standards will perpetuate and amplify the unjust exactions and exclusions in the past. Fairness, then, demands that present distributions be arranged to undo and offset old biases, not to perpetuate them.

Like the non-discrimination theme this is a fairness argument, rather than a welfare argument. But it emphasizes groups as the carriers of historic rights rather than as indicators of individual

victimization. And it looks to a very different time frame. Welfare arguments are prospective; non-discrimination looks at the present situation and seeks to refine out lingering inequalities. The reparations theme sees the present as an occasion to reckon accounts for past injustice.

X. EVALUATING THE COSTS AND BENEFITS OF AFFIRMATIVE ACTION POLICIES

The evaluation of these affirmative action programs involves a two-stage inquiry. First, there is what we might call the problem of performance. Does the program actually deliver the goods (more jobs or housing or better performance in schools or whatever)? In making such judgments we must be wary of all the pitfalls of measuring program effects. Having satisfied ourselves that the program has the projected effect, we then face what we might call the problem of achievement. Has the program produced the results that it is supposed to achieve--do more jobs for Zs produce considerate treatment by officials, or stimulate educational accomplishment, or produce social integration? To what extent does delivering the jobs entail the costs alleged by critics of affirmative action--such as stigmatizing the beneficiaries, fomenting group resentments, lowering self-esteem?

What follows is not a list of the direct effects of affirmative action programs--e.g., more jobs, higher literacy, or better nutrition. It is a check list for assessing achievement, it is a list of the good and bad effects that are alleged to flow from the performance promised by the program, including the effects attributable to the specifically preferential aspects of the program. Even if all of these dimensions enter into estimation of the overall working of the affirmative action policy, it is not implied that all of them are involved in every specific scheme. Nor is it implied that they are to be accorded equal weight in making such evaluations. Presumably, specific schemes in different fields (education, housing, etc.) or for different groups have a different mix of intended effects. And, the relative weights to be assigned to those effects (and to unintended by-products) will differ among various participants and observers.

The utility of the list is to remind us of the range of claims and counter-claims about the effects of AA measures and to suggest the complexity of any definitive assessment.

Table 1

Alleged Benefits and Costs of Policy of Affirmative Action

REDISTRIBUTION	vs.	DIVERSION
Affirmative action provides a direct flow of valuable resources to the beneficiaries in larger measure than they would otherwise enjoy.		These resources are enjoyed by a small segment of the intended beneficiaries and do not benefit the group as a whole.
REPRESENTATION	**vs.**	**MISREPRESENTATION**
Affirmative action provides for participation in decision-making by those who effectively represent the interests of the beneficiaries, interests that would otherwise be under-represented or neglected.		By creating new special interests that diverge from those of the beneficiaries, affirmative action obstructs accurate representation of their interests.
INTEGRATION	**vs.**	**ALIENATION**
By affording opportunities for participation and well being affirmative action promotes feelings of belonging and loyalty among the beneficiaries, thereby promoting the social and political integration of these groups into the national society.		By emphasizing the separateness of these groups, affirmative action reduces their opportunities for (and feelings of) common participation.

ACCEPTANCE	vs.	REJECTION
Affirmative action induces in others an awareness that the beneficiary groups are participants in the national life whose interests and views have to be taken into account and adjusted to.		Preferences frustrate others by what they consider unfair favoritism and educate them to regard the beneficiaries as separate, with their own facilities and having no claim on general public facilities.
INTEGRITY	vs.	MANIPULATION
Affirmative action permits forms of action that promote pride, self-respect, a sense of achievement and personal efficacy that enable the beneficiaries to contribute to national development as willing partners.		Affirmative action subjects these groups to manipulation by others, aggravates their dependency, and undermines their sense of dignity, pride, self-sufficiency and personal efficacy.
INCUBATION	vs.	OVER-PROTECTION
By broadening opportunites, affirmative action stimulates the acquisition of skills and resourses needed to compete successfully in open competition.		Affirmative action provides artificial protection, which blunts the development of the skills and resources needed to succeed without them.
MOBILIZATION	vs.	ENERVATION
By cultivating talents, providing opportunities and incentives and promoting their awareness and self-		By making them dependent, blunting the development of talent, undermining self-respect, affirmative

consciousness, affirmative action enhances the capacity of the beneficiary groups to undertake organized collective action.		action lessens the capacity for organized effort in their own behalf.
STIMULATION	vs.	SEDATION
By increasing the visibility of the beneficiary groups, promoting their placement in strategic locations and preferment, emphasizing the national commitment to remedy their condition, affirmative action serves as a stimulus and catalyst of enlarged efforts for their uplift and inclusion.		By projecting an image of comprehensive governmental protection and affirmative action stirs the resentment of others, allaying their concern and undermining initiatives for measures on behalf of the beneficiary groups.
SELF-LIQUIDATION	vs.	SELF-PERPETUATION
The benefits of affirmative action are mutually reinforcing and will eventually render unnecessary any special treatment.		These arrangements create vested interests in their continuation, while discouraging the development of skills, resources, and attitudes that would enable the beneficiaries to prosper without special treatment.
FAIRNESS	vs.	UNFAIRNESS
Affirmative action compensates for and helps to offset the accumulated disablements resulting from past deprivation of advantages and opportunities.		Affirmative action places an unfair handicap on individuals who are deprived of opportunities they deserve on merit.

INDIVIDUALISM	vs.	COMMUNALISM
By reducing tangible disparities among groups affirmative action promotes the development of a society in which individual achievement is recognized and rewarded.		By recognizing and stimulating group identity affirmative action perpetuates invidious distinctions, thereby undermining recognition of individual achievement.
DEVELOPMENT	vs.	STAGNATION
Affirmative action contributes to national development by providing incentive, opportunity, and resources to utilize neglected talent.		Affirmative action impedes development by misallocation of resources, lowering of morale and incentive, and waste of talent.

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A HISTORICAL ANALYSIS OF FEDERAL AFFIRMATIVE ACTION FOR MINORITY BUSINESS ENTERPRISES IN THE UNITED STATES OF AMERICA

by Anthony W. Robinson*

Introduction

The evolution of federal affirmative action on behalf of minority business enterprises (MBEs)** can be classified as a study of preferential treatment of minorities by the government in an effort to promote minority business ownership and success. In order to understand the development of MBE affirmative action programs in the United States, it is necessary to review them in chronological order, beginning with the earliest administratively oriented small business procurement programs, and ending with the most recent judicial holdings.

One cannot ignore the problems encountered during this development, such as the constitutional challenges to the government's use of racial preferences and alleged violations of the constitutional right of equal protection under U.S. law.

But the reader should bear in mind that the adoption of affirmative action measures by the government was - and remains -remedial in nature. MBE programs in the U.S. owe their existence to the recognition by government that subsequent to the abolition of slavery, African-Americans were subjected to continuing racial discrimination and oppression. Not unlike the discrimination suffered in the acquisition of housing, education, employment and the exercise of the right to vote, minority-owned businesses (particularly those owned by blacks) were not permitted to compete equally within the public and private sectors of America's marketplace. Access to contracting opportunities was denied through both de facto and de jure discrimination. For example, in 1845, the Georgia Legislature passed the following Act relating to Negro mechanics:

> "Section 1. Be it enacted by the Senate and House of Representatives of the State of Georgia in General Assembly met, and it is hereby enacted by the authority of

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** Most federal minority business affirmative action programs generally define the term "minority" as including United States citizens who are Negro, Spanish-speaking, Oriental, Indian, Eskimo and Aleut. However, different definitions of this term include "socially or economically disadvantaged" criteria. A minority business enterprise (MBE) is generally defined as a business at least 51 per centum of which is owned by minority group members or, in case of publicly owned businesses, at least 51 per centum of the stock of which is owned by minority group members.

the same. That from and after the first day of February next, each and every white person who shall hereafter contract or bargain with any slave mechanic, or mason, or free person of color, being a mechanic or mason, shall be liable to be indicted for a misdemeanor; and on conviction, to be fined, at the discretion of the court, not exceeding two hundred dollars." (Cited in W. Du Bois, A. Dill (1912), The Negro American Artisan, Atlanta University Publications, pp 32-3).

The historical economic disadvantage of minority Americans is well documented. Indeed, patterns and practices of discriminatory treatment continue. In response to a 1989 U.S. Supreme Court decision (Croson, infra at Section III), studies commissioned by state and local governments across this nation reveal that MBEs continue to be underutilized in public sector procurement and construction contracting due, in large part, to racial discrimination.

Although anti-discrimination legislation has improved minorities' economic status to some extent, discrimination continues to hinder minority economic development. Race-conscious MBE programs have been found to be effective in providing minority business owners with access to opportunities for government contracting.

A national commitment to affirmative action for all small businesses (irrespective of racial ownership) has its roots in the Small Business Act of 1953, wherein it is stated "[t]hat the Government should aid, counsel, assist, and protect... the interests of small business concerns in order to preserve free competitive enterprise ..."[1]

But the growth of MBE programs can be understood when they are examined as logical extensions of civil and social rights movements. To this end, the underlying motto behind the emergence and the need for continued MBE program development is that civil and social rights are largely meaningless unless unaccompanied by viable economic parity. Thus, the term "affirmative action" as currently used is generally understood to mean positive, active measures taken to seek out and assist capable minority small businesses.[2]

I. Background

The Congress of the United States evinced its determination to eradicate the abuses of monopoly in the national economy and provide safeguards for the private enterprise system with the passage of Sherman Act in 1890.[3] This first federal antitrust law originated in an era of trusts and combinations when predatory and monopolistic interests openly sought to control the marketplace by suppression of competition and the elimination of competitors.

The Sherman Act was augmented by the Clayton Act,[4] the Federal Trade Commission Act,[5] and later by the Robinson-Patman Act,[6] among others. Thus, there has been created over the years a body of law which forms the basis for economic freedom and a competitive business climate among private enterprise.

The nascent stirrings on behalf of small business can be traced to the creation of the Temporary National Economic Committee (TNEC) in 1938.[7] The Committee's investigations

dealt with causes of business mortality, such as lack of managerial competency, lack of credit, government regulations, and the struggle for marketing control.

The early 1940's were wrought with complaints and allegations flooding into Washington that small business was being subjected to discrimination, that defense contracts were being given almost exclusively to the larger corporations, and that certain sections of the country were receiving a disproportionate share of defense work while other sections were neglected. Members of Congress feared that, unless steps were taken to include the small communities and the small businessmen in the defense production program, the United States might be weakened on the home front in numerous ways. Not only was it thought that vast aggregate productive power of small units might be lost, but also that if the country failed to keep many thousands of small businessmen functioning, the economy of the Nation would be harmed.

Then in 1942, during World War II, the Smaller War Plants Corporation (SWPC)[8] was established to mobilize the production capacity of all small business concerns and to determine the means by which such concerns could be most efficiently utilized to augment war production. In this regard, SWPC was a pioneer because it was the first federal agency established to assist small firms. It had authority to make direct loans and also participated in bank loans to small firms.

In 1946, SWPC's work came to an end when its lending authority was transferred to the Reconstruction Finance Corporation (RFC).[9] In World War II, the RFC's role was expanded to financing and building defense plants and stockpiling strategic war materials. However, despite this transfer, small businesses only made nominal gains in procuring defense contracts.

It was not until 1951 that a second temporary small business agency, the Small Defense Plants Administration,[10] was created principally to assist small firms to participate in defense production at prime contract levels during the Korean conflict. Its lending authority, however, was limited to recommending firms to the RFC.

It is crucial to note that up until the creation of the SDPA, federal assistance to small business in government procurement at prime contract levels was only authorized to maintain or mobilize the nation's full productive capacity during wartime. This assistance was deemed necessary because Congress recognized that small businesses found it increasingly difficult to obtain a fair share of government procurement as prime contractors. This difficulty has been attributed to a number of factors, including an inability to secure working capital,[11] problems in obtaining bonding,[12] lack of experience in management and bidding skills,[13] the state of the economy,[14] and racial bias.[15]

With SDPA phasing out, Congress was most reluctant to let the idea of federal assistance to small business die. Thus, the Small Business Administration (SBA)[16] was created on July 30, 1953, the first independent agency of the Federal Government ever established in peacetime, solely to advise and assist the nation's small business concerns. It was made a permanent independent agency in 1958.

Congressional use of set-aside programs began with the enactment of the Small Business Act of 1953 (the "Act").[17] Preferential treatment may occur under a variety of labels, including

"goals," "quotas" or "set-asides." For example, in Regents of the Univ. of Cal. v. Bakke,[18] Justice Powell proposed that these semantic distinctions were constitutionally "beside the point" so long as lines were drawn on the basis of race and ethnic status. As used in this article, preferential treatment is similarly viewed as any result-oriented approach that concentrates upon racially based numerical outcomes rather than racially neutral nondiscriminatory procedures. The Act made no reference to race or ethnic criteria as eligibility markers for participation in programs authorized thereunder.[19]

The original authority for SBA assistance to small and disadvantaged businesses has its roots in Section 8(a) of the Small Business Act of 1953.[20] Section 8(a) authorizes the SBA itself to enter into contracts with government agencies and to arrange for the performance of such contracts by awarding subcontracts, by negotiation or otherwise, to small business firms or others. In 1958, the SBA issued its first regulations implementing Section 8(a).[21] These regulations indicated that the section 8(a) power was to be exercised in the event of emergency for the benefit of small business as a class and on a publicized competitive basis. The SBA regulations were amended thereafter in 1970 to state that a firm must be owned or be destined to be owned by socially or economically disadvantage persons in order to be eligible for an 8(a) subcontract.[22] The regulations also were amended to authorize the award of 8(a) subcontracts on a non-publicized, non-competitive basis.[23]

Thus, originally, the concept of channeling contracts to small businesses through an intermediate federal agency was an emergency measure to ensure that small businesses were not bypassed in wartime. The SBA, however, never used the Section 8(a) authority for that purpose, section 8(a) lay dormant for about 15 years because the SBA believed that efforts to start and operate an 8(a) Program would not be worthwhile in terms of developing small businesses.

Section 15 of the Small Business Act[24] provides that small business concerns may receive any contract if the Small Business Administration determines that making a non-competitive award to a small firm will serve the government's interests in:

(1) maintaining or mobilizing the Nation's full productive capacity;
(2) carrying out war or national defense programs; and
(3) assuring that a fair proportion of total government contracts for property and services are placed with small business concerns.[25]

Section 15 was enacted in 1958. It was a revision of Section 214 of the Small Business Act of 1953. The 1953 Act made no mention of assuring that a fair proportion of total government contracts for property and services was placed with small business concerns. Consequently, Section 15, as amended,[26] is extremely significant in that it put the Federal procurement assistance program on a peacetime basis, and permits assistance to be rendered for all types of Federal procurement without regard to any relationship to war or civil defense programs.

During the early 1960's, military weapons systems became more complex and more expensive; consequently, small business found it increasingly difficult to obtain a fair share of government defense procurement at prime contract levels. In 1961, Congress, recognizing that small firms were being shut out of defense contracts, enacted Public Law 87-305,[27] which requires that prime contracts in excess of $1 million and subcontracts in excess of $500,000 be performed

partly by small companies.

The Federal Government began its campaign to assist minority business enterprise in 1964 as part of the Johnson Administration's war on poverty. First, the Small Business Administration announced a "Revised Small Loan Program" which offered financial assistance to needy small businesses under liberalized loan criteria. Under this plan, the agency made loans up to $15,000 for as long as 6 years to aid small retail, service and other independent firms. Second, in the same year, 1964, the SBA formulated the "6x6" Program whereby the agency would lend up to $6,000 for a maximum of 6 years to needy small businessmen. Although these plans were directed toward aiding the poor, they simultaneously involved minority businessmen, because of high incidence of poverty among minorities.

Subsequently, these two small loan programs evolved into the Economic Opportunity Loan Program (EOL) under the Office of Economic Opportunity, which was established in late 1964. This Office was authorized to make loans up to $25,000 for 15 years to disadvantaged individuals, chiefly minority businessmen, who have the capability and the desire to become independent entrepreneurs.[28] In 1966, this program was transferred to the Small Business Administration.[29]

The minority assistance program of Small Business Administration was expanded by adding such programs as the Minority Enterprise Small Business Investment Company Program (MESBIC's, which are now known as "301-d" investment companies); and surety bonds guarantees.

In the late 1960's, Congress enacted the 1967 Amendment to the Economic Opportunity Act,[30] which included a loan provision directing the SBA "to assist in the establishment, preservation, and strengthening of small business concerns...with special attention to small business concerns (1) located in urban or rural areas with high proportions of unemployed or low-income individuals, or (2) owned by low-income individuals."[31] This was one of the earliest attempts by Congress to place emphasis upon economic standards of eligibility for small business owners for participation in SBA programs, i.e., small concerns owned by low-income individuals. However, the governmental use of racial preference had not yet been exercised.

Following widespread urban unrest in 1967, President Johnson appointed the Kerner Commission[32] to investigate civil disorders in the ghettos. This investigation revealed that in the area of government assistance to small businesses, in general, there were truly two societies: one Black and one White...separate and unequal; consequently, the Commission recommended that the government encourage business ownership by minorities. Reacting to this proposal, President Johnson's successor, Richard M. Nixon, promulgated a series of executive orders to foster his so-called program on "black capitalism." In his first such order, issued in 1969, Executive Order No. 11458,[33] President Nixon created within the Department of Commerce an Office of Minority Business Enterprise (OMBE), whose mission was to help establish and promote minority business. A second order, issued in 1970, Executive Order No. 11518,[34] called for increased representation of the interests of small business concerns, particularly MBE's, within Federal departments and agencies. Under the third order, issued in 1971, Executive Order 11625,[35] the OMBE was given the authority to provide financial assistance to public and private organizations that would provide management and technical assistance to MBE's. Thus under the Nixon Administration, the executive branch of government gave its stamp of approval for the first time

to the use of racial preferential treatment in promoting "black capitalism". However, despite the socially- based motives underlying Nixon's executive orders, substantial increases in minority business ownership continued to remain a dream rather than reality.

The Section 8(a) authority was not used for promotion of disadvantaged business until 1968 when the President's Test Cities program was initiated during the Johnson Administration, largely in response to the riots in 1967. The primary purpose of the test program was to mobilize the resources of private industry and the federal government to help find jobs and provide training for thousands of America's hardcore unemployed. In 1968, the SBA embarked upon experimental program to secure government contracts from various agencies and to offer the contracts to small businesses that agree to relocate into depressed areas. In 1969, the program's purpose was changed and its scope was broadened to encompass the procurement of now competitive contract support for disadvantaged small businesses. These contracts, however, were not restricted to minority-owned firms.

During the early stages of the test program, the SBA recognized that the solution to hard-core unemployment involved not only the creation of jobs, but also the creation of business ownership opportunities for minority and low-income people. Responding to this recognition, the SBA gradually changed the program emphasis, beginning in 1969, from hiring the unemployed in ghetto areas to developing successful firms owned by disadvantaged persons. Under the program in 1977, federal contracts were to be directed to firms owned only by "socially or economically disadvantaged" persons.[36] SBA regulations later defined those persons automatically eligible for the program to include "Black Americans, American Indians, Spanish Americans, Oriental Americans, Eskimos, and Aleuts."[37] This definition of disadvantage was not used in the 1967 Amendment to the Economic Opportunity Act; however, it was later adopted verbatim in the Nixon executive orders to limit MBE ownership.[38]

During the 1970's, constitutional challenges to the Section 8(a) Program emerged. In several cases, plaintiffs alleged that the program's administration favored applicants from certain racial and ethnic groups thereby violating the equal protection rights of nonminority contractors.[39] The equal protection issue in these cases was not resolved due to problems relating to "standing." For example, in Ray Baille Trash Hauling, Inc. v. Kleppe,[40] a small, nonminority business engaged in refuse hauling challenged the Administration of the SBA and the Secretary of the Air Force's noncompetitive placement of subcontracts for refuse disposal at an Air Force base. Among the arguments advanced by the plaintiffs was that the Section 8(a) program overwhelmingly favored applicants from certain racial and ethnic groups, and thus violated the equal protection rights of nonminority contractors. Although the court of appeals upheld the discretionary authority exercised by the SBA under its regulations and rejected a substantive due process attack on the noncompetitive nature of Section 8(a) contract awards, it found that because the plaintiffs had neither applied for participation in the program nor contended that they were eligible, or that they were entitled to get the contract, they lacked standing to raise an equal protection challenge.[41]

By 1977, the SBA revised its standard operating procedures to eliminate the appearance of racial preference by using nonracial and nonethnic factors in determining social or economic disadvantage.[42] These revisions prohibited the qualification of an applicant based solely on race,

creed, or ethnic origin.[43] Despite these revisions, minority-owned small businesses continued to receive major focus as potential contractors despite the general ineffectiveness and inefficiency of the administration of the program.[44] The inefficiency of the administration of the program included circumstances such that many of the businessmen in the program were not eligible to be there because they were not, or never were, economically or socially disadvantaged; that through inadequate negotiation procedures, many Section 8(a) contracts were significantly over or under the fair market price: and that there were few criteria for determining when, if ever, a Section 8(a) contractor should leave the program.[45]

II. Legislative Initiatives

During the 1970's, government sought to encourage the development of MBEs primarily through expanding government contract procurement opportunities. The administrative program for MBE set-asides developed by the SBA under the general set-aside authority of Section 8(a) of the Small Business Act was the primary vehicle to accomplish this goal. Initially, eligibility for the program was based upon establishing social or economic disadvantage; however, eligibility for the program evolved to a point at which only specified racial and ethnic group members or those able to prove social disadvantage could obtain program benefits. Generally speaking, the administratively-developed MBE set-aside proved to be largely ineffective.

Despite the fact that the Section 8(a) Program grew rapidly,[46] evidences of clear program abuse unfolded.[47] One example of such an abuse included the situation where sponsorship programs, under which the SBA encouraged white-owned and nondisadvantaged businesses to provide management services, training, and capital to disadvantaged small businesses, became agreements for the sponsoring businesses who would often retain control of the 8(a) firm.

Gradually, Congress began to recognize that the efforts made by the Federal government to assist MBEs directly amounted to little more than a minimum level of assistance primarily designed to keep civil and social protests down to a politically acceptable level. This recognition eventually resulted in the creation of statutorily-authorized programs such as the Local Public Works Capital Development and Investment Act of 1976 (LPW)[48] which gave birth to the Public Works Employment Act of 1977.[49]

Congress enacted the Local Public Works Capital Development and Investment Act of 1976 (LPW) to help alleviate nationwide unemployment in the economically depressed construction industry. Under the LPW, state or local government "grantees" can obtain federal funds for public works projects. When additional funds were appropriated in 1977, section 6705(F)(2) was added to the LPW. This section conditions the award of construction grants upon the grantee giving assurance that at least 10% of the grant will be used to employ minority business enterprises. A minority business enterprise (MBE) is defined by the statute as a business at least 50% of which is owned by minority group members. Thus, to comply with the MBE provision, a state or local grantee must obtain a commitment from prime contractors bidding on the contract that at least 10% of the grant will be set aside for minority subcontractors or suppliers. In the event that there are insufficient qualified MBEs within a reasonable proximity to the particular locality, the grantee can apply for a waiver of the MBE requirement. Thus, the MBE provision placed conditions on applicants seeking to qualify for federal grants.[50]

The original of the provision was an amendment to the House version of the 1977 Act, H.R. II, offered on the floor of the House on February 23, 1977 by Representative Parren Mitchell of Maryland.[51] As offered, the amendment provided:

> Notwithstanding any other provision of law, no grant shall be made under this Act for any local public works project unless at least 10 per cent of the articles, materials, and supplies which will be used in such project are procured from minority business enterprises. For purposes of this paragraph, the term "minority business enterprise" means a business at least 50 percent of which is owned by minority group members or, in case of publicly owned businesses, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

The sponsor stated that the objective of the amendment was to direct funds into the minority business community which, based on past experience with government procurement programs had not benefitted significantly from the public works program then in existence.[52] Representative Mitchell noted that in fiscal year 1976 less than 1% of all federal procurement was granted to MBE's although minorities comprised 15-18% of the population.[53]

The concept of MBE percentages being used as a means of increasing MBE procurement participation was not a new one.[54] However, non-minority contractors attempted to get injunctions preventing the enforcement of section 6705(f)(2). Challenges to the provision were made on the ground that since no specific findings of previous discrimination were made, the provision was unconstitutionally preferential, rather than remedial in nature.[55]

With pressure continuing to mount resulting from the use of the rigidly-enforced MBE set-aside program under the 1977 Public Works Bill and from on-going controversy over recent judicial decisions involving the concept of preferential treatment such as in DeFunis v. Odegaard,[56] Congress (under H.R. 11318) was prompted to reveal findings admitting that certain named minority groups have been discriminated against and, as a result, have suffered disadvantage. Thus, it became legislative intent to use federal resources to develop competitive MBEs to alleviate this economic disadvantage. This intent was reinforced by findings by the Government Accounting Office (GAO) that only 33% of more than 3700 firms who had ever participated in the Section 8(a) Program had graduated from the program and had a positive net worth. Consequently, Congress decided it was time to extend legislative control over the 8(a) program. It enacted reforms to the Small Business Act in 1978, which were included in Public Law No. 95-507.[57] It should be noted that until Public Law 95-507 was signed by President Carter on October 24, 1978, there was no specific statutory coverage or recognition of Federal procurement from minority businesses.

There are several provisions of Public Law 95-507 which are of interest to both small and minority businesses, Section 211 of Public Law 95-507 amends section 8(a) of the Small Business Act and requires, generally, that the apparent successful offeror or low bidder on large federal contracts (more than $1,000,000 for contracts for construction of any public facility, and over $500,000 for all other contracts) submit, before award of the contract, a subcontracting plan

setting forth percentage goals for the utilization as subcontractors of small business concerns owned and controlled by socially and economically disadvantaged individuals. The prime contractor also must describe the efforts it will take to assure that such firms have an "equitable opportunity" to compete for subcontracts.

The requirements of Public Law 95-507 differ significantly between contracts awarded under procurement by negotiation and those awarded as a result of formal advertising. As to contracts resulting from negotiation (approximately 70 percent of the total dollar value of Federal contracts is through negotiation), the law specifically requires that the apparent successful offeror "negotiate with the procurement authority a subcontracting plan" which incorporates percentage goals for small, socially and economically disadvantage concerns. Further, "that no negotiated contract shall be awarded to any offeror unless the procurement authority determines that the plan to be negotiated by the offeror . . . provides the maximum practicable opportunity" for small and small disadvantaged concerns to participate in the performance of the contract (section 8(d)(4)(D)). The plan must be "included in and made part of the contract" (section 8(d)(4)(B)(iv)). Failure of the contractor "to comply in good faith" with the terms of the plan is stated by the statute to be a "material breach" of the contract (section 8(d)(8)).

The requirement for subcontracting plans does not apply to small business prime contractors, to contracts under the prescribed amounts, or to prime contracts not offering subcontracting possibilities. The law also binds the prime contractor to require that each of its non-small business subcontractors receiving a contract over $500,000 ($1,000,000 for construction) develop a subcontracting plan pursuant to the requirements of the statute.

Additionally, section 221 of Public Law 95-507 adds a new subsection (g) to section 15 which provides that each Federal agency shall, after consultation with the SBA, establish goals for the participation in the agency's procurement contracts by small businesses and small businesses owned by socially and economically disadvantaged persons. The goals must reflect realistically the potential of the small and small disadvantaged companies to perform such contracts and subcontracts under such an agreement. If the SBA and the Federal agency fail to agree on a goal, the disagreement is to be submitted to the Office of Federal Procurement Policy for final determination.

Section 221 of Public Law 95-507 also requires the establishment in "each Federal agency having procurement powers" of an Office of Small and Disadvantaged Business Utilization. The director of each such office must be appointed by the agency head and "be responsible only to, and report directly to, the head of such agency or to his deputy."

The 8(a) Program, which is administered by the SBA and has been the center of much public controversy, relied, until the passage of Public Law 95-507, on the original language of Section 8(a) of the Small Business Act of 1953. That provision authorized the SBA to enter into contracts with a department or agency of the United States and to subcontract the actual performance to "small business concerns and others," with no specific mention of minority businesses.

Under the SBA regulations[58] that implement Section 8(a) of the Small Business Act, it has been stated that "it is the policy of the SBA to use such authority to assist small business concerns

owned and controlled by socially and economically disadvantaged persons to achieve a competitive position in the marketplace."

Public Law 95-507 (section 202) for the first time provided clear-cut statutory legitimacy to the 8(a) Program by amending section 8(a) of the Small Business Act to provide, specifically, that the SBA will subcontract, to "socially and economically disadvantaged small business concerns," federal contracts for construction work, services, manufactured supplies, etc. Socially and economically disadvantaged concerns are those owned and controlled by socially and economically disadvantaged individuals. "Socially disadvantaged" individuals, under Public Law 95-507, are "those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities." "Economically disadvantaged" individuals are "those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged."

As previously noted, SBA is now statutorily restricted by Public Law 95-507 in its "8(a) subcontracting" to concerns owned and controlled by individuals who are both socially and economically disadvantaged. The groups identified by findings of the new law, with respect to SBA's business development program, as "having suffered the effects of discriminatory practices" include, but are not limited to "Black Americans, Hispanic Americans, Native Americans, and other minorities" (Section 201 of Public Law 95-507 establishing new Section 2(e)(1)).

Section 221 of Public Law 95-507 added a new subsection (j) to Section 15 of the Small Business Act to provide that "each contract for procurement of goods and services which has an anticipated value of less than $10,000 and which is subject to small purchase procedures shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns" that are competitive in terms of price, quality, delivery, etc.

Pursuant to the authority of Section 15(a) of the Small Business Act of 1953 which set forth a general requirement for placing contracts with small business concerns, the regulations of the procurement agencies and the SBA provided for a Government-wide small business set-aside program which required contracting officers to set aside any procurement of more than $2,500 if sufficient small business concerns are available to supply the required item.

Concerning this matter, it should be noted that Section 221 of Public Law 95-507 (1) "reserve[d]" for small business contracts of less than $10,000 and (2) established the "reservation" requirement in Section 15(j) separate and distinct from the existing set-aside program operating under the authority of Section 15(a).

Throughout the years, federal initiatives to assist minority businesses have survived hailstorms of criticism. Concerns have been raised both as to the nature of the programs and their actual administration. Such issues have included the legality of the preferences, the exclusion of non-minorities and women-owned businesses ("WBEs") from participation, the uneven distribution

and apparent concentration of 8(a) awards to firms located in certain geographical regions, political corruption, and the length of time required for the processing of certification applications. The 8(a) Program has also been criticized for failing to be sufficiently comprehensive in the scope of assistance offered to DBEs for purposes of facilitating their development into economically viable and competitive firms. Conversely, criticism from other quarters have charged that the program is no more than "welfare" - permitting DBE firms to participate indefinitely and without regard to the firms' growth or continuing need for governmental assistance.

Consequently, Congress decided that in order to improve the program, insure its integrity, and to further the competitive goals of the effort, it was necessary to reform the 8(a) Program so that it may better realize the Congressional objectives upon which it was based. The Business Opportunity Development Reform Act of 1988 (Pub. Law 100-656, 102 Stat 3855 (1988)) reaffirmed the objectives of the Small Business Ownership Development Program and measured success by the number of 8(a) firms that graduate from the program and become competitive in the economic mainstream.

Section 201 of the Act amended the eligibility requirements of the Program to limit an individual upon whom eligibility for the Program is based to such eligibility for only one small business concern. In addition, the Act clarifies that an individual who was determined to be eligible for the 8(a) Program prior to June 1, 1989 may not assert such eligibility for any other business concern that applies for certification after June 1. The Act also prohibits business concerns from subsequent participation in the program if they previously graduated, were terminated, or voluntarily resigned from program participation. Transfer of ownership is allowed when the transferee is socially and economically disadvantaged. (Pub. L 100-656, Sect 201)

The new law created a Division of Program Certification and Eligibility within the Office of the Associate Administrator for Minority Small Business and Capital Ownership Development. The Division is responsible for processing 8(a) applications and challenges to claims of disadvantaged status. Also, the Division will hear appeals on denied 8(a) applications.

Section 202 of the Act amended the law to provide for a specific time limit and stages of participation of the 8(a) Program. A newly-admitted firm may participate in the program for a total period of nine years. The nine-year term is divided into two stages for program participation: a developmental stage, which will last no more than four years, and a transitional stage, which will last no more than five years. During the developmental stage, participants receive from the Administration:

1. contracts;
2. financial assistance in the form of SBA guaranteed or direct loans;
3. exemptions from bonding and other legal requirements on federal construction projects;
4. exemptions from the "regular dealer or manufacturer" provisions of the Walsh-Healey Act (which has been a barrier to DBE participation on federal procurement contracts);
5. employee training, with the cost reimbursed to eligible training providers; and
6. transfers of technology and surplus property owned by the federal government.

Firms in the subsequent "transitional stage" receive similar assistance but are not entitled to training grants or exemptions from bonding and other legal requirements.

To ensure competitive viability of 8(a) firms once they leave the program, Public Law 100-686 mandated competitions among program participants for certain contracts. Contract opportunities in manufacturing in an amount above $5,000,000 and all other contract opportunities above $3,000,000, (including options) will be awarded on the basis of competition if there is a reasonable expectation that at least two participants will submit offers and that the award can be made at a fair market price. For contracts below the threshold, SBA is required to make sole source awards on the basis of an equitable geographic distribution of contracts.

Another provision relates to strengthening requirements for subcontracting plans as mandated under P.L. 95-507. Contracts awarded to other than small businesses which are above a certain threshold ($500,000, or $1 million, if construction) must contain subcontracting plans. Because investigations have found many instances of non-compliance by prime contractors, all contracts
must contain a clause requiring the payment of liquidated damages if a prime contractor fails to act in good faith effort to comply with its plan.

Public Law 100-686 also amended the law by adding a new definition for "graduation." It states that "graduation" means that the participant firm is recognized as having successfully completed the program by substantially achieving the targets, objectives and goals contained in the participants' business plan and thereby demonstrating its ability to compete in the marketplace without assistance under the Program.

Criticisms and reforms notwithstanding, the SBA's 8(a) Program and Public Law 95-507 have proven effective initiatives to ensure the participation of minority-owned businesses on federal procurement and construction contracts. And as now configured, P.L. 95-507 may be considered the modern cornerstone of the federal effort to assist small and disadvantaged businesses (SDBs). Under the latter legislation, the President is required to establish a government-wide goal for SDB utilization at not less than five percent of the total value of all prime contracts. Moreover, in consultation with the SBA, each agency, in consultation with the SBA, must establish an annual procurement goal which may not be less than the five percent government-wide goal.

Other significant initiatives include:

* The Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), Public Law 100-17, which requires the Department of Transportation (DOT) to expend not less than ten percent of federal highway and transit funds with SDBs. State and local recipients of federal transportation funds are also required to establish specific annual goals for SDB participation on their highway and transit construction contracts.

* The Airport and Airway Safety and Capacity Expansion Act of 1987, Public Law 100-223, which requires the DOT to expend not less than ten percent of federal airport improvement funds with SDBs. The law also requires individual airports to ensure, to the maximum practicable extent, that SDBs obtain at least ten percent of airport concession contracts.

* Section 1207 of the National Defense Authorization Act of 1987, Public Law 99-661 (and its reauthorization at P.L. 101-189), requires the Department of Defense (DOD) to award five percent of the total value of DOD procurement contracts to minority firms, historically black colleges and universities and other minority institutions. Achievement of DOD's goal is obtained through the use of set asides (where competition for certain procurement contracts is limited exclusively for bidding of SDBs) and a subcontracting initiative (under which DOD prime contractors are required to submit plans and goals for the utilization of SDB subcontractors).

Additional federal laws providing for expenditures with minority-owned businesses include:

* The Omnibus Diplomatic Security and Anti-Terrorism Act of 1986 (Public Law 99-399), authorizes funds over a five-year period for the Department of State to construct and maintain U.S. embassies abroad. This law requires that 10 percent of the total value of its contracts be awarded to minority construction companies in the United States.

* The Superfund Amendments and Reauthorization Act of 1986 (Public Law 99-499), authorizes funds over a five-year period to clean up hazardous waste sites throughout the country. While there is no specific set-aside goal or quota in this legislation, it does require the Environmental Protection Agency to submit to Congress an annual report on contracts awarded to minority businesses under this legislation.

* The Competitive Equality Banking Act of 1987 (Public Law 100-86), designed to recapitalize the Federal Savings and Loan Insurance Corporation (FSLIC), extends the forbearance or capital recovery program to viable and well-managed minority-owned thrift institutions primarily serving minority communities and directs the Treasury Department to expand the use of minority-owned thrift institutions primarily serving minority communities and directs the Treasury Department to expand the use of minority-owned S&Ls for Federal deposits.

* The Foreign Operations, Export Financing, and Related Programs Appropriations Act for FY 89 (Public Law 100-461), sets a goal of awarding at least 10 percent of the dollar value of the Agency for International Development's bilateral assistance contracts to SDB enterprises, minority colleges and universities, and private and voluntary organizations controlled by minorities or women. Known as the "Gray Amendment", this provision has been renewed by Congress every year since 1984 and includes women in its definition of economically and socially disadvantaged individuals.

* The Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (Public Law 101-73), contains provisions to: preserve the present number of minority-owned banks (Sec. 308); ensure their opportunity to participate in the bidding process for failed institutions (Sec 501) and in the purchase of obligations issued by the Resolution Trust Corporation (Sec. 511); increase the use of minority banks, women's banks and limited income credit unions as depositories or financial agents of Federal agencies (Sec. 1204); and ensure the inclusion of minority and women-owned firms in contracting opportunities with Federal banking and failure resolution agencies (Sec. 1216).

* Public Law 101-101, making appropriations for energy and water development for FY 90, provides that the Secretary of Energy shall, to the fullest extent possible, ensure that at least 10 percent of Federal funding for the development, construction and operation of the Superconducting Super Collider be made available to SDBs (including WBEs) and minority educational institutions.

* Public Law 101-144, making appropriations for Departments of Veterans Affairs and HUD and independent agencies for FY 90, requires the National Aeronautics and Space Administration annually to establish a goal that at least eight percent of the total value of prime and subcontracts awarded in support of authorized programs, including the space station by the time operational status is obtained (estimated to be July 1997), be made available to SDBs and minority educational institutions.

* Public Law 101-167, making appropriations for foreign operations, export financing and related programs for FY 90, changes the Gray Amendment from a goal to a set-aside by requiring that not less than 10 percent of development assistance funds and funds for African famine relief be made available for SDBs (including WBEs), historically black colleges and universities, and other minority institutions.

* The Foreign Relations Authorization Act, Fiscal Years 1990 and 1991 (Public Law 101-246), requires the Secretary of State to: establish a pilot program of voluntary set-asides to increase SDB participation in contract, procurement, grant, and research and development activities funded by the Department of State and the United States Information Agency (Sec. 126); allocate not less than 10 percent of the amount of funds obligated for local guard contracts for Foreign Service buildings abroad for contracts with U.S. MBEs (Sec. 136); and make available to U.S. SDBs not less than 10 percent of the amounts available for U.S. contracts for the broadcasting relay station in Israel (Sec. 301).

In addition to the market access initiatives identified above, the federal government also provides technical and financial assistance to MBEs:

* The U.S. Department of Commerce funds the operation of approximately 95 Minority Business Development Centers (MBDCs) located throughout the country. The centers provide management and technical assistance to minority entrepreneurs to help them start, expand and manage their businesses.

* The SBA's 7(a) Program provides financial assistance to existing MBEs through loan guarantees to a limited number of small business entrepreneurs who are in possession of good business plans but who are unable to obtain financing from conventional commercial lending institutions.

* The SBA also helps finance MBEs through its assistance to privately-owned Minority Enterprise Small Business Investment Companies (MESBICs) which provide equity funds and long-term loans as venture capital for start-up cost, research and development, operating expenses, modernization and expansion. MESBIC financial assistance to MBEs often takes the form of equity-type investments by which the MESBICs will share in the future growth and profits

of the firms.

III. Judicial Sanction of Set-Asides

Despite the suspect nature of racial classifications, the courts have recognized that remedies for prior discrimination must consider race in order to fully eradicate the effects of previous discrimination. In Regents of the University of California v. Bakke,[59] one of the most controversial civil rights cases in a number of years, the Supreme Court held that a medical school's special admissions program for minority applicants, by totally foreclosing consideration of non-minorities, was illegal, but that race may nevertheless be used as a factor in the admissions process.[60] Justice Powell's plurality opinion emphasized that any racial distinction is "inherently suspect" and requires the "most exacting scrutiny."[61] He stressed that findings of racially discriminatory practices were a prerequisite to instituting a remedial program based on race, and distinguished the preferential hiring cases under Executive Order 11246 as based on the determination of previous discrimination made by a legislative or administrative body.[62] Moreover, he emphasized that congressionally authorized administrative actions are not affected by the Bakke decision, [63] and reaffirmed "the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.[64]

Justice Powell's emphasis upon findings of racially discriminatory practices as being a prerequisite to instituting a remedial program based on race was supported by the decision in Weber v. Kaiser Aluminum & Chemical Corp.,[65] where the training plan requiring the admission of one minority worker to the training program for every white worker admitted until the percentage of minority craft workers reached the approximate percentage of the minority population in the surrounding area, was invalidated under Title VII of the Civil Rights Act. The program was undertaken voluntarily by Kaiser in an attempt to comply fully with the requirements of Executive Order No. 11246. The court's ruling was based on a finding that there had been no history of discriminatory hiring or promotion at Kaiser, and that the plan was therefore not an equitable remedy, but an unlawful racial preference prohibited by Title VII.[66]

Prior to 1980, the Supreme Court had failed to resolve the constitutional legality of racial preferences in affirmative action programs.[67] However, in Fullilove v. Klutznick,[68] the Court upheld, against a constitutional challenge, the legality of a minimum ten-percent set-aside provision, in favor of MBEs, contained in the Public Works Employment Act of 1977.[69]

The MBE provision, [70] as previously discussed, requires that, absent an administrative waiver, at least 10% of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members. Petitioners in Fullilove, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation, and air conditioning work, filed suit for declaratory and injunctive relief in federal district court, alleging that they had sustained economic injury due to enforcement of the MBE requirement and that the MBE provision on its face violated, inter alia, the equal protection clause of the Fourteenth Amendment and the equal protection component of the due process clause of the Fifth Amendment. The district court[71] upheld the validity of the MBE program, and the Court of Appeals affirmed. On certiorari, the Supreme Court affirmed stating that the MBE provision of the 1977 Act, on its face, does not

violate the Constitution. The important issues addressed by the Court were as follows:

1. Congress' objective to ensure that, to the extent federal funds were granted under the Act, grantees who elected to participate would not employ procurement practices that Congress had decided might result in perpetuation of the effects of prior discrimination which had impaired access by minority businesses to public contracting opportunities, was within the spending power of Congress under the Constitution (Art. I, Sec. 8, cl. 1);

2. The set-aside provision's limited use of racial and ethnic criteria constituted a valid means of achieving the objective so as not to violate the equal protection component of the due process clause of the Fifth Amendment; and

3. The set-aside provision was justified as a remedy serving the compelling governmental interest in eradicating the continuing effects of past discrimination identified by Congress, and that since the requirement was constitutional, there was also no violation of Title VI of the Civil Rights Act of 1964.[72]

Despite the decision in Fullilove that the MBE set-aside was constitutional on its face, no single rationale in favor of the validity of the statute commanded a majority. Two plurality opinions, each representing the views of three members of the Court and approaching the issues differently, accounted for the six votes in favor of the program's legality. There were two vigorous dissenting opinions. Thus, although it can be argued that Fullilove raises serious questions concerning the precedential value of the decision since it was a plurality decision, it can also be declared that Fullilove resolved numerous questions in the area of affirmative action: namely,

1. Set-asides based upon race may be imposed by Congress;

2. Past societal discrimination may be a basis for congressionally imposed affirmative action;

3. All set-asides based upon race even for benign remedial purposes, will be closely scrutinized; and

4. Some sort of findings of past discrimination must be the predicate upon which set-aside programs based upon race are imposed.

The Supreme Court revisited this issue in the case of City of Richmond v. J. A. Croson, 488 U.S. 469 (1989). The Court specifically distinguished between the standard of review to be applied in evaluating federal set-aside programs and the "strict scrutiny" that the Court would apply to similar race-conscious MBE programs as enacted by state and local governments. Reaffirming the Fullilove decision, the Court held in Croson that the U.S. Congress would be accorded greater latitude than state legislatures and local organs of government in remedying the on-going effects of past discrimination. Moreover, the Croson decision provided greater insight as to the nature of the factual predicate as required under "strict scrutiny" analysis to justify the adoption of race-conscious set-aside programs. The Court indicated that a compelling governmental interest standard could be met through the demonstration of statistical disparities between the availability and utilization of minority-owned firms, as well as anecdotal evidence of

specific instances of discrimination in the marketplace.

IV. The Future of Federal Affirmative Action to Assist MBEs

The MBE set-aside, as successfully utilized in the Public Works Employment Act of 1977, can be an effective affirmative action tool, especially when it is supported by prior legislative determinations of a compelling governmental interest to eradicate the injustices within our system brought about by past and present practices of discrimination. Unfortunately, due to legal uncertainties regarding the constitutional underpinnings for affirmative action, it does not appear that the use of MBE set-asides will become more widespread in the United States. Under the Carter Administration, federal assistance to MBE's de-emphasized developmental needs and reduced the federal effort to one of "goaling". Moreover, that part of President Carter's urban policy package which included an MBE set-aside provision for the creation of a three-year Labor Intensive Public Works program failed to gather sufficient congressional support.[73] Under the Reagan Administration, the developmental purpose behind federal assistance to MBEs was eliminated. Moreover, even "goaling" was diminished as a mechanism for affirmative action. The Bush Administration has continued this trend, and the current federal policy seeks to speak only in terms of "non-discrimination", and not affirmative action.

V. The Need

When Congress passed the Small Business Act of 1953, it expressed its legislative intent that the government had to do more than "make its best effort" to award contracts to small businesses. Congress realized, after years of urging and frustration that without special preference, small businesses would not be able to compete their way into the government procurement arena.

In retrospect, 38 years later, the small and minority business community must continue to struggle to gain its proper place in the nation's economy.

Since 1977 the federal procurement budget has increased to more than $100 billion each year. Yet, in 1977 MBEs received less than 1 percent of this money. By 1980, MBEs received about 3 percent. While such gains are promising, much remains to be accomplished. MBEs continue to receive less than five percent of the federal procurement budget.

There is a great need within our current federal procurement policies, as they relate to minority business concerns, to reaffirm the purposes of Public Law No. 95-507, which mandates generally that each federal agency set goals and establish programs to increase minority procurement activity. Strong reaffirmation of this law should come first from the President and this effort should not be subordinated to budget considerations as is presently the case. Generally, there is the need to raise the awareness and conscience of Congress that in the area of federal assistance to small and disadvantaged business, inequality cannot be considered either socially acceptable or legally permissible.

Additional program needs of small and disadvantaged businesses are as follows:

o sources of equity capital

- o tax incentives
- o movement from traditional to non-traditional minority businesses
- o accessible bonding
- o improved bidding packages
- o training programs in high technology areas
- o increased subcontracting opportunities

A national commitment to promote the development and on-going viability of minority owned business must meet these needs with consistent satisfaction.

This twenty-five year development of federal assistance to MBEs should be perceived as an integral part of promoting national economic opportunity. Federal economic and financial policy plays a crucial role in small business viability. Thus, it is important that federal departments involved in these areas be consistently sensitive to small business needs. With such sensitivity, small and disadvantaged businesses are likely to flourish and to contribute generously to the enhancement of the general economic welfare of the nation.

Recommendations

The following recommendations reflect general principles that should be applied in any affirmative action program that seeks to remedy the effects of marketplace discrimination through a national government apparatus. The American experience with such MBE programs has clearly demonstrated that the remedy must be comprehensive in order to be effective. It is of paramount importance that the remedy embodies elements that address each and every identified barrier to full participation by disadvantaged persons in the economic mainstream:

Recommendation One: The government must provide market access through mandatory set-asides of procurement opportunities for that class of firms whose ownership has been victimized by racial discrimination. Such set-asides should exist at both prime contract and subcontract levels to provide incentives for market entry and capacity expansion by such firms. Such set-asides should also cover the full spectrum of purchased goods and services to promote diversification.

Recommendation Two: Government must review and adjust all regulations to insure that their application does not have a disproportionately adverse impact upon market entry and growth for socially and economically disadvantaged firms. Long-term contracts and contract specifications that give unfair advantage to incumbent firms must be especially scrutinized.

Recommendation Three: Enforcement of the government program must be integrated into and monitored through the normal procurement process. Procurement personnel should have direct responsibility for program implementation and a significant portion of their job performance evaluation should be tied to this job element.

Recommendation Four: Program implementation should address the distinctly differing needs of firms that are in the start-up, transitional, and mature stages of development. Technical assistance (e.g., estimating, marketing, bookkeeping, contract administration), financial assistance and market access features of the program should be tailored to these varying needs. A full range

of contract sizes from small to large should be incorporated into the set-aside program to permit market access for these firms in a accordance with their stages of development.

Recommendation Five: The government must provide sufficient financial support for firms participating in the program to enable them to successfully compete for the complete contracts. Such financial support can come in a variety of forms including requirements for government to pay prime contractors and prime contractors to pay subcontractors promptly, contract financing or advance payments, and incentives for private equity financing. The severe wealth gap that results from institutionalized racial discrimination is a major obstacle to business formation and growth among victimized classes.

Recommendation Six: The government must require full disclosure on the part of financial institutions and sureties regarding commercial lending and bonding practices. Affirmative action goals for equitable financing to program participants must be imposed upon financial institutions and carefully monitored. Such disclosure requirements must be accompanied by vigorous enforcement of anti-discrimination laws, especially with respect to price discrimination by suppliers, discrimination by financial institutions in lending practices, and discrimination by sureties in issuing bid and performance bonds.

Recommendation Seven: Program features and administration should be uniform for the entire government procurement process. Simplicity in the certification process for eligible participants should be sought. As the goal of the program is to facilitate the development of competitively viable firms, care should be taken to avoid unnecessarily burdensome bureaucratic requirements and duplication of effort that increases the costs to participants and thereby diminishes their competitiveness. However, care should also be taken to ensure that the program participation is limited solely to legitimate minority-owned firms whose socio-economical status and/or history of discrimination warrant their inclusion as intended beneficiaries. Procedures to "weed out" illegitimate firms actually owned and/or controlled by non-minority persons (i.e., "front companies") should be established. Participants engaged in fraudulent fronting activity should be vigorously prosecuted and severely punished. Moreover, firms should be graduated out of the program once they attain a certain level of competitive viability. Competitive viability should be measured by objective industry-specific standards, such as average market share for established successful firms, or demonstrated ability to successfully penetrate the private sector.

ENDNOTES

1. See Small Business Act. 13 U.S.C., Sec. 2(A) (1958).

2. See e.g., 41 C.F.R., Sec. 1-1.1300 to 1-1.1300-2 (1977) (requiring federal prime and subcontractors to take positive steps to seek out and use MBE's in federal contracts; "4Rs Act," 905, 45 U.S.C.A., Sec 803 (West Supp. 1978); 49 C.F.R., Sec. 265.1, 265.7(a)(5) (1977) (race can be taken into account as part of an affirmative action remedial scheme).

3. Sherman Act, 15 U.S.C., Sec 1, et seq. (1890).

4. Clayton Act, 29 U.S.C., Sec. 52 & 53 (1914)

5. Federal Trade Commission Act, 15 U.S.C., 41 et seq (1938).

6. The Robinson-Patman Act. 15 U.S.C., Sec 13, 13a, 13b, 21a (1936).

7. The Temporary National Economic Committee Act, ch. 438, 52

8.The Smaller War Plants Corporation Act of June 11, 1942. Pub. L. No. 77-603, ch. 404, Sec 4(f), 58 Stat. 353, 154 (1942).

9. The Reconstruction Finance Corporation Acts, 15 U.S.C., Sec. 601 et seq. (1932).

10. The Small Defense Plants Administration Act of July 31, 1951. Pub. L. No. 82-96. ch. 275, Sec. 71 4(b)(I)(P)(C). 65 Stat. 131, 140 (1951).

11. See U.S. COMM'N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 2 (1975).

12. This problem has been noted frequently in Congress; See, 115 CONG. REQ. 19383 (1969) (remarks of Sen. Bayh) (quoting National Business League report indicating that 70% of Negro contractors report losing contracts due to inability to secure bonding).

13. See U.S. Comm'n on Civil Rights, supra note 12, at 24-28. See also, 116 Cong. Rec. 18888-89 (1970).

14. See M. HALL & O. SCOTT, MINORITY ENTERPRISE AND PUBLIC POLICY 29 (congressional Research Service Monograph No. 77-177e 1977). Undercapitalized firms are hurt most during periods of recession as a result of the increased inaccessibility to financing and credit. Moreover, higher supply costs, interest rates and wages during inflationary periods weaken MBEs competitive positions.

15. See Hearings on H.R. 567, 4960 and 2379 Before the Subcomm. on Minority Enterprise and

General Overnight of the House Comm. on Small Business. 95th Cong., 1st Sess. 3, 42 (1977) (Statements of Reps. Addabbo and Mitchell) (discrimination is the simple reason why minority enterprise has not kept up with national minority population growth).

16. See Small Business Act, Sec. 15 U.S.C. 633-4(c) (1958).

17. Pub. L. No. 83-163, 67 Stat. 232 (1953), as amended by Pub. L. No. 85-536, 72 Stat. 384, (1958). and at various times thereafter. (currently codified at 15 U.S.C., Sec. 631 et seq).

18. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 98 S. Ct. 2733 (1978).

19. See, generally, U.S. COMM'N ON CIVIL RIGHTS, MINORITIES AND WOMEN AS GOVERNMENT CONTRACTORS 29, n.54, at 35 (May 1975).

20. 15 U.S.C., Sec. 637(a) (1958).

21. Pub. L. No. 85-536 Sec. 2(8). 72 Stat. 389 (1958).

22. Act of Aug. 12, 1970, Pub L. No. 91-375, Sec. 6(g) 84 Stat. 778 (current version at 15 U.S.C. 637 (1970).

23. Id.

24. See, Pub. Law No. 85-536, 72 Stat. 384 (1958).

25. Id.

26. See, S. Rep. No. 1714, 25th Congress. Sess. at pp. 9.10.

27. See, Small Business act, 15 U.S.C., Sec. 637-8(d)(1)(1968).

28. Pub. L. No. 88-452, 78 Stat. 508 (1965).

29. Pub. L. No. 89-794, 80 Stat. 1451 (1966).

30. Pub. L. No. 90-222, 81 Stat,. 672 (1967) (repealed 1974).

31. Pub. L. No. 90-222, Sec. 106(a), 81 Stat. 672 (1967)

32. See, REPORT ON THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 236 (March 1, 1968).

33. Exec. Order No. 11,458, 3 C.F.R., Sec. 779 (1968-1970 compilation), as amended by Exec. Order No. 11,625, 3 C.F.R., Sec. 616 (1971-1975 compilation), reprinted in 15 U.S.C., Sec. 631 (1976).

34. Exec. Order No. 11,518. 3 C.F.R. 907., Sec. (1976), reprinted in 15 U.S.C. App 839

(1976).

35. Exec. Order No. 11,625, 3 C.F.R. Sec. 616 (1971), reprinted in 15 U.S.C. App., Sec 631 (1976).

36. S. Rep. No. 1070, 95th Cong., 2d Sess. 7 (1978), reprinted in [1978] U.S. CODE CONG. & AD NEWS 3835, 38-42.

37. 13 C.F.R., Part 124.8-1(c) (1977).

38. Exec. Order No. 11,625, 3 C.F.R., Sec. 616, 620, reprinted in 15 U.S.C. App., Sec 631 (1976).

39. See, e.g., Ray Baillie Trash Hauling, Inc. v. Kleppe, 477 F.2d 696, 701 (5th Cir. 1973), cet. denied, 415 U.S. 914 (1974); Massey Services, Inc. v. Fletcher, 348 F. Supp. 171, 175-76 (N.D. Cal. 1972).

40. 477 F. 2d at 701.

41. Cf., Bakke v. Regents of University of California, 18 Cal. 3d 34, 553 P. 2d 1152, 132 Cal. rptr. 680 (1976), cert granted, 429 U>S> 1090 (1977) (in Bakke, the plaintiff did apply for school admission whereby establishing "standing").

42. See, Small Business Administration 8(a) Contract Procurement Program: Hearings before the Senate Select Committee on Small Business, 94th Cong., 2d Sess. 249-57 (1976).

43. Id.

44. In 1977, the House Committee on Small Business issued a lengthy report evaluating the ongoing Section 8(a) program. This report summarized a previous 1975 committee report entitled "Minority Enterprise and Allied Problems of Small Business". The 1975 report concluded "There are substantial section 8(a) opportunities in the area of Federal construction, but...the practices of some agencies preclude the realization of that potential." See, H.R. REP. No. 94-1791 (1977); H.R. Rep No. 94-468 pp. 1-2 (1975).

45. See, Small Business Administration 8(a) Contract Procurement Program: Hearings Before The Select Comm. on Small Business, 94th Cong., 2d Sess. 149-57 (1976).

46. In fiscal year 1969, 8.9 million dollars worth of government procurement contracts had been awarded under the program; by 1971, the amount had grown to 64.5 million dollars, and two years later, to 208 million dollars. A total of 3,726 businesses were awarded 2.2 billion dollars in contracts between fiscal years 1968 and 1977. See, OFFICE OF MANAGEMENT AND BUDGET, INTERAGENCY PROGRAMS 20 (1978); S. REP. NO. 1070, 95th Cong., 2d Sess. 13 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 3835, 3848.

47. One such serious abuse uncovered in the section 8(a) program's administration was the group proliferation of 8(a) "fronts," which one Senate report described as groups of minority members

with little or no education or business experience who posed as company officers to qualify a firm for the program. See, Minority contracting: Joint Hearing before the Senate Select Committee on small Business and the House Subcommittee on Minority Enterprise and General Overnight of the Committee on Small Business. 95th Cong., 2d Sess. I (1978); Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs, 95th Cong., 2d sess. REPORT ON HEARINGS AND INQUIRES CONDUCTED ON THE SBA INVOLVING ABUSES IN THE 8(A) PROGRAM AND IRREGULARITIES CONCERNING MINORITY BUSINESSES. 3-4 (Comm. Print 1978).

48. Pub. L. No. 94-389, Title I, 90 Stat. 999 (current version at 42 U.S.C., Sec 6701-10)(1976 Supp. II, 1978).

49. Pub. L. No. 95-28, 91 Stat. 116 (1977) (codified at 42 U.S.C., Sec. 6710) (Supp. II 1978) (amending 42 U.S.C., Sec. 6710 (1976).

50. See, 42 U.S.C., Sec. 8705 (1976 ed. Supp. II).

51. 123 CONG. REG H1388 (Feb. 23, 1977)(remarks of Rep. Mitchell).

52. Id., at H1388-H1389.

53. Id., at H1389.

54. See, Note, Federal Contract Compliance: Use of Special Contract Provisions to Encourage Minority Employment, 8 Loy. U.

55. See, e.g., Wright Farms Constr., Inc. v. Kreps, 444 F. Supp. 1023 (D. Vt. 1977); but see Associated Gen. contractors v. Kreps, 446 f. Supp. 553, 567 (D.R.I. 1978).
56. DeFunis v. Odegaard, 84 Wash. 2d 617, 529 P. 2d 438 (1974).

57. Act of October 24, 1978, Pub. L. No. 95-507, 92 Stat. 1737-73 (1978) (codified in scattered sections of 15 U.S.C.). The basis for this legislation was H.R. 11318 of the 95th Congress which sought to amend the Small Business Act to institute procedures to ensue small business concerns owned and controlled by socially and economically disadvantaged individuals were given the maximum practicable opportunity to participate in public procurement, construction, and service contracts.

58. 13 C.F.R., Sec. 124.8-1 (1977).

59. See 438 U.S. 265 (1978).

60. 98 S. Ct. at 2764.

61. Id. at 2749.

62. Id. at 2754-55.

63. Id. at 2755.

64. Id. Reference to Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968) and Katzenbach v. Morgan, 384 U.S. 641 (1966) as examples of Congress passing appropriate legislation under its section 5, fourteenth amendment and section 2, thirteenth amendment powers to remedy the efforts of previous discrimination. 98 S. Ct. at 2755.

65. Weber v. Kaiser Aluminum & Chemical Corp. 563 F. 2d 215 (5th Cir.) (1977).

66. Id. at 224

67. Cf. Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (where the court held that the university's denial of admission to a white applicant constituted racial discrimination in violation of Title VI of the Civil Rights Act of 1964 and that race may be considered in a school admission's program without being a per se violation of equal protection; DeFunis v. Odegaard, 416 U.S. 312 (1974) (where the court never discrimination because of mootness).

68. Fullilove v. Klutznick, 100 S. Ct. 2758, 2781-82 (1980).

69. See, note 43, supra.

70. See, note 43 supra.

71. Most district courts denied preliminary injunctive relief in similar cases triggered by the MBE set-aside provision. See, e.g., Michigan Chapter, Associated General contractors v. Kreps, No. C.A.M-77185 (W.D. Mich. Jan 4, 1978); Florida East Coast Chapter, Associated General contractors v. Secretary of Commerce, No. C.A. 77-8351 (S.D. Fla. Nov. 3, 1977).

In other cases, the provision was declared unconstitutional. See, e.g., Wright Farms Construction, Inc. v. Kreps, 444 F. Supp. 1023, 1037 (D. Vt. 1977) (unconstitutional as applied).

72. See Civil Rights Act of 1964. 42 U.S.C. 2000d et seq. (which broadly prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance.

73. Bills introduced into the House and Senate incorporating that proposal failed to pass. See, S. Rep. No. 3186, 95th cong. 2d Sess. 124 Cong. Rec. S8845 (daily ed. June 3, 1973); H.R. No. 12993, 95th cong. 2d Sess., 124 Cong. Rec. H5062 (daily ed. June 7, 1978).

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INDIGENISATION OF ENTERPRISE THROUGH LAW: LESSONS FROM KENYA

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I. INTRODUCTION

Jurists have debated the role that law plays in carrying out required economic, social, and political developments.[1] We cannot review that debate here. We, however, support the view that law does not exist in a vacuum. Its role is necessarily within the historical and socio-economic of a country. If we ignore the non-legal phenomena--economic, social, cultural, political, ideological--then the truth is not in the whole. In this paper we will attempt to show how Kenyan legislation since independence has reflected specific historical and socio-economic developments in the country. The legislation is restricted to the area of "Africanisation"--later "Kenyanisation" or "indigenisation"--of enterprise.

Part II of the paper deals with the relevant historical background which will bring out some historical, socio-economic parallels between Kenya and South Africa. We shall here give the facts and let the South African draw the parallels.

Part III of this paper gives a detailed account of the relevant legislation, its aims, and implementation. Part IV will deal with an appraisal of the implementation; that is, the sucesses and/or failures of the legislation. Part IV will also attempt to discuss the lessons South Africans may draw from such an appraisal. In our view, a free non-racial and democratic South Africa may benefit from these lessons.

II. A BRIEF HISTORICAL SKETCH OF KENYA: POSSIBLE PARALLELS?

Archeologists have established that the first man on earth lived in Kenya. There is evidence, too, that at Lukenya, 25 kilometres from Nairobi, 15,000 years ago cattle were being domesticated.[2] History records evidence of an astronomical observatory in Kenya 300 years B.C.[3] In the field of medicine, history also records that among the Masai, in treating pleurisy and pneumoritis, they could induce partial collapse of the lung.[4] History similarly records that the various indigenous communities in Kenya had autonomous developments: struggling against nature, becoming herders and cultivators, developments in metallurgy and trade, etc.[5] These autonomous developments ceased with the invasion and occupation of the country by the British in the latter part of the 19th century. This occupation was preceded by the explorers "discovering" falls, mountains, lakes, etc. Of particular interest was the sighting of Mount Kenya in Kitua by Dr. Krapf in 1859. Krapf, a German missionary, must have asked one of his guides the name of the mountain. Kitui is the country of the Wakembi. He must have been told that the name of the mountain was Kinyaa (a place where there are ostriches, kirinyaga in the Gikuyu language). They had seen the mountain from time immemorial. Krapf must have recorded the response as "Kenia." The British baptised the country Kenya. Kirinyaga still exists as a district in the

Central Province of Kenya.

The invasion and occupation of Kenya by the British was resisted by the people right from the beginning. Resistance started at the least. As the building of the railway proceeded, the maneaters of Tsaro (lions) stopped the progress of construction of the railway. Whether it is a weird sense of humour or not, it has been suggested that these lions were spirits of African nationalists who put up a fight against the occupation. The British occupied Kenya with the might of the gun. The so-called pacifying missions were military expeditions which resulted in the murder of the Kenyan people. In 1920 Kenya was declared a British colony.

The British occupation facilitated the growing of foodstuffs and raw materials in the country which also became an area of investment of British capital and a market for its manufactured goods. White settlers were allocated fertile land in the Highlands, then called the "White Highlands," and they proceeded to grow foodstuffs and raw materials for British people and industry respectively. The white governors participated in the ruling of the country in the Legislative Assembly. The colonial administration was run by British civil servants. Some of the white people were involved in commerce along with Asians and Arabs. They all facilitated the distribution of British manufactured goods. British capital was used in all economic ventures.

The Africans lost their land. They were forced to work for the Europeans. Under legislation that allowed taxation, the Africans had to work to pay these taxes. They were segregated. The so-called native reserves were created. Segregation existed in growing urban areas. The Kipande (Pass) controlled the movement of the African and facilitated the sale of his labour power. The Africans were consumers of British manufactured goods.

In the area of enterprise,[6] the Africans were denied credit and wholesale business. They started off as retail shopkeepers, rans teashops and ox-carts. These developments persisted during the colonial period. Some African bought lorries for transport and built more permanent shops by using stone. African tailors worked for Asians and Europeans, and later some bought their sewing machines and worked in shops. Chiefs, herdsmen and clerks--Africans who had regular incomes from the colonial administration--invested in ventures requiring more capital; for example, water-powered maize mills and diesel-powered mills. African artisans were developing also. Gavin Kitching has written:

> Thus by the early 1950's a comparatively clear picture of African trade and business emerges. It was for the most part concentrated on the classical middleman function--buying in order to sell--and its major profits (perhaps all its profits) came from the purchase and resale of

African agricultural produce. Its most successful exponents were those who had managed to combine the capital resources to buy in bulk with the ability to transport the bulked produce. For this group, though bearing risks, were able to capitalise on the market imperfections of an agricultural system which almost annually produced surpluses in some areas and shortages in others.[7]

In 1945 some industrialization did start in Kenya. It was the beginning of what was to be called "local" industry, the setting up of plants by foreign multinationals in their competition for markets. Manufacturing and finance still remain a foreign enclave.[8]

As stated earlier, British occupation of Kenya was resisted. This resistance culminated in the Mau Mau War of Independence from 1952 to 1958. At independence in 1963, some of the Mau Mau patriots were still in the forests. This war did speed up independence. While the armed struggle continued, led by such great patriots as Dedan Kimadhi, the Constitutionalists (in 1957 seven Africans were elected to the Legislative Assembly. In 1958 the number was increased to fourteen) urged a peaceful transition to African majority rule. From 1954 the British administration quickly started preparing Kenya for independence. Land adjudication and consolidation gave titles to land to Africans. Wages were reviewed. Africans were elected into the Legislative Assembly. Political parties and unions were legalised. KANU, the political party that rules Kenya today, was formed in 1960. It is significant also that on April 12, 1960, the Credit to Africans (Control) Ordinance was repealed. We will discuss this ordinance below. On December 12, 1963, Britain granted Kenya her independence.

The substance of independence achieved from the British soon became an issue for debate. Was Kenya independent and developing? Some said this was so. Others said Kenya was not yet Uhuru (independent) and it was going through a process of underdevelopment. This latter view pointed an accusing finger at foreign domination. There was, however, a consensus: the basic needs of all the people--food, shelter, clothing, clean water and environment, health, education, democratic participation in the affairs of the country, right to work, etc.--were yet to be realized.

The people's democratic rights guaranteed by the Constitution cannot be taken for granted. People have had to stand up and fight for them. The ruling group has found the upholding of these rights an obstacle to development. The institution of the presidency is the embodiment of arbitrariness, non-accountability, and concentration of power in an individual. Neither King Henry VIII nor Louis XIII or XIV or XV or XVI could operate a constitution

based on a Westminster model!

The current debate on political pluralism sums up the obstacles to Uhuru. The debate does not offer solutions because it is a power struggle within the status quo. While the demands of the multiparty advocates for 1)their rights to participate in the political affairs of the country; 2) the rule of law and respect for human rights; and 3) accountability, democracy, and strengthening of institutions in society should be supported, crucial issues are definitely left out. Other groups in Kenya have demanded economic and social rights which will guarantee the basic needs of all the people. There are demands, too, against the economic, military, and political domination of the country by the West. These post-independence debates and struggles are crucially relevant to events unfolding in new non-racial and democratic South Africa.

III. ENHANCING INDIGENOUS ENTERPRISE: POLICY AND LEGAL REFORM

Independent Kenyan government policies[9] were to remove impediments to the enhancement of indigenous enterprise, end discrimination in the field of enterprise, support indigenisation of commerce and industry through furnishing of credit; favour citizens in all these fields at the expense of non-citizens, and attempt to create an autonomous national economy controlled by indigenous people. Legal reform played a crucial role in the implementation of these policies. The Constitution of Kenya[10], the supreme law of the land, did contain a Bill of Rights and specific provisions against discrimination on the basis of race, tribe, place of origin or residence, or other local connection, political opinions, colour, creed, or sex.[11] It did contain a provision against compulsory acquisition of property except where certain conditions were satisfied--mainly, in the public interest. Prompt and full compensation had to be paid upon compulsory acquisition of an individual's property.[12]

The Bill of Rights, and such provisions in the Constitution, while granting Africans rights hitherto not enjoyed, also safeguarded vested interests that had crystalised during the colonial period. Thus two cases decided by the High Court of Kenya after independence are illustrative.

In Madhwa v. City Council of Nairobi[13], the facts were as follows: in December 1966, the Nairobi City Council, in pursuance of its "Africanisation of Commerce" policy, passed a resolution to serve notices to quit on six non-citizens of African origin who had tenancies of stalls in the Municipal Market at Muindimbingu Street, Nairobi. These tenants sought to have the notices declared void as conflicting with certain provisions of the Constitution. Harris J. held inter alia that the resolution of the Council was "discriminatory" within the meaning of Section 26(2) of the Constitution (now Section 82 of the 1969 Act) by reason of the

preference shown in favour of those persons who were termed "Anglicans" as against "non-Africans" and that giving the notices to quit in pursuance of the resolution constituted treating the plaintiffs in a discriminatory manner. The notices were, therefore, void and ineffective.

In Shah Vershi Dershi & Co. Ltd. v. The Transport Licensing Board[14] the appellant had been refused the renewal of some of its transport licences by the respondents. The appellant successfully applied for an order of certiorare quashing the decision of the respondents. The evidence clearly revealed that the respondents had discriminated against the appelant on grounds of race.

The Consitiutional provisions on the compulsory acquisition of property and distribution of land were successfully invoked 1) to acquire agricultural land in the White Highlands held by European farmers and had to be acquired for the settlement of Africans; 2) to retire some non-African public servants so as to give way to Africans; 3) to refuse a large number of non-African non-citizen traders trading licences under the Trade Licensing Act, 1967.

The Trade Licensing Act was a reflection of government's policy to encourage Kenyans to enter the commercial sector. The Act gave the government powers to embark upon a programme of Kenyanisation of commerce by limiting the number of trade licences given to non-citizens and raising the number of Kenyan traders. Non-citizens wre denied licences to trade in rural areas. They sold their shops and businesses mainly to Africans. Overnight the rural areas of Kenya had very few non-African traders. In the urban areas the non-citizens were licenced to carry on businesses in what the Act called general business areas. These were by and large the central streets in urban areas.

The Africans or Kenyans were able to acquire shops and businesses because of the availability of credit. The Credit to Natives (Control) Ordinance, 1948, (the successor of the 1903 Act) which controlled the granting of credit by non-natives to natives in excess, in aggregate of a sum of two hundred shillings, was repealed in 1900. In 1907 the Industrial Development Act was amended and the Industrial and Commercial Development Corporation (ICDC) was set up. It has disbursed large and medium loans. It owns Kenya Industrial Estates, which "provides not only finance to purchase equipment but also ready-made factory premises." It has implemented the small loans scheme to buy property and industrial, commercial, and machinery enterprises.

In 1965 the Kenya National Trading Corporation (KNTC) was established. Its main objective was to assist in the transfer of commerce from non-Kenyans to citizens and to engage in state trading activities. Through this corporation Kenyans became wholesale distributors of commodities handled through the corporation. They were also able to compete with non-Kenyans for

the distribution of goods manufactured by multinationals. The National Chamber of Commerce was expected to reinforce these endeavours.

The government's implementation of the findings of the Ndegwa Commission (Report on the Commission of Inquiry: Public Service Structure and Remuneration Commission) in 1971 resulted in the public servants' in business subject to avoiding conflict of interest or bringing the service into disrepute. Public servants thereafter played a key role in the Kenyanisation of commerce.

Availability of business premises was essential for the expansion of the commercial sector. The Africans did start off as tenants in particular in urban areas. The Landlord and Tenant (Shops, Hotels, and Catering Establishments) Act, 1965,[16] was passed to protect such tenants from evictions, increases of rent, and what the Act termed as exploitation.

The Companies Act[16] and the Registration of Business Names Act[17] which had been passed during the colonial period were invoked by Kenyans to form companies and businesses in areas where such legal form was necessary to acquire credit. Some Kenyans who were farmers turned to business as well, and commercial banks loaned money to Kenyans. Two local banks, Kenya Commerical Bank and National Bank of Kenya, started operations in 1970, the former acquiring assets and liablilities of National and Grindlays Bank, a foreign bank.

Under the Banking Act[18] Kenyans have formed and transacted banking and financial businesses. Kenyans had traded and accumulated such amounts of money capital as could satisfy the provisions of the Banking Act

Since independence, the government has been committed to development through private foreign investment. The corporations such as ICDC have had, as part of their funding, foreign sources. Foreign loans and grants have been used to implement the policies of Kenyanisation. The corporations have also entered into joint ventures with multinationals in various manufacturing projects. So have individual Kenyans. JK Industries Ltd. and Madhupaper International Ltd. are examples of Kenyans venturing into manufacturing under joint venture arrangements. The Foreign Investments Protection Act, 1964, has protected these joint ventures. Multinationals or individual foreign investors are allowed under the Act to repatriate management fees, technical fees, dividends, profits, and even capital in hard currency. The Exchange Control Act[19] facilitates this repatriation. It also allows the investor to borrow locally or to seek overdraft facilities.

The independent Kenyan government position on nationalisation of private property was spelled out in Sessional Paper No. 10,

African Socialism and its Application to Planning in Kenya. It is stated:

> The Constitution and the KANU Manifesto make it clear that African socialism in Kenya does not imply a commitment to indiscriminate nationalisation. These documents do commit the Government to prompt payment of full compensation whenever nationalisation is used...
>
> Nationalisation, since it does not always lead to additional resources for the economy as a whole, will be used only where the national security is threatened, higher benefits can be obtained, or productive resources are seriously and clearly being misused, when other means of control are ineffective and financial resources permit, or where a service is vital to the people and must be provided by the Government as part of the responsibility to the nation.[20]

Since independence, the Kenyan government has nationalised the Kenya Broadcasing Corporation.[21] This was in 1964. In April 1970 the government purchased 51% of shares of East African Power and Lighting Company Limited. In 1970, the Government acquired the assets and liablities of National and Grindlays Bank Ltd. and founded the Kenya Commercial Bank.

IV INDIGENISATION OF ENTERPRISE IN KENYA: AN APPRAISAL AND THE LESSONS

What did the policies achieve? Was the legislation effective on the ground?

There is no doubt that the Trade Licensing Act did successfully place Kenyan citizens in the distributive trade. In rural areas Africans bought out Asians who were by and large non-citizens. The availability of credit through mainly ICDC and KNTC did help much. Those citizens who were tenants got a half-hearted protection from the Rent Act mentioned above. The Kenyan businessman beefed up the ranks of the middle class which was comprised of Europeans and Asians. Some citizens acted as business fronts for the non-citizens, but this was always a temporary measure. There were applications for citizenship by Europeans and Asians. It is common knowledge that the very rich persons in these communities had no problem acquiring citizenship. This process was a source of corruption on the part of the African public servants. Funds for investment in business by African public servants in part came from this source. As for the British citizen, becoming a Kenyan citizen was a convenient way of carrying on business and benefiting from the programmes instituted by the government. The

British citizens knew they could resurrect their citizenship whenever they chose to return to Kenyan citizenship. It can be argued that in allowing non-citizens to become Kenyan citizens, the vested interests under colonialism were consolidated and the citizens came to face the same disadvantages they faced during colonialism. In the area of enterprise, a non-racial social group grew sharing similar interests. The Landlord and Tenant (Shops, Hotels, Catering Establishments) Act is illustrative in this aspect. While when the Act was passed in 1963 Africans constituted the tenants, by the 1970s some Africans had become landlords. Their tenants were not only Africans but non-Kenyans as well. The material interests of these Kenyans had changed and their property rights as landlords became paramount. The half-heartedness of this Act was maintained.

Kenyans have not become captains of industry in the country.[22] They have no national economy, no national capitalists. The colonial roles have become neo-colonial roles. The country is still dominated, ecomomically, militarily, and politically, by Western interests. Western multinational corporations still dominate the small manufacturing sector and the entire finance sector. Joint ventures have not resulted in national control of the economy. The so-called local industry is nothing but the setting up of multinational subsidiaries within the country. The local financial institutions have not fared better. A large number collapsed, a couple still carry on. While research on the courses of this failure is yet to be throughly done, it is safe to state that the institutions were badly managed. Others acted as money lenders and set out to swindle the people and accumulate capital that way. Others faced political hostility from certain local quarters and this hampered their performance. There was, however, a basic common denominator. All these financial institutions have and still have their accounts with multinational banks and their capital is controlled by such banks. The local financial institutions have become branches of multinational banks. It is also common knowledge that they do not handle foreign transactions.

The reasons for this state of affairs is simple. Kenya still remains foreign dominated. The ruling group is an agent of this foreign domination. The ruling group is non-racial. It excels in dominating efforts by nationals who venture into the manufacturing sector. It competes with multinationals in the repatriation of foreign currency from the country. What they have striven to do since independence is give the Africans some space in the Kenyan capitalism and it is arguable that they have succeeded in this. There has been no nationalisation. Public corporations have worked hand in hand with multinationals. These corporations have always had huge losses mainly because their capital has been looted by elements of the ruling class that controlled them. There is now much talk about their privatisation. It is very likely that these elements, who are responsible for the collapse of the corporations, will now buy them for a song. These elements will then continue

the join venture arrangements which may result in huge profits for them.

The Export Free Zones (EPZ) is the recent extension of the local industry scenario. Kenyan businessmen will be involved in manufacturing for export. This is the beginning of the experiences in Taiwan, Thailand, Korea, Hong Kong, South Africa, Mexico, Jamaica, Sri Lanka, Morocco, Panama, etc.[23] The initiative is clearly not national and our workers are set to compete with others elsewhere around the globe in providing cheap labour to multinational corporations.

It is up to the South Africans to decide the kind of society they want.[24] If they want some space for Africans in South African capitalism, Kenya does offer revealing lessons. Our analysis has been general. An in depth analysis of the various programmes, legislation may reveal particular peculiarities which may be of interest to South Africans.

The crucial issue of foreign domination cannot be underestimated.[25] As in Kenya, the forces are the same notwithstanding that South Africa is a semi-industrialised country. Indigenisation of business will come up against the same economic, social, and political hurdles that Kenyans have faced. The multi-racial democracy will safeguard vested interests while allowing African participation.

V. CONCLUSION

Citizenship may not be a card to use in affirmative action in new South Africa. The constitutional provisions against discrimination, the dismantling of legal hurdles in the path of African participation in the South African economy, and equitable distribution of resources in the country can indeed give the Africans space in South African capitalism. The crucial question for South Africa is whether or not this is what South Africans want.

1. See, for example, David Williams, "Law and Socialist Rural Development," 6 Eastern Africa Law Review (1973):200; W. Mutunga, "Development Through Law: The Search for a Liberation Legal Theory fro the Developing Countries," Mimeo, 1980; R. Siedman, "Law and Economics in Independent English Speaking, Sub-Saharan Africa," ed., T.W. Hutchinson Africa and Law (Wisconsin:1968); Okoth-Ogendo, "Development and Legal Process in Kenya: An Analysis of Law in Rural Development Administration" 12 International Journal of the

Sociology of Law (1984):59; Yash Ghai, "The Role of Law, Legitimacy and Governance," in eds. Ghai, Luckman, Synder, The Political Economy of Law (Delhi: Oxford University Press, 1987):253; David Sugarman, "Theory and Practice in Law and History: A Prologue to the Study of the Relationship between Law and Economy from a Socio-Historical Perspective," in eds. Fryer, Hunt, Barrett, Moorhouse, Law, State and Society (London: Crown Helm Ltd., 1981): 70-106; Francis Snyder, "Law and Development in the Light of Dependency Theory," 14 Law and Society Review 1979-80:737.

2. Ed:, Ivan Van Sertima, Blacks in Science, p.20.

3. Ibid. p.10

4. Ibid. p.10.

5. Ed., O.A. Ogot, Zamani (Nairobi: EALR, 1972).

6. Gavin Kitching, Class and Economic Change in Kenya: The Making of an African Petite-Bourgeoisie (New Haven: Yale University Press, 1980), Chapter 6.

7. Ibid. p.186.

8. Who Contols Industry in Kenya N.C.C.K. 1965 updated by R. Kaplinsky in 1076; Olin Leys, Underdevelopment in Kenya (Berkeley: University of California Press, 1974); Steve Langdon, Multinationals in Kenya, (Nairobi, Heinmann, 1980).

9. See generally the Development Plan since independence.

10. Act 5 of 1969.

11. S.82 of the Constitution.

12. S.75 of the Constitution.

13. [1968] EA 406

14. [1971] EA289

15. CAP 301 Laws of Kenya

16. CAP 486 Laws of Kenya

17. CAP 499 Laws of Kenya

18. CAP 488 Laws of Kenya

19. CAP 113 Laws of Kenya

20. Pages 26-27.

21. Vide the Kenya Broadcasting Corporation (Nationalisation) Act CAP 221.

22. There is of course a debate about this. There has been an argument that such a social group is emerging or has emerged. See N. Swainson, "The Rights of National Bourgeoisie in Kenya," 8 ROAPE (1977); Steven Langdon, "Industry and Capitalism in Kenya: Contributions to a Debate," ed., Lubeck, The African Bourgeosie Capitalist Development in Nigeria, Kenya, and Ivory Coast (Boulder, Lynne Rienner Publications, 1987); Bjorn Berkman, "Imperialism and Capitalist Transformation: Critique of a Kenyan Debate," 19 ROAPE (1980); Colin Leys, "Underdevelopment, Capital Accumulation, Class Formation and Dependency: The Significance of the Kenyan Case," Socialist Register (1978).

23. See C. Enloe, Bananas, Beaches and Bases (University of California Press, 1989) at p. 157:

> White South African government officials have encouraged foreign companies to set up shops in bantustans, a scheme intended to bolster apartheid and the fiction of self-sustaining Black "homelands." Companies from Hong Kong, Taiwan, and Israel have been among those to accept Pretoria's invitation.

24. "Show Me Another Way," ANC. A survey supplement to Financial Mail September 28, 1990, p.36.

25. D. Kaplan, "Internationalising South African Capital: South African Direct Foreign Investments in the Contemporary Period." African Affairs Vol. 83 pp. 465-94; J. Saul and S. Gelb, Crisis in South Africa (Monthly Review Press, 1981); M. Zipton, Capitalism and Apartheid in South Africa (Gower Publishing House Co. Ltd., 1985); NDELA, Seidman, et. al., Transnationals in Southern Africa (Harare: Zimbabwe Pulishing House, 1986). South Africa remains essentially an exporting country of mineral raw materials (gold, diamonds, etc.) and not of manufactured products.

National Employment Equity Programs:

A Canadian Perspective

on

Their Evolution and Implementation in the Private and Public Sectors

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1. Introduction

Canada's employment equity universe has been shaped by our political culture, by the evolving social expectations of Canadians, and by our rapidly diversifying workforce.

In any consideration of employment equity, the indispensable starting point is the fundamental fact of Canada's federal and parliamentary system: the distribution of powers between the federal government and the 10 provinces. The story of the shifting evolution of powers since Confederation in 1867, and for that matter with increasing urgency in the future, is in essence the political history of Canada. The nation also includes two vast and sparsely populated territories, Yukon and the Northwest Territories, which have a variety of internal self-governance but are not yet provinces.

Some of the comments that follow will touch on questions of concurrent and exclusive jurisdictions, but this discussion is mainly concerned with federal legislation and institutions that affect employment equity in the private and public sectors. For convenience's sake, I will concentrate on five major pieces of constitutional and statute law:

- the *Canadian Charter of Rights and Freedoms*, part of the *Constitution Act, 1982*
- the *Employment Equity Act*, 1986
- the *Public Service Employment Act*, 1967
- the *Canadian Human Rights Act*, 1977, and
- the *Canadian Multiculturalism Act*, 1988.

Similarly I will focus on the operations of the five federal government departments and agencies principally responsible in one way or another for administering those acts:

- the Department of Employment and Immigration
- the Treasury Board of Canada
- the Public Service Commission of Canada
- the Canadian Human Rights Commission
- the Department of Multiculturalism and Citizenship.

My summary observations at the end will serve as a kind of report card in lieu of a conclusion; as anyone experienced in the application of employment equity measures is only too well aware, the whole field more resembles an ever-receding moral horizon, something to be striven for, than it does something that is eventually and finally accomplished.

2. Equality and the Constitution

Most Canadians — but by no means all — would probably be surprised to learn how recently the whole notion of human rights has come to encompass equality rights. It was not until 1960, for instance, when Prime Minister John Diefenbaker brought in the *Canadian Bill of Rights*, that the legal basis for disenfranchising Aboriginal Canadians was removed. On the other hand, Supreme Court decisions soon made it clear that the *Bill of Rights* would be treated as any other federal legislation, and could be amended at the will of Parliament. Moreover, it applied only to matters within federal competence.

After long and occasionally acrimonious debate and negotiations with the provinces, the federal government unilaterally "patriated" Canada's constitution in 1982. Before that, because they were unable to agree on amending formulæ, much less provisions, both levels of government had tacitly agreed to let the written portion of Canada's constitution (the *British North America Act*, 1867) remain as a statute of the United Kingdom. The *BNA Act*, of course, had only been amended at Canada's request, and appeals to the Judicial Committee of the Privy Council had ended in 1949. It is noteworthy that the province of Québec was very strongly opposed to the process of patriation and the provisions of the future *Constitution Act*, refused to ratify the accord that would lead to patriation, and made firm representations to Westminster not to pass the U.K.'s enabling *Canada Act*.

The new *Constitution Act* of 1982 became "the supreme law of Canada" (Schedule B, Part VII, subsection 52.[1]), with an entrenched *Canadian Charter of Rights and Freedoms* covering fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights, official languages, and minority language educational rights (Schedule B, Part I).

In part reflecting the bargaining that led to patriation, however, the rights and freedoms enshrined in the *Charter* are circumscribed by two provisions. First, they are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (section 1). Second, and more significantly, the *Charter* provides that

> 33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision in section 2 [on fundamental freedoms] or sections 7 to 15 [on legal and equality rights] of this Charter.

Québec responded to this "notwithstanding" clause with Bill 62, subsequently passed in 1982, that provided for a new clause to be added to each Québec law stating that it operated notwithstanding the *Charter*.

With those limitations, the *Charter* is clear about both equality rights and what the headnote (but not the text) calls "affirmative action programs":

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Section 15 came into force on 17 April 1985.

It is equally clear in another section of the *Charter* (also under the "affirmative action programs" rubric) that provisions for mobility rights "do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada" (subsection 6. [4]).

3. Affirmative Action or Employment Equity?

In common with most Western liberal democracies during the 1970s and early 1980s, Canada and its federal parliamentarians grew increasingly sensitive to increasing demands from the underprivileged and disadvantaged. Social expectations were rising, and in Canada so was confidence in the state's ability to redress long-ignored grievances, most notably in employment opportunities.

Women in particular felt an expanding economic power as their participation rate in the labour force rose dramatically. The 1970 *Report* of the Royal Commission on the Status of Women in Canada, itself a direct response to the women's movement, had documented the treatment of women as an authentic social problem. The following year the federal government appointed the first Cabinet Minister Responsible for the Status of Women. The federally funded Canadian Advisory

Council on the Status of Women, set up in 1973, began to produce reports aimed at eliminating sexual inequality.

By 1980 projected trends suggested that women would comprise the majority of new entrants into the labour force during the decade, and by 1989 projections indicated that women would constitute an absolute majority of the labour force within 10 years. In 1986, 53% of community college and university graduates were women. The most recent (1990) forecast for visible minorities is that they will account for half the annual growth in the labour force by the end of the century.

During the first half of the 1980s the House of Commons set up a series of parliamentary committees, often the prelude to legislation, and the government established a Royal Commission. Each heard submissions and evidence from a broad spectrum of representatives and individuals. The titles of the parliamentary committees and of their reports suggest the groups who, in addition to women, would be the primary focus of later employment equity legislation — Aboriginal peoples, disabled persons and visible minorities:

- House of Commons Special Committee on the Disabled and the Handicapped, *Obstacles*, 1981
- House of Commons Special Committee on the Disabled and the Handicapped, *Follow Up Report: Native Population*, 1981
- House of Commons Special Committee on Indian Self-Government, *Report: Indian Self-Government in Canada*, 1983
- House of Commons Special Committee on Participation of Visible Minorities in Canadian Society, *Report: Equality Now!*, 1984, and
- House of Commons Sub-Committee on Equality Rights, *Equality for All*, 1985.

As it turned out, by far the most important study was that undertaken by Judge Rosalie Silberman Abella, appointed sole Commissioner of a Royal Commission of Inquiry on Equality in Employment in June 1983. She was specifically charged with looking into "the most efficient, effective and equitable means of promoting employment opportunities, eliminating systemic discrimination and assisting all individuals to compete for employment opportunities on an equal basis".

At the time of her Commission's research, the most accurate data on the four designated groups came from the 1981 decennial census of Canada, with additional data from Statistics Canada's monthly Labour Force Survey:

- Of a total labour force of slightly more than 12,000,000 people, about 5,000,000 or 41% were women, compared to 3,000,000 women or 35% ten years earlier.
- Statistics Canada interpretation of census data (which in Canada does not include race or skin colour), suggests that about 5.7% of labour force participants reported a single ethnic origin other than European: a figure that may approximate the number of members of the visible minority group.
- Of the 413,000 people reporting themselves as Aboriginal peoples, 123,000 were labour force participants; to these may be added a further 78,000 reporting mixed Native and other ancestry, which Statistics Canada classifies for statistical purposes as Aboriginal people.
- No data from either the census or the labour-force survey were available on disabled persons. A 1978-79 Canada Health Survey by Statistics Canada and the federal Department of Health and Welfare determined that there were 2,600,000 non-institutionalized disabled people in Canada, of whom approximately 1,700,000 were of working age.

From all this the Commission felt able to state that members of the four designated groups represent about 60% of Canada's population.

Judge Abella's final *Report of the Commission on Equality in Employment* (October 1984) was so cogently argued that in June 1985 the government introduced Bill C-62, the *Employment Equity Act*, based in large part on the Commission's recommendations. Covering Crown corporations and large federally regulated private companies, the bill passed both chambers and was proclaimed in August 1986.

Among its many merits, Judge Abella's report was useful in helping Canadians understand that the idea of equality did not mean only "sameness and that treating people as equals meant treating everyone the same":

> Equality in employment is not a concept that produces the same results for everyone. It is a concept that seeks to identify and remove, barrier by barrier, discriminatory disadvantages. Equality in employment is access to the fullest opportunity to exercise individual potential.

> Sometimes equality means treating people the same, despite their differences, and sometimes it means treating them as equals by accommodating their differences. (p. 3)

Consequently in the Commission's analysis of the *Charter*'s equality provisions, its report notes the "paradox at the core of any quest for employment equity: because differences exist and must be respected, equality in the workplace does not, and cannot be allowed to, mean the same treatment for all" (p. 13).

A further legacy of the Commission is its proposal that the term "employment equity" replace "affirmative action" to describe programs of positive remedy for discrimination in the Canadian workplace:

> Often the words themselves rather than the issues trigger intellectual resistance. Their use almost instantly produces a protective wall through which reason cannot easily penetrate.... People generally have a sense that "affirmative action" refers to interventionist government policies, and that is enough to prompt a negative reaction from many.... In devising their unique program, the Americans have called it affirmative action. In most people's minds, it has become associated with the imposition of quotas. In creating our own program in Canada, we may not wish to use quotas.... (p. 7)

Both "quotas" and "affirmative action" are now nearly taboo in the lexicon of the federal public service.

4. The Private Sector: The *Employment Equity Act* and the Federal Contractors Program, 1986

The *Employment Equity Act* has attracted a certain amount of international attention, both for its coverage and its implementation. It is administered by the Employment Equity Branch of the Department of Employment and Immigration, otherwise known as Employment and Immigration Canada (EIC), one of the largest federal departments.

The act applies to all federally regulated employers with 100 or more employees, in both the private and public sectors, but excluding the Public Service of Canada. In practice this means some 375 companies and institutions employing over 630,000 people. It includes large Crown corporations (companies owned by the government

but operating independently of it) and federally regulated banks, communications corporations, and air, rail and sea transportation companies.

Employers are responsible, first, for identifying and removing artificial barriers to the hiring, promotion and training of women, Aboriginal peoples, visible minorities and persons with disabilities, and with taking special measures to eliminate discrimination in the workplace.

Second, employers must work to achieve a representative workforce, reflecting the demographic makeup of the available labour force in the area. In other words, the employer's workforce should contain approximately the same proportions of the four designated groups, in each occupation, as are known to be available in the outside workforce.

Third, employers must report annually on their results, according to industrial sector, geographic location and employment status (full or part time). Reports must show the representation of members of the four designated groups in specific salary ranges, occupational groups, and by hirings, promotions and terminations. Failure to report may result in a fine of up to $50,000. The Employment Equity Branch of EIC verifies the reports, and companies are given an opportunity to submit additional documentation or clarification.

And, finally, employers must prepare an annual employment equity plan, with goals and timetables. They must keep each plan, together with the records used to prepare their annual reports, for three years.

Employers are also invited to include a voluntary executive summary to supplement their statistical information; the summary becomes part of the company's public record, and allows the company to highlight accomplishments that might not necessarily show up in the statistical information.

A closely related program, known as the Federal Contractors Program, has applied since 1986 to any company with 100 or more employees and that intends to enter a bid to supply the federal government with goods or services worth $200,000 or more. Any such company must commit itself to implement employment equity, and to certify its commitment as a condition of its bid. The company must then establish goals for the hiring and promotion of designated group members, eliminate policies and practices that hinder designated group members, and adopt special measures to ensure that the goals are achieved.

The additional coverage of the Federal Contractors Program is relatively large: 1,350 firms with over 1,000,000 employees have signed certificates of commitment. Enforcement, moreover, is strict. Failure to make a commitment to employment

equity could result in the bid's being declared invalid, and contractors who fail to live up to their signed commitments may be denied the opportunity of bidding for future business with the government. Successful bidders are subject to an on-site review by EIC officers; 720 employers are currently subject to compliance review, 141 have been found in compliance, and 202 are still under review.

Conversely, EIC offers service to employers such as seminars, technical information, and published guides to employment equity. EIC has 499 Canada Employment Centres across the country, and each region has experienced consultants to offer advice and assistance on implementing employment equity plans. A new Employment Equity Computerized Report System is now available to all federally regulated employers, and was used by one-third of them in the last reporting year (1989).

Through many of its employee-oriented programs for job-seekers, EIC includes special measures to increase the participation of designed group members, including funding for people with disabilities who are participating in training programs, training materials on audio cassette or in Braille, and outreach projects using community-based organizations. The Canadian Jobs Strategy and the new Labour Force Development Strategy both offer programs for designated group members who are not currently participating in the labour market.

The government believes that one of the most effective mechanisms for enforcing the *Employment Equity Act* is public scrutiny. All reports from employers are publicly available. The act requires that an annual report on employment equity be published and tabled in Parliament, and the report is distributed widely. A volume of tables consolidating the data reported by employers is issued as part of the annual report.

The annual report summarizes statistical changes in designated group representation in several ways, discusses representative information from the voluntary executive summaries at some length, provides an overview of the workforce under the act, presents detailed profiles of the designated groups, and assesses and ranks the results of all employers, by name. The annual report also identifies by name any company charged under the act for not filing a report, and prominently reports the results of the prosecution, normally a fine. For example, in the *1990 Annual Report: Employment Equity Act* (covering 1989), we read that

> one employer, Dicom Direct Communications Canada Ltd., was charged with not submitting its 1988 employment equity report by June 1, 1989. The company subsequently filed its report in December 1989. It pleaded guilty to the charge and was sentenced to a fine of

> $3,000 and costs. Its 1989 report was filed in June 1990, and it has committed itself to implementing an employment equity program. (p. 2)

The act provides for a review of its provisions and operations by a parliamentary committee; the first review will be held this year.

5. The Public Sector: The Treasury Board and the Public Service Commission

While the *Employment Equity Act* was the first mandatory effort to affect the private sector nationally, it did not of course emerge from a vacuum. Voluntary programs on behalf of women in the private sector were attempted after the Royal Commission on the Status of Women reported in 1970, and were given some impetus by International Women's Year in 1975. For the most part it appears that they had no discernible effect. And the Affirmative Action Directorate — now Employment Equity Branch — of EIC contacted more than 1,400 employers between 1979 and 1984 to encourage them to take part in a voluntary affirmative-action program; only 71 responded positively.

In the public sector, the Public Service Commission of Canada created an Office of Equal Opportunities for Women in 1971. Its voluntary sensitization work may be considered to be relatively successful, or it may be that the growing proportion of women in the labour force is reflected in the composition of the federal public service. Whichever the case, although the number of public servants dropped from nearly 280,000 in 1976 to some 222,000 in 1982 (because the post office became a separate employer in 1980), the proportion of women in the federal public service rose from 33.7% to 40.4%. The number of women in managerial positions, while very low, also rose from 2.4% to 5.4%. More revealing are salary figures; in 1983, the year after these statistics, 11.9% of male public servants earned less than $20,000, while 37.9% of women earned less than the same amount.

The Treasury Board of Canada instituted another voluntary program in the federal public service in 1978 to increase the participation of disabled workers. It estimated that by 1983 less than 0.5% of public servants were disabled, compared to 4.5% of disabled persons in the labour force.

And EIC has had a Black Employment Program since 1973 in Nova Scotia, dedicated to promoting employment among Nova Scotia Blacks in the federal public

service. By 1982, 2.2% of federal public servants in Nova Scotia were Black, compared to 4.5% in the Nova Scotia labour force generally.

a. The Treasury Board

Faced with these rather disappointing results, the government rethought its reliance on voluntary programs. Finally in 1983 it gave the Treasury Board the authority to implement a mandatory affirmative action program — including several "special measures" — within the federal public service. It extended the compulsory aspects of its policy to all Crown corporations, regardless of size, in October 1986; the depth of compliance with various analysis and planning requirements depended on the size of the organization.

The Treasury Board is a statutory committee of the cabinet, with overall responsibility for human-resources management, including personnel policies, systems and methods. Because it also has general authority under the *Financial Administration Act* for a broad variety of classification, pay, collective bargaining and policy functions, it is one of the most powerful of the central agencies. Its President, a cabinet minister, is usually a member of the inner cabinet.

The Treasury Board Secretariat was careful not to establish quotas as such. Instead it chose to call its aims "goals", or "targets". Initially it set goals only for the number of women in management; for instance, it announced that its target for women was to increase their participation from 217 in 1983 to 475 by the end of March 1988. To this end the Treasury Board established the Women's Career Counselling and Referral Bureau within the Public Service Commission, to increase the number of women in the senior management ranks. An advisory committee on disabled persons, women, visible minorities and Aboriginals (whose members are not public servants) assists the President of the Board. Four public service advisory committees, one for each designated group, also give advice on the specific employment concerns of each group.

The Secretariat identified the population of the other designated groups by a self-identification survey in 1985. Its first report, *On Target*, was published in July 1988, and data are now available on employment equity goals for all designated groups through to 1991. The Treasury Board Secretariat does not administer all of the government's employment equity policy itself, however; the job of operating Special Measure Programs of recruitment and staff development was delegated to the Public Service Commission.

b. The Public Service Commission

The Public Service Commission of Canada in its present form dates from 1967 and the passing of the *Public Service Employment Act*. It is independent, not a government department, and reports directly to Parliament. Headed by three Commissioners, each appointed for 10 years, it is responsible for the recruitment, hiring and promotion of Canada's federal public servants: more than 218;000 of them in some 60 departments of government and numerous Crown corporations, central agencies, commissions and tribunals. The federal government is Canada's largest single employer. The Commission audits the staffing of positions, and handles appeals of appointments; decisions of the Appeal Board are binding on the Commission.

Merit is the cornerstone of the Commission's staffing system. Effectively established by Prime Minister Borden in 1918, merit has long been understood to encompass two related concepts: that a reasonable opportunity to be considered for employment should be available to all Canadians, and that selection should be based on demonstrated skills and abilities to do the job.

The Commission develops and implements government-wide policies on staffing, sets selection standards and tests, and provides human resource planning and training programs. It administers several employee inventories, including those for employment equity target groups, employees wanting to transfer between departments, and external candidates seeking to enter the public service.

While setting policy across the public service, the Commission delegates much of its authority for staffing positions to departments. It retains outside recruitment authority, when needed skills and experience are not available within the service or when outside recruitment would best serve the needs of the public service. It also retains the authority for staffing to and within the management category.

A system that regulates the hiring, transfer and promotion of more than 200,000 public servants needs to be monitored for potential systemic discrimination. Since the early 1970s the Commission has tried to keep the staffing system fair and unbiased by reviewing selection tests for stereotyping, by tracking test results for fairness, by ensuring that women and men are equitably represented in the examples used in selection standards and in bench marks, and by issuing guidelines to increase the number of women on selection boards.

Efforts to eliminate systemic barriers can be derailed if managers and those hiring staff are not encouraged to broaden their understanding. The Commission offers training to all public service managers on how to use selection standards and educational alternatives. It provides tools to promote techniques for the valid

assessment of candidates, and has standardized general cognitive ability tests as alternatives to formal educational requirements.

The Commission's Management Trainee Program offers focused training in advanced management skills, and it uses enhanced recruitment strategies to attract designated group members.

The Commission gives courses to managers and supervisors who want to improve their abilities to coach and to be career development mentors for their staff. Modules on employment equity and managing diversity are integrated into management and supervisory courses, and in other areas of personnel management and human resource planning.

As a final administrative control, the Commission's cyclical audits examine those staffing practices that have been delegated to departments on a broad range of issues. Central among these are identifying systemic discrimination and reporting on departments' compliance with employment equity policy.

Within its regular mandate, the Commission has placed some emphasis on recruiting members of designated groups, particularly at the post-secondary level, through wide advertising in Aboriginal newspapers, national visible minority associations, women's centres and the National Educational Association of Disabled Students. Job notices are available to print-handicapped employees through a toll-free Automated Notice System. The Commission maintains a Technical Aid Loan Bank for employees with disabilities, providing no-cost short-term loans of devices to help them work with greater independence; it has contracted with a private non-profit foundation to conduct on-site technical needs analyses.

Recognizing that employment equity and managing diversity are fundamentally management challenges and responsibilities, the Commission also helps managers to improve the working climate for members of the designated groups: by consulting widely about innovations in managing diversity, by developing a diversity training strategy, and by encouraging members of designated groups to identify themselves in the Management Resources Information System, the main computerized source for candidates for management-level positions.

In essence, the challenge is learning how to extend equity *beyond* employment, so that we will have equity *in* employment. In other words, the challenge will be not only to attract and recruit talented workers from designated groups, but also to manage and value diversity within the workforce, and to see it as an integral aspect of sound human resource management.

The Commission has been at pains to stress that employment equity is part of the merit system, which is itself dynamic. As social attitudes changed, it became more and more clear to many Canadians that merit alone had failed them. For whatever reasons — social, political or economic; consciously or unconsciously — some qualified people were still not participating fully in employment opportunities.

The idea of special measures was not new to the federal public service. Before the Second World War, the ostensible Golden Age of the public service, it was largely an English-speaking male bastion. After the war, returning veterans were allowed special entry to the service for many years. And after the *Final Report* (1967-70) of the Royal Commission on Bilingualism and Biculturalism documented the English-French imbalances in the service, special efforts were instituted to increase the participation rate of francophones (a Gallicism now widely accepted in Canadian English).

The Commission administers five Special Measure Programs on behalf of the Treasury Board:

- the ACCESS Program, providing on-the-job training for persons with disabilities who require additional work experience to compete equitably for public service positions
- the Visible Minority Employment Program, which provides incentives to departments to recruit members of visible minority groups outside the public service
- the Northern Careers Program, in Yukon and the Northwest Territories, combining a variety of on-the-job and formal training opportunities in federal departments, particularly for aboriginal peoples
- the National Indigenous Development Program, for Aboriginal peoples, providing training and career-development opportunities in federal departments, and
- OPTION: The Non-Traditional Occupations Program for Women, providing incentives for on-the-job training, work experience and career-development opportunities in 38 identified non-traditional groups and subgroups. Non-traditional occupations are defined as those in which the current representation of women within the public service is not more than 30%, and the availability of women in the same areas is less than 30%; examples include fire-fighters, electronics and aircraft operations.

An occasionally controversial instrument available to the Commission is the Exclusion Approval Order, actually an Order in Council temporarily removing certain

restrictions on recruitment, hiring or promotion required under the *Public Service Employment Act*. An Order may be general, for a group of persons, or personal. For example, in 1990 the Commission recommended and had accepted an Appointment of Aboriginal Peoples Exclusion Approval Order to increase the participation and representation of aboriginal peoples in the Department of Indian Affairs and Northern Development. Details of Orders are always included in the Commission's extensive annual report.

6. The Canadian Human Rights Commission

The Canadian Human Rights Commission was established by the *Canadian Human Rights Act* in 1977; as the Commission noted recently, "Canada has been in the vanguard of those countries that have put institutional flesh on the bare bones of their international commitments on human rights". Those international commitments include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights (both covenants were ratified in 1976 with the unanimous consent of the provinces), and the Optional Protocol to the Civil and Political Rights Covenant. All Canadian provinces had human-rights codes by 1975, enforced by permanent commissioners.

The federal Human Rights Commission has fairly broad powers under the 1977 act to investigate and attempt to resolve, or order the resolution of, complaints filed with it alleging discriminatory practices or unequal treatment of individuals on a wide variety of grounds, including race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability, and conviction for an offence for which a pardon has been granted. In 1990 it received 873 new complaints, and by the end of the year had 1,900 active files. Complaints may be resolved by conciliation (189 attempts in 1990), or by formal tribunal (37 hearings in 1990). The Commission publishes an analytical annual report.

The Commission receives copies of employers' reports filed under the *Employment Equity Act*, and is seeking powers (which it does not now have) to enable it to conduct systematic reviews of those employers subject to the *Employment Equity Act*. The *Human Rights Act* incorporates the two principles of the removal of discriminatory job practices, and of the payment of equal wages for work of equal value, but it is normally up to an individual to lodge a complaint with the Commission. The Commission devotes part of its annual report to its own work on employment equity issues; it was involved in 78 actions in 1990.

7. The Department of Multiculturalism and Citizenship

While not strictly an agent of employment equity, in fact the new (1991) Department of Multiculturalism and Citizenship carries on a well-established history of federal government initiatives in race relations and inter-ethnic understanding. There is good evident that the term "multiculturalism" itself is a Canadian coinage.

Multiculturalism as a policy of cultural pluralism — recognizing all Canadians as full and equal partners in Canadian society — was first proclaimed by the federal government in 1971. In its 10-point statement of federal policy the *Canadian Multiculturalism Act* of 1988 recognizes that "multiculturalism is a fundamental characteristic of the Canadian heritage and identity" (paragraph 3.[1][a]), and further requires that all federal institutions shall "ensure that Canadians of all origins have an equal opportunity to obtain employment and advancement in those institutions" (paragraph 3.[2][a]).

The government has also tabled Bill C-63, *An Act to Establish the Canadian Race Relations Foundation*; the bill lapsed when the House of Commons prorogued in May 1991. Bill C-37, *An Act to Establish the Canadian Heritage Languages Institute* has passed the House of Commons and is now before the Senate of Canada.

Previously part of the Department of the Secretary of State of Canada, the functions of the former Multiculturalism Sector are being transferred to the new department, which also includes citizen registration and promotion, literacy, voluntary action and human rights sections. The minister is advised by a 37-member Canadian Multiculturalism Advisory Committee. Multiculturalism activities are organized in three main program areas:

- Race Relations and Cross-Cultural Understanding: promotes understanding through conferences, public-education campaigns (billboards, television public service announcements, information kits for schools) and by sponsoring 21 March as the International Day for the Elimination of Racial Discrimination; sponsors Awards for Excellence in Race Relations; is developing a National Action Plan on Police-Minority Relations in conjunction with police authorities, visible minority group representatives, and other levels of government; develops curriculum material for secondary schools; sponsors projects to encourage the participation and appropriate portrayal of minorities in the media and the arts; and sponsors workplace studies and projects for training in the health and social services fields.

- Heritage Cultures and Languages: promotes heritage languages through regional organizations, teacher training and curriculum development; assists and encourages scholarly activities in Canadian ethnic studies through research chairs, visiting lectureships, fellowships, conferences, and research grants on the economic and social aspects of ethnocultural groups in Canada; supports skill and professional development among minority and ethnocultural artists; facilitates the equal participation of those artists in artistic and cultural institutions; promotes public awareness of minority creative and cultural expression, including projects in broadcasting, film and audio-visual arts; and sponsors a wide-spread writing, translation and publishing program.
- Community Support and Participation: assists Canadians born outside Canada, whose basic settlement needs have been met, to overcome barriers to participation in Canadian life, by supporting community-based organizations and immigrant-serving agencies; assists organizations helping immigrant women facing discrimination, youth learning a new language, and seniors needing special services; supports the production of resource materials for health and social-service workers; supports research and information-sharing activities for first-generation Canadians; helps develop leadership training for representative organizations; and supports newsletters and congresses.

The department publishes an extensive annual report that includes a survey of multicultural activities, pro and con, in all federal departments and agencies, from the Law Reform Commission to the Royal Canadian Mint.

8. Summary Observations

If the Canadian experience in national employment equity programs has any lessons for others, surely it will centre in one precept. Employment equity can be achieved more effectively through a comprehensive, systems-based and results-oriented approach. It is imperative that this approach be actively supported through well-focused training and development tools for all employees, and be fully integrated in every aspect of human resource management.

Whether in the private or the public sector, furthermore, any mandatory program will most likely require a minimum of four objectives:

- the equitable representation of designated groups, taking into account work-force availability, the evolving social and economic situation of the groups, and the organizations' operational goals
- the identification and removal of systemic barriers in employment systems, policies, procedures and practices that have had an adverse effect on the employment and the career progression of the designated groups
- the implementation of special measures to correct the effects of employment disadvantages and to promote the work-force participation of the designated groups, and
- the training and development of managers, supervisors and employees in the skills required to manage and work effectively with a diverse workforce.

And, finally, it is a slow and incremental process. Consider the progress reported under the *Employment Equity Act* for private-sector companies and large Crown corporations, over the two years from the beginning of 1988 to the end of 1989:

- women increased their representation from 40.9% to 42.55%
- Aboriginal peoples increased their representation from 0.66% to 0.79%
- persons with disabilities increased their representation from 1.59% to 2.34%, and
- members of visible minorities increased their representation from 4.99% to 6.68%.

These are all very encouraging, but it is worth noting that in only one group did the representation meet or equal the group's representation in the labour force generally. The representation of visible minorities in the companies reporting under the act, 6.68%, now exceeds their representation of 6.3% in the general labour force.

In the federal Public Service of Canada, over the four years from the beginning of 1987 to the end of 1990:

- women increased their representation from 42.4% to 44.4%
- Aboriginal peoples increased their representation from 1.8% to 1.9%
- persons with disabilities increased their representation from 2.6% to 3.1%, and
- members of visible minorities increased their representation from 2.7% to 3.5%.

Again, although these are positive results, there is much more that must be accomplished in the equity domain.

The government's considered response to this progress in the public service highlights its assessment of areas that need strengthening. Most significantly, these points are included in a formal statement of policy, the White Paper on *Public Service 2000: The Renewal of the Public Service of Canada*; the government proposes:

- to base an important part of every manager's performance assessment on how he or she has promoted the development of women and minority groups
- to enhance training to help reduce previous inequities. As a starting point and until there is evidence of substantial improvement, efforts will be made to ensure that women and members of minority groups are over-represented in developmental programs, and
- to provide a firm basis for increasing the representation of women, aboriginal persons, members of visible minority groups and persons with disabilities at all levels of the Public Service, the Government proposes to amend the *Public Service Employment Act* to provide explicit authority to permit recruitment and promotion to redress imbalances, and to adopt a common job evaluation plan based on the consideration of skill, effort, responsibility and working conditions as set out in the *Canadian Human Rights Act*.

It is increasingly clear that as Canada moves toward the 21st century, our challenge is to ensure that employment equity is fully realized, and that managing diversity is a management skill imperative of the 1990s.

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AFFIRMATIVE ACTION IN THE UNITED STATES
Rationale, Models and Effectiveness

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A paper prepared for the Conference on Affirmative Action in Port Elizabeth, South Africa, October 10-13, 1991.

Sponsors: Constitutional Affairs Committee, African National Congress; Community Law Centre of the University of the Western Cape and The South Africa Project of the Lawyers Committee for Civil Rights Under Law

Affirmative action has been a very controversial and politicized subject in the United States. The last two Republican administrations have taken a stance of opposition to affirmative action, contrary to that adopted by all previous administrations, Republican and Democrat. By most accounts, at least one recent election for U.S. Senator may have swung in a different direction when one candidate characterized affirmative action as a threat to job opportunities for the majority white community. The issue is not solely one of blacks being opposed by unsympathetic whites. An emerging group of black neo-conservatives criticizes the current black civil rights leadership on a range of issues, including that leadership's support of affirmative action.

This paper will explore the background and rationale for the development of the concept of affirmative action in the employment context. It will look at the qualifications and limitations placed upon the concept by the courts under the U.S. federal constitution and under one major federal statute. It will also explore the impact that affirmative action has had on the racial and gender composition of the work force.

Early Rationales for Affirmative Action

The most important federal legislation prohibiting racial discrimination in employment is Title VII of the 1964 Civil Rights

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Act.[2] There have, however, been several of earlier efforts by government, at various levels, to make discrimination in employment unlawful. President Franklin Roosevelt, in 1941, issued an executive order prohibiting racial discrimination in employment in all industries involved in defense production.[3] Some states, beginning with New York in 1945, passed local legislation prohibiting racial discrimination in employment.

The net effect of these early and state initiatives were that some minimal improvements occurred in employment opportunities for African-Americans, but no major changes had occurred by the time the Congress was considering the 1964 Civil Rights Act. Several factors to retarded progress of federal and state efforts to abate in discrimination. Roosevelt's executive order was ineffective because the Committee which could investigate complaints and seek negotiated settlements, had no enforcement authority. At the state level, courts had authority to enjoin future discrimination by defendant companies, but later studies of those companies showed that, in many instances, racial employment patterns had not changed

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2 The statute also prohibits discrimination on the grounds of sex, religion and national origin.

3 The Administrator of the National Industrial Recovery Act of 1933, issued regulations which prohibited racial discrimination in the emergency public works program which had been provided for under that Act. Congress passed the Hatch Act in 1939, which was principally designed to prevent partisan political connections from influencing employment in the federal government, but it also prohibited employment discrimination in federally-assisted work relief programs. "Affirmative Action to open the Doors of Job Opportunity - A Policy of Fairness and Compassion that has worked" - A Report of the Citizens' Commission on Civil Rights (1984) at p. 32-33.

significantly. Many companies with exclusively white work forces had developed a reputation for not hiring blacks, and that discouraged blacks from applying even after legislation was passed. The discouragement may have continued even after a court order may have issued against a company barring discrimination, because the news of the order may not have reached all potential black applicants. Conversely, for some blacks the news that an employer had been found to be an active violator, would discourage them if they were seeking work and not litigation. Moreover, fears that blacks may have had of retaliation if one took a job in a hostile context are not without foundation. Studies in a related areas show that employees who are illegally discharged for union activity and re-employed under a court order, subsequently leave or are dismissed from the company in disproportionate numbers in comparison with other workers[4].

Active, but covert discrimination, may explain much of the lack of improvement in black employment, but a more pervasive problem is what has been called "institutional discrimination". These are institutional norms and practices, usually devoid of active racial animus, which operate to deter or suppress black employment. For example, hiring by word of mouth, tends to circulate jobs primarily to other whites if the work force is largely white. Some employers used tests and exams which recorded some educational deficiency that blacks have disproportionately.

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4 Weiler, "promises to keep; securing Worker's Rights to self-organization under the NLRA", 96 Harv. L. Rev. 1769, 1787-1803

These tests were then relied upon in making employment decisions adverse to blacks, despite the fact that there was often no proof that the tests measured the ability to do the job. Whites who manned personnel offices often had negative stereotypical views of the capacities of blacks. They would silently "rate" black applicants as lacking merit, thus further suppressing black employment. A simple injunction prohibiting discrimination in the future, even from a court, would not be efficacious in negating these forms of "institutional discrimination".

Affirmative action, can be defined as reliance on race conscious remedies, often of a numerical character, designed to achieve racial integration of a work force in a measurable time and at a defined pace. One rationale for affirmative action was that it could, unlike a simple order prohibiting discrimination prospectively, strike at the hidden and manifold forms of institutional discrimination.

At the time of the passage of Title VII, 45% of the black community was below the poverty line, and blacks suffered twice the level of unemployment of whites. Some proponents of Title VII hoped that removing the racial barriers to employment, would reduce the level of poverty amongst African-Americans. Prior to the adoption of affirmative action concepts, anti-discrimination law operated primarily through individual complaints, individual relief and prospective, but generalized, injunctions against discrimination. This proved to be a slow process, compromised further by blacks having limited information about employment opportunities, and by

the difficulty in mounting a successful charge of discrimination when one is not privy to the internal processes by which employment decisions are made. Affirmative action was thought to be a speedier process for integrating the workforce (and thus reducing poverty) because it had two facets which placed more responsibility on employers: first, employers must undertake special recruitment efforts to apprise blacks of job openings and second, employers can be required to reach a specified complement of black employees over a measurable time.

Affirmative Action Under the Executive Order and Title VII

Presidents Truman, Eisenhower, Kennedy and Johnson adopted executive orders which required employers receiving government contracts to adopt a policy of not discriminating on the basis of race. The Kennedy order used, for the first time, language requiring employers to "take affirmative action to ensure" equal employment opportunity. During the Kennedy and Johnson administrations enforcement of the anti-discrimination policy began to require that employers engage in an "underutilization analysis". This required the employer to make an assessment of the complement of workers currently employed from groups that had been subjected to discrimination (blacks, women) and to evaluate whether that proportion was less than the proportion that the group occupied in the pool of qualified persons. If there was any underutilization by this measure, the employer was required to make a plan for correcting it over a specified period of time. (These were referred

to as "goals and timetables"). Despite the pressure on the employer to achieve the expected degree of integration within the time frame adopted, affirmative action was reasonable. Any employer could defend by proving that the had made his best effort, but that, for reasons beyond his control, there were not a sufficient number of qualified black applicants for his business. All courts have found the executive order program to be a lawful exercise of executive power to control the terms under which Employers will contract with the federal government.[2] The courts have found that it is legitimate for the executive to seek a wider pool of qualified workers by requiring non-discrimination from its contractors.

Affirmative action under Title VII took two forms: voluntary affirmative action adopted by an employer without governmental coercion, and affirmative action under the aegis of a court order.

Voluntary affirmative action was subjected to legal attack on the ground that it constituted "reverse discrimination" against the white majority or males, and thus were a violation of Title VII. The U. S. Supreme Court upheld a voluntary affirmative action program adopted by a Union and an Employer which had the following features: (a) The plan was adopted in an industry in which craft jobs had traditionally excluded blacks; (b) the plan did not exclude whites from the craft apprenticeship positions created, but mandated that one white would be chosen for every black allowed

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2. Weiner v. Cuyahoga Community College District 238 N.E. 2d 839 (Ct. Comm. Plea of Ohio 1968), 249 N.E. 2d. 907, (1969), cert. den. 396 U.S. 1004 (1970). Contractors Association of Eastern Pa. v. Secretary of Labor, 441 F2d 159 (1971), cert. den. 404 U.S. 854 (1971).

into the program; (c) white were not to be discharged or replaced by a blacks; (d) the plan would terminate when blacks occupied the proportion of craft jobs that their numbers in the local labor pool would predict.[3]

A court may order an employer to operate under an affirmative action plan, if the employer is found, after litigation, to have violated Title VII. A plaintiff, however, must satisfy more stringent proof requirements to get an affirmative action order from a court than would be necessary for an affirmative action plan imposed under the executive order program. In the executive order program a bare finding of underutilization, will justify an affirmative action plan with goals and timetables, and there is no further inquiry as to whether the underutilization was due to some past discriminatory practices. The executive order program has more latitude in this regard because employers are voluntarily seeking government contracts and the executive branch can impose conditions on participation which satisfy some legitimate public policy. Under Title VII, however, a court cannot base an affirmative action order solely upon the finding of

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[3] United Steelworkers of America v. Weber, 443 U.S. 192 (1979).

The Equal Employment Opportunity Commission (EEOC) is the body which administers Title VII. EEOC advised employers that the agency would not credit reverse discrimination charges against them if, prior to their adoption of an affirmative action plan, they had done a self-study and concluded that they had, at some time in the past discriminated against the group that was the beneficiary of the plan or that they had had means and methods of hiring or promotion which unfairly, and indirectly disadvantaged protected groups.

underutilization. One provision of the statute expressly forbids requiring any employer to give preferential treatment to any group solely because there is a racial or sexual imbalance in his workforce. Therefore, a plaintiff (or the EEOC) must successfully rebut any exculpatory explanation the employer offers for any underutilization which exists, and the fact finder must conclude that it was racial discrimination which produced the imbalance.

Moreover, even if plaintiff proves the defendant employer violated Title VII, an order for affirmative action does not result as a matter of course. The court must also find that special conditions are present such as the fact that the defendant has previously violated an outstanding injunction or that the discrimination has been so pervasive or active that only the stringent measure of affirmative action can effectively dispel the lingering effects of the long-standing discrimination. Where the employer has been found to have relied on tests or other screening mechanisms which have resulted in discrimination against blacks, a court may order affirmative action in the interim, pending the adoption of new measures which have no discriminatory impact. Under court ordered discrimination ratio hiring or promotion may be required--namely that a certain percentage (but not 100%) of the new openings will go to plaintiff's class until their proportion of qualified persons in the labor pool is reached.

An employer may enter into a consent decree in which he agrees to engage in affirmative action. The courts have not, as they are required to in a fully litigated case, required a finding of

discrimination or an admission by the employer that he is currently in violation of Title VII. The consent decree is valid if the employer can meet the EEOC's self-study criteria.[4]

The ratio hiring of blacks under an affirmative action order of a court, does not require an employer to employ a person who is less qualified than a competing white candidate. At best, the affirmative action order can operate as a tie-breaker when the black and white candidates are equally qualified. Persons who are hired under a ratio order need not prove that they personally were discriminated against by the employer. They need only show that they are members of the group who are beneficiaries of the affirmative action plan.

Other limitations have been established by the courts on affirmative action. In one case, a public employer entered into a consent decree to hire blacks on an affirmative action basis into a fire department. After the order had been in effect for some period, the City decided to cut back on the size of the fire department workforce in a move for fiscal austerity. The district court, which had approved the consent decree, ordered the City to maintain the proportion of blacks it had hired under the decree. In doing so, the City laid off some whites who had greater seniority than blacks who were retained. The U.S. Supreme Court reversed. The Court said that the original consent decree was bottomed on an implicit finding of discrimination in <u>hiring</u>, but not discrimination with regard to <u>lay-offs</u>. Therefore the District

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[4] See supra, footnote 3.

Court's attempt to revise the affirmative action order to cover lay-offs was invalid because it lacked a necessary predicate. The Supreme Court also relied on a special provision in Title VII which required that seniority agreements be respected unless there was a finding that they had been created to discriminate.[5]

The Federal Constitution

The 14th amendment to the federal constitution prohibits state governments from denying equal protection of the laws to its citizens.[6] The U.S. Supreme Court has held, that under the federal constitution, just as under Title VII, there must be a predicate of a finding of discrimination in a form that is appropriate for the governmental entity involved, before

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[5]. Firefighters Local Union, No. 1784 v. Stotts, 467 U.S. 561 (1984). The decision has been criticized on the ground that the court could have recognized the white workers seniority by giving them an independent cause of action against the employer for any monetary losses they sustained in the lay-off. The court may not have entertained this because it would have undercut the City's effort to cut costs. However, it could be argued that the City should have been restrained in the latitude that it had in seeking to reduce costs using the fire department where they were now under a court order to repair discrimination. Perhaps the City should have been made to seek savings in other areas.

The court may have avoided this outcome, for while a public employer is merely faced with the alternative of raising revenue through added taxes, if the ruling were applied to a private employer, preventing it from reducing its workforce without costs might drive it into bankruptcy.

[6] The due process provision in the 5th amendment applies to the federal government, and has been held to have an "equal protection" component which operates in the same manner as the 14th amendment applied to the states. Bolling v. Sharpe, 347 U.S. 497 (1954).

affirmative action may be ordered or voluntarily adopted.[7] Under the 14th amendment, plaintiffs confront a more stringent standard of proof that a governmental unit has engaged in racial discrimination than if the same case were brought under Title VII. The 14th amendment prohibits only intentional, deliberate exclusion of persons from public jobs because of race. It does not, therefore, in the same strength as Title VII, prohibit reliance on practices which have the indirect effect of disproportionately excluding persons of color from employment.

In Washington v. Davis,[8] a public employer was permitted to rely on a written personnel test which excluded a disproportionately high number of black applicants from a training academy for the police force. Under Title VII, the plaintiffs would have prevailed if they could have shown that the City had not actually validated the test as a measurement of the ability to perform the job in question. Under the 14th amendment, however, the City had only to show that the test fulfilled some arguably "legitimate state purpose". The court found that the City had met this easy to meet standard when it argued that the test was designed to measure a "particular level of verbal skill" and "upgrade the communicative abilities of its employees".

The decision in Davis may have been appropriate because the court was mindful that had they accepted the plaintiffs' argument that an equal protection violation had occurred they would have had

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7. Fullilove v. Klutznick, 448 U.S. 448 (1980).

8. 426 U.S. 229 (1976).

to void numerous state laws that had an incidental, but disproportionate impact on a minority. For example, the Court might have had to entertain a claim that a sales tax was a violation of the federal constitution because it is regressive and takes a larger proportion of the income of the poor (and blacks). Since the 14th amendment governs all "state actions", the Court thought that such a ruling would place a great constriction on the options that the state had for problem solving in too many areas.[9] Since federal legislation is more easily amended to respond to particular problems and contexts, such legislation specifically directed to employment may be a more appropriate way to address the problem.

The U.S. Supreme Court has, however, recognized that the 14th amendment does not totally bar affirmative action, or the explicit reliance on race to counter past discrimination, once the finding of previous discrimination is appropriately made by the

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[9]. Davis has been criticized on the ground that there was a way for the court to avoid the "horribles" that would flow from a simple reliance on disproportionate impact as the standard for a 14th amendment violation. One commentator argues that the plaintiffs should prevail where they can show that the governmental unit has also engaged in unconstitutional practices which disabled the black applicants for employment from passing the "neutral" test that the government unit now seeks to rely on. Plaintiffs in Davis might have been able show that their verbal skills were impaired because they had been forced to attend racially segregated and inferior schools prior to the decision in Bolling v. Sharpe, supra, footnote 6, which outlawed racial segregation in the public schools of the District of Columbia where the Davis case arose. The argument proceeds that since the City was involved, unconstitutionally in the plaintiffs' impairment, they should have been limited to reliance on tests which were, on some proven basis, more cogently tied to the actual performance of the jobs in question.

governmental unit involved.[10] The Court has emphasized that a prior finding of discrimination is necessary for it has disapproved an affirmative action plan premised solely on the need to provide black "role models" for black children.[11] Moreover, the state unit which erects the affirmative action plan must be the unit which has engaged in the past discrimination, for the Court has rejected "societal discrimination" by other actors as a basis for such a plan.

The Court, however, has a very high standard for a governmental unit to meet before it may engage in a voluntary affirmative action plan. There will be "strict scrutiny" of any state program making an explicit use of race, and the state must be ready to prove that the state goal could not be achieved through reliance on neutral, non-racial alternatives.[12] There have been vigorous dissents against applying the same standard to programs designed to achieve racial integration as are applied to programs to enforce racial segregation. The majority of the Court, however, believes that since the 14th amendment was the product of the Civil War to end slavery of blacks that the equal protection clause is especially driven by a goal of eradicating any reliance on race by state actors. This is not a wholly unrespectable stance since the federal constitution is a relatively permanent document,

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[10]. Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

[11]. Wygant v. Board of Education, 106 S. Ct. 1842 (1986).

[12]. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).

governments have a virtual monopoly in some areas of decision-making and even the proponents of affirmative action say that the ultimate goal is race-less decision making.

The Court's stance in this regard has been underscored by a refusal to adopt a "strict scrutiny" standard for judging state or federal government reliance on gender in decision-making.[13] There is no U.S. Supreme Court decision indicating whether or not the relaxed standard for review of gender would affect adoption of an affirmative action plan for females.

The Impact of Affirmative Action

The macro evidence is that twenty five years after anti-discrimination laws and affirmative action have been in place racial minorities and women have experienced significant economic improvements and integration into the workplace. There has been regular and consistent upward movement by females and black males as reflected in higher earnings and increased representation in occupations and professions considered more prestigious and

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13. There is one way in which Title VII itself evidences this dual policy on race and gender--one provision of the statute permits an employer to explicitly rely on gender, (or national origin or religion) in making employment decisions. He can do so if he can prove that gender is a "bona fide qualification" for doing the job - that all or substantially all of the persons needed to do the job must be males. (i.e. An employer may employ only male employees to work in the male locker and shower rooms of a health club). There is, however, no "bona fide qualification" for race under Title VII.

desirable by the society.[14]

The 1964 Civil Rights Act and affirmative action did not generate all of the increased integration and improvements in occupational status because there was some trend in that direction before passage of the Act. (Blacks and females found more job opportunities, for example, during World War II). However, there is some specific evidence that affirmative action played a role in the changing racial and gender character of the workforce. One study showed that blacks and women made greater gains in employment at establishment that had contracts with the federal government--and thus subject to affirmative action requirements--than those employed at non-contractor companies.[15]

The Arguments For and Against Affirmative Action

The charge is made that affirmative action is "unfair" to white males in that it gives blacks and females a preference based solely on their race or gender. The common parlance is that this is "reverse discrimination" against persons who were not the perpetrators of the past discrimination and therefore they are "innocent victims".

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14. See Leroy D. Clark "Insuring Equal Opportunity in Employment Through Law" - p. 173 - 180 - in book - "Rethinking Employment Policy", Editors D. Banden and F. Skidmore (Urban Institute Press, 1989).

15. Unpublished study: Office of Federal Contract Compliance Program, Employment Standards Administration, U.S. Department of Labor, A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on Employment Opportunities of Minorities and Women, (1983).

When we speak of "fairness" we must look not only to the immediate loss of an employment opportunity for the white male, but to the total employment and social context in which affirmative action is being implemented. White males, unless they are young entrants into the labor market, are certainly aware that race and sex discrimination against others has historically (and even currently) given them a skin or gender advantage. There are hardly any reports of white males inquiring as to whether they were getting an employment advantage on the basis of their race and sex and then rejecting that advantage. The term "innocent" may mean that they did not have the power to author the discrimination against others, but they were willing recipients of the indirect and "unfair" advantage that they did receive.

Moreover, prior to the passage of Title VII and sometimes even thereafter, exclusion of blacks and women from some sectors of private employment was not spear-headed primarily by employers but by Unions. Unions, with the full approval of their membership, monopolized the better jobs for white males and excluded blacks and females from membership in some circumstances where membership was a functional pre-condition to securing employment. Thirty to thirty five percent of the current work force have been union members at some time during their work careers.

Another charge made against affirmative action is that it denigrates the reliance on "merit" as the prime criterion for choosing applicants for jobs. Under affirmative action law as it has developed, in the employment context, there is no obligation

for an employer to hire a person who is unqualified or even less qualified than a white or male applicant.[16]

The concern has been expressed, that no matter what the formal requirements, employers will be pushed in the direction of lowering standards to meet a hiring goal. At an anecdotal level this may have occurred on occasion, but there are no systematic studies showing that such abuses affirmative action have occurred frequently. Indeed in one study commissioned by the U. S. Department of Labor, the researchers assert that there is no evidence of lowered productivity being associated with affirmative action plans. This result matches what a common sense point of view would suggest. The profit motive militates against the hiring or retention of incompetents, and one would expect that productivity would be <u>enhanced</u> when an employer chooses employees not only from the 35% of the population constituting white males, but also from the 65% comprised of white females, blacks, Hispanics and other ethnic groups.

The claim is often made that affirmative action is over-inclusive because it benefits primarily members of the middle class in racial and ethnic groups, and is under-inclusive because it has not eradicated poverty amongst blacks and Hispanics. Poverty amongst blacks has gone down from the 45% level that existed before the 1960's. However, one-third of the black community is still

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16. This paper focusses exclusively on affirmative action in employment. Affirmative action, for example, in the arena of education, may have different goals and criteria, thus allowing for entry of persons with "lesser credentials."

below the poverty line and blacks continue to experience poverty disproportionately. More cogently, blacks still experience unemployment at double the rate of whites, the same rate which existed at the time of the passage of the 1964 Civil Rights Act. (Although one commentator claims that the unemployment has remained high amongst blacks because they have a larger proportion of young persons in their group, who chronically suffer higher levels of unemployment than other persons in the population).[17]

There are however, responses to those charges. The fact that a person (or his parents) may have reached middle-class status does not mean that that person will not continue to be subjected to racial discrimination, particularly the "institutional discrimination" described earlier in this paper. Furthermore, the proponents of affirmative action never claimed that it is a total panacea for a disadvantaged group. It cannot affect the quantum of employment which is available, because that is a function of the business cycle and macroeconomic policies. Since affirmative action is available only to those who have the necessary qualifications for a job, it cannot reach blacks who have been disabled in attaining the appropriate education and skills, due to the action of persons or institutions over whom the employer has no control.[18] The answer is that affirmative action must be

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17. Alfred Blumrosen, "The Law Transmission System and Southern Jurisprudence of Employment Discrimination. Industrial Relation Law Journal 313 (1984).

18. Where an employer has regularly trained persons on the job, affirmative action can require that such training be extended to blacks.

supplemented with programs to reduce illiteracy, upgrade skills, improve education and expand employment opportunities.

Another claim is that affirmative action does not reach all groups who have experienced some discrimination (eg. Southern Europeans and Jews) because the programs have been limited to persons who have been subjected to official governmentally-sanctioned discrimination, on the theory that these groups have experienced more intense and lasting discrimination. Such groups do, however, have all of the other protections and non-afirmative action relief that the Civil Rights law provide.

Affirmative action is not without its problems. Blacks and members of other ethnic groups, usually exhibit some signs of lack of confidence under the destabilizing conditions of racial prejudice. These feelings may become exacerbated by being confronted with charges that the positions they hold are due to some artificial preference, which critics of affirmative action contend is a natural development. Despite all of the disclaimers that affirmative action is not a full employment program for incompetents, and despite the fact that persons who previously discriminated against blacks and females have been high priests of "merit", there is still the possibility that there will be a negative psychological impact on the beneficiaries, since affirmative action has become a public cause celebre.[19]

All in all, however, affirmative action has had a net positive impact on the racial and gender composition of the workforce. It has prompted many businesses to examine more carefully their employment and promotion practices and some companies believe they have, as a result, a richer and stronger complement of employees and more rationalized employment practices since adoption of the concept.

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[19]. See, for example, the painful recollections of Steven Carter, in "Reflections of an Affirmative Action Baby".

INDIA'S EXPERIMENT WITH PROTECTIVE DISCRIMINATORY POLICY

L.G. HAVANUR (INDIA)

The Constituent Assembly (1946) elected to draw up a constitution for governance of independent India declared in its Objectives Resolution, among other things, its resolve to proclaim India as an independent sovereign Republic, wherein all the people of India were to be guaranteed and secured justice - Social, economic and political; equality of status, of opportunity and before law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality; and wherein adequate safeguards be provided to minorities, backward and tribal areas, and depressed and other backward classes.

The Constituent Assembly adopted and enacted (1949) the Constitution for independent India incorporating the above ideals in its preamble and the text.

I am called upon by Mrs. Gay J.McDougall, Director, Southern Africa Project, Lawyers' Committee For Civil Rights Under Law, Washington, to write a paper on the "Depressed and other Backward Classes of Citizens" in India and the constitutional system of safeguards of protective and preferential treatment for these historically deprived and disadvantaged classes.

Ethnic Composition:

India is a vast country, both in area and in its population. It is a country with a conglomeration of nations, races, cultures and languages far more diverse than any other country in the world. In its huge mass of inhabitants are to be found the followers of every great religion: there are Christians, Mohamadans, Buddhists, Sikhs and Hindus.

The present day people of India are largely descendants of immigrants belonging to six races: Negrito, Proto Australoids or Austrics, Mangoloids, Medeterranian or Deavidian, Western

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Brachycephals and Nordic Aryans. The fact is Indian people are polygenetic with confusing mixture of various racial strains.

The population of India in 1991 is estimated to be 840 Millions (Official Census figures for 1991 are not yet available). Hindus constitute 82.64 per cent, Muslims 11.35 per cent, Christians 2.43 per cent, Sikhs 1.96 per cent, Budhists 0.91 per cent, Jains 0.48 per cent and others 0.43 per cent. Of them the population of the Backward Classes is around 25 per cent (in this context, the expression 'Backward Classes' is referable only to the castes of Hindus and tribes and races of all religious communities notified by the President of India as Scheduled Castes and Scheduled Tribes for purposes of the Constitution). ***

*** During the British Rule the expressions Depressed Classes and Backward Classes were used, sometimes officially and sometimes unofficially, to refer to certain castes and tribes, and also to Muslims and Indian Christians in some areas. Statutory definition was given to 'Depressed Classes' in Government of India Act, 1935, as meaning castes and tribes specified by the Governor-General in a Schedule. Thus they were called Scheduled Castes. The Act defined 'Backward Tribes' as meaning certain tribal communities needing special system of representation and authorised the Governor-General to specify them. Sometimes 'Backward Classes' comprised not only 'Depressed Classes' and 'Backward Tribes' but also some advanced castes of Hindus and religious minorities of Muslims and Indian Christians. While the terms retained their meaning, the breadth of their coverage varied with the inclusion or exclusion of the number of castes and tribes. Terms were inter-changeable and their coverage was overlapping. The Objectives Resolution moved in the Constituent Assembly in December 1946 and The Indian Provisional Constitution (Second Amendment) Order, 1947, retained the 1935-definitions.

The Constituent Assembly finally adopted 'Backward Classes' as meaning Scheduled Castes, Scheduled Tribes and such other socially and educationally Backward Classes.

While categorical definitions of Scheduled Castes and Scheduled Tribes were incorporated in the Constitution the definition of such other Backward Classes was felt redundamt. Identification of Other Backward Classes was left to a Commission to be appointed by the President of India. Since 1950 two such Commissions were appointed, but the criteria selected for identification being considered vague and unintelligible the

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the recommendations of the Commissions have remained unimplemented. However, some State Governments have listed certain castes, tribes and communities applicable to their respective States.

Besides these communities there are aboriginals who are spirit worshippers. The great majority of population is known as Hindus and their religion called Hinduism or Brahminism. This religion is known among themselves as Arya or Sanathana Dharma which means a religion that lasts throughout the eternity. It is like a vast mosaic inlaid with every kind of religious idea and every form of worship which human mind can possibly conceive.

Hinduism: Brahminism:

In their social life Hindus are extremely restricted than any other community in the world. Their social laws are rigid and binding. They will not associate or inter-marry outside their own group much less with Christians and Mohamadans because of Hindu social and religious ideals.

The social organisation of Hindus is based on the theory of Chaturvarns i.e., vertical division of society into four broad categories - Brahmins (Priests), Kshyatriyas (Soldiers), Vaishyas (Traders) and Shudras (meniels). The theory goes further and makes the principle of graded inequality the basis for determining the terms of associated life as between the four categories. This system of graded inequality is not merely notional; it is legal and penal. Shudras being placed at the bottom of the hierarchical gradation are subjected to innumerable ignominies and disabilities preventing them from rising above the place and condition fixed for them by scriptural laws.

Caste system has produced groups in the Hindu society falling under the category of lowest castes whose members are untouchable, unseable, unspeakable. These are the lowest castes in the Shudra category, leading a segragated life on the outskirts of the villages.

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When Aryans migrated to India from Central Asia, they appeared to be a cultured race. When a division of labour became necessary they divided themselves into four classes in accordance with their natural tendencies. There are at present at least 6000 castes and tribes with many sub-castes or groups, speaking more than 1600 languages!

Tribal communities are racial groups, by and large, living in jungles and forests isolated from the rest of the society. Most of the tribes lead a primitive life, some professing Hinduism, some Islam, some Christianity, some Budhism and some animism.

Caste and community-units are based on secterian, denominational and religious affiliations sharing certain common interests. They are particularistic in their character. Caste system which is essentially connected with Hinduism is rooted in the religious order and this system is a hierarchy of hereditary occupational and functional groups with position of each group fixed and mobility barred by ritual distance thus maintaining endogamy. Muslims and Christians are also influenced by the Hindu caste system to some extent.

Ethnic diversity being a unique characteristic of Indian Society, those differences have not contributed to social tensions and conflicts. An individual, irrespective of his ethnic or physical characteristics, identifies himself as a member of a caste or community on the sole ground of his birth in it. Not being based on racial differentiation a caste or a community is therefore only a social category. Every Hindu caste-group or its sub-group follows the rule of endogamy thus contributing to the preservation of its cultural and social identity. However, intermingling and inter-breeding goes on endlessly in an imperceptible style producing new groups. So too, recruitments and admissions of outsiders into a caste, or expulsions from a caste, have contributed to the multiplications of caste-groups.

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Caste inequalities:

Caste system is the oldest and most elaborate system of social organisation. It is an institutionalised inequality, described as the extreme opposite of egalitarian social order. There is a close relationship between the status or standing of a caste group in the hierarchy and its occupation, its educational level, its civil and political privileges, its representation in Government service, its ownership of land and other property, its income and expenditure, its dwelling and living conditions, its opportunities for jobs and the nature of jobs. Hindu Society is a classical model of social stratification with summation of statuses. The ascribed status in social scale of honour of a caste group in the hierarchy of castes is determinative of its opportunity or capacity to acquire corresponding status in economic, educational, political and all other fields.

Disabilities imposed on and suffered by the non-Brahmin castes vary from caste to caste depending upon the relative ranking of a caste in the hierarchy; lower the ranking larger the number of disabilities and greater the severity of their imposition. But all the disabilities and liabilities are imposed on, and enforced against, untouchable castes by all the other castes which are above them.

Ideas of social and economic equality, individual freedoms and human dignity were unknown to Indians until the British Rule was established. For purposes of recruitment of Indians in the lower caders of the civil and defence services at the Central and Provincial levels education was spread in the English language. Brahmins, with their tradition of learning, were the first to take to English education and Government services offered by the British. Zamindari (land owning) and merchant communities came next. Social, cultural and educational conditions did not permit other castes to get education and therefore they did not get entry into prestigeous Government services and newer professions of learning like Law, Medicine, Engineering.

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From the dawn of history, education has been a concern of religious functionaries tending to confine itself only to the Brahmin class creating gulf between the Brahmins and the rest of the population. Princes, feudal chiefs, noblemen and merchants, who were non-Brahmins, at times, acquired sufficient power and wealth to enable them to raise an effective demand for the education of their children and of those who were employed as military officers, managers, architects, engineers and physicians and so on. As a result, the educated upper strata came into existence; the Brahmins could not preserve full monopoly over all learning and education, but their monopoly in teaching continued.

It was the religious duty of those who had faith in Koran to educate the young, but this duty was never carried out on large scale. Hindu tradition influenced Islam resulting in the religious functionaries serving as teachers.

Origin of preferential claims:

British had adopted the policy of running the entire higher administration purely by European agency, but as early as 1831 they were confronted with a demand by the educated upper strata like the Brahmins and the Kayasthas that public services, particularly the covenanted services such Indian Civil Service should be open to the "educated Indians" according to 'their' abilities and merits, with relaxation of certain eligibilities.

Recognition of the claims of religious "minority communities" for protection of their interests goes back to a period following the 1857-revolt against the British. In 1892 representations of minorities like the Muslims were provided by Indian Councils Act. In 1909 Muslims got provision for their representation through election based on communal electorate of their own. More and more minorities came to be recognised as being in need of protection through separate representation in ~~their~~ legislatures, reserved quotas in public services, and in various other ways. In course of time the Sikhs, the Anglo-Indians, the Indian Christians,

the Depressed Classes (untouchable castes amongst the Hindus) were treated as minorities in need of such protection. In fact even the most prosperous European commercial and mercantile community in India was granted separate representation.

British Rule in India had helped the Brahmins to take to Western education to enter civil services and the newer professions. At the end of the 19th century some of the British Provinces and the native Princely States thought of reducing the large preponderance of Brahmins in public services. Steps were taken encouraging important non-Brahmin communities to seek employment under their respective Governments in large numbers. Rules of recruitment to public services were altered and the meritarian principle was partially given up. Special facilities were given to the non-Brahmin communities i.e., the backward classes encouraging them to take to higher and professional courses of education. The concept of 'merit' or 'efficiency' had acquired a calculated and restricted meaning aimed at co-opting members from the advanced class; merit and efficiency being defined and prescribed by the advanced class to exclude members of the backward classes.

Statutory recognition of claims:

The important feature of the Government of India Act, 1935, was the acceptance of the claims of minorities to have their representation in the Provincial Legislatures, and the elections of members of the Constituent Assembly, 1946, were also held on communal basis, though all these communities were not represented proportionate to their population. There were the representatives of the Sikhs, the Parsees, the Christians, the Anglo-Indians, Tribal communities, untouchable Depressed castes, Muslims and a prepondance of Hindu upper castes. The Committee appointed by the Constituent Assembly to prepare the Draft Constitution consisted of seven members of whom 5 were Brahmins, 1 Muslim and 1 Depressed Class. Though the Constitution was to be drawn up by a Constituent Assembly elected on the basis of universal adult suffrage (on the basis of one man, one vote and one value) the idea was given up and the Assembly was elected by

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the members of the Provincial Legislatures who were elected on a very limited franchise within their respective communal quotas.

Constituent Assembly:

From the time of the British Rule to the framing of Indian Constitution in November 1949 various institutions of our national life like the Legislature - Union and Provincial, administration and even Army were all representative institutions, in the sense, that provision of representation in those institutions was made to the Muslim, Christian, Sikh, Parsee and Anglo-Indian communities and Depressed Classes. Without altering the structural character of those institutions being representative, the number of communities to have statutorily reserved representation is reduced by the Constitution.

The Constituent Assembly while adopting and enacting the Constitution rejected the case of all religious minorities for reservation of seats in the Central Parliament and the State Legislatures, accepting only the case of untouchable Castes and the Aboriginals for the first period of ten years (now extended to 50 years). It accepted the case of Anglo-Indians for nomination on certain Legislatures.

So far as reservation in public services was concerned the claims of untouchable castes, aboriginal tribes and such other backward classes were recognised, and of the Anglo-Indian community in some Central Services for a period of ten years in a diminishing scale.

By Constitutional Amendment in 1951 reservation of seats in educational institutions maintained or aided by the State was provided for untouchable castes, tribes and such other backward classes, because of judiciary invalidating communal reservations.

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The evil practices of untouchability and forced labour enforced against the untouchable and lower castes have been abolished and practice in any form is forbidden.

The following are some of the disabilities enforcement of which is constitutionaly and legally prohibited: denial of access to shops, public restaurants, hotels, places of public entertainment; and use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public. Societally imposed disabilities are the exclusion of the lower castes from honorable and remunerative employments forcing them to take to menial and unremunerative occupations. Even barbers and washermen refuse to render their services to the lower castes. Situations are created forcing them to live a segregated life outside the villages in dingy and unhygenic thatched huts where civil amenities like drinking water, roads, street-lights are absent.

Constitutional concept of equality:

The concept of equality is not absolute in terms, but is circumscribed by limitations. In an unequal society the principle of equality is violated if it is applied in its absolute sense. The rule of equality could be applied to those caste-groups which are similarly circumstanced. Equality means equal treatment of equal caste-groups. Classification for legal purposes on the ground of caste differences is the constitutional essence of equality. The principle of equality consists in providing equality of opportunity to castes which are equal and the Indian Constitution does not conceive of absolute individual equality. It consists in equal treatment of equal castes in equal circumstances. Different or special treatment of different castes is the rule of equality embodied in the constitution. Differential treatment of untouchable castes, tribal groups and such other backward castes alone can give equality of opportunity to all. Equality of opportunity in absolute terms for unequal castes and tribes

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means aggravation of inequality. Differential treatment to certain castes and tribes, particularly in the matter of entry into legislatures, in educational institutions and public services is prescribed because Indian Constitution makers thought of making them truly representative democratic institutions in their composition, character and functioning.

One of the aims of equality adumbrated in the constitution is to achieve caste-equality in fact. Inequality in castes has generated an attitude of protest in the lower castes against an unjust treatment meted out to them by the upper castes, and an urge for equality. Privileges are symbols of inequality, and privileges to some upper castes only are indicators of unjust society. Removal of privileges or their proportionate distribution amongst all castes is justice which the Constitutional concept of equality aims to secure. Distributive justice satisfies the rule of equality. Backwardness of castes is a stigma in the national life and the object of equality, conceived of in the Constitution, is to erase the stigma. Equality has a two-fold object. One is, it aims at removing the existing caste-inequalities. The second, an off-shoot of the first, is, it aims at creating equal abilities in all castes. The achievement of the said objectives implies differential treatment of castes by the State. In doing so, the State is to take into consideration private inequalities of caste-status and economic and educational disparities. Achievement in the success of equality is measured by equal results produced by all castes. The lower castes which have been exploited, oppressed, suppressed and neglected by the higher castes for many generations can not produce equal results without compensatory measures protecting them from discrimination. Protesting against protective discrimination amounts to an ideal of maintaining inequality.

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Judicial blunders:

From the reported judgments it seems some of the judges who claim to believe in social justice to the depressed and backward castes appeared to be in an amusingly simple and unaffected state of mind in construing or interpreting the Constitutional provisions artlessly, expecting those castes to consume their pronouncements as divinely given nourishing substances. In deciding certain cases, a judge depends upon intuition which is subtle, though in assigning reasons for his judgment he is seen articulating major general propositions.

Meritocracy:

Some of the important programmes of the policy of compensatory and discriminatory schemes mandated by the Constitution in favour of untouchable Castes and Tribes, departing from the proclaimed and much valued "absolute equal" treatment of all individual citizens, relate to the national commitment to reduce discrimination among various social groups for their equal participation in institutions of national importance and for betterment of their socio-economic conditions.

Free competition amongst individuals in an unequal caste society leads to greater inequality amongst the various classes. Claims of the disadvantaged classes, and the social needs for equalising all classes may have to be subordinated to the meritarian principle. Indian Constitution has resolved the dilemma. It has accepted the meritarian principle ensuring free competition amongst individuals, at the same time it has accepted the compensatory principle to eliminate centuries old social discriminations protecting the discriminated classes from discrimination.

a. In Legislatures:

Seats have been reserved in the House of the People (Parliament) and in the Legislative Assemblies of all the States for Castes and Tribes separately, the number of seats so reserved being of the same proportion to the total number of seats in the House or the Assembly as the population of Castes and Tribes bears to the total

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population. Elections are held on the basis of electoral rolls prepared for each territorial constituency on the basis of adult (18 years) universal suffrage; that is to say, one citizen, one vote and one value, and no one is excluded on the ground of religion, caste, race, sex, language, economic standing, etc., This has provided opportunity to the Scheduled Castes and Scheduled Tribes for political participation in the highest national and State Legislative bodies, though not to the excected expectation.

b. In education:

The fundamental right of equal treatment to every citizen and the right not to be discriminated against on the ground of religion, caste and race in the matter of admission into any educational institution maintained or aided by State funds resulted in total denial of entry to the Scheduled Castes and Scheduled Tribes in the State(Province) of Madras (in spite of considerable progress the State had made in the past thirty years in the field of education as a result of awakening generated in the Shudra class by the non-Brahmin or anti-Brahmin movements), which necessitated the Parliament to promptly amend the Constitution in 1951 authorising the State for making any special provision for those classes including reservation of seats in educational institutions.

The Central Government and the State Governments have now been making reservation of certain percentage of seats in some of the educational institutions like Engineering and Medicine. Educational development being the basis for alround development of the nation, Indian Constitution directs the State to provide universal free and compulsory primary education to all children below the age of 14 years. But the measures of implementation of the policy being tardy they have not been of expected benefit to the Castes and Tribes. Economic poverty, strong caste prejudices and their living in segregated, isolated and inaccessible areas are the hurdles which Scheduled Castes and Scheduled Tribes can not yet cross, though nation as such has made remarkable advance in the field of education.

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Central and State Governments are encouraging the Scheduled Castes and Scheduled Tribes to take to education by providing residential schools, hostels, scholarships, stipends, supplying text books, stationary, relaxing qualifying marks for admission to higher educational institutions, starting coaching centres etc.,

c. In services under the State:

Government employment affords a sense of economic and service security, prestige, power, dignity, authority and a sense of pride to the employees; and above all it provides access to and participation in the State administration. Adequacy of representation of castes, tribes and communities proportionate to their population has a bearing on the efficiency of administration and services. Reservation of posts in Central and State services has been provided to the Scheduled Castes and Scheduled Tribes adequate to their population. Implementation of the policy being half-hearted and the provisions of the Constitution in respect of reservation being given a very restricted meaning by the judiciary, in their scope and extent, the Scheduled Castes and Scheduled Tribes have not been able to get adequate representation in all the services and at all levels of administration. Policy measures of reservations in promotional vacancies, relaxation of educational standards and age limit for entry, to improve the qualitative and quantitative representation have, of late, improved their position numerically. Reservation scheme has been enforced in Government and also in semi-Government undertakings and public sector and nationalised Banks.

These, in brief, are the constitutional safeguards for the upliftment of the depressed and backward classes in addition to the granting of fundamental rights to cultural, linguistic and religious minorities to start educational institutions of their own choice. Special provisions could also be made for the welfare of women and children irrespective of their religion, caste, creed etc.,

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Political freedom was considered a condition precedent for the socio-economic development of Indian and the positive aspect of freedom is the creation of a new social order securing socio-economic equality to the lower classes. In Indian society certain sections do not have adequate means of livelihood. Ownership and control of the material resources are concentrated in the hands of few communities and few families, and such concentration does not subserve common good. Those in whose hands wealth is concentrated and those who control means of production are exploiting the weaker sections, and children and women. The unequal social order has resulted in the deterioration of health and strength of the workers and the labourers, and inspite of their ill-health they are forced by economic necessity to enter avocations unsuited to their age, health and strength. Working conditions are unjust and not humane. There is wide disparity in the living standards between the advanced communities and the exploited communities. Huge wealth is concentrated in the advanced communities in the midst of abject poverty in the backward classes. Such disparities have given rise to discontentment in the lower strata and to a desire to radically alter the present social order.

Pursuant to the Constitutional directives to reduce the disparities, land reforms measures have been introduced by various State Legislatures abolishing the intermediary land tenures, imposing ceiling on land holdings and re-distribution of surplus lands to the landless members of Scheduled Castes and Scheduled Tribes, fixing minimum wages for agricultural labourers, abolishing slavery and forced labour and rehabilitating labourers, allotting them house sites and houses and formulating Special Component Plans.

Atrocities and practice of untouchability:

The members of the Scheduled Castes and Tribes getting education and economic benefits and who are becoming aware of their rights have been the victims of atrocities in the rural areas.

The types of offences committed by the upper class broadly fall under the categories of murder, assault, rape and arson. Motives for the crimes are generally related to the assertion of rights by the Scheduled Castes and Tribes over their lands granted by the Government. Upper classes do not allow and tolerate the lower castes who are generally labourers becoming economically independent. Terrorism and social boycott are the other coercive weapons used with impunity to deter the lower castes from raising their voice against the feudal castes. Disabilities and liabilities arising out of the evil practice of untouchability are imposed unchecked.

Research and Evaluation:

Central Ministry of Home Affairs has been making financial grants to research organisations and agencies engaged in the study and survey of the problems of Scheduled Castes and Tribes. Anthropoligical Survey of India, National Institute of Rural Development, Bureau of Economics and Statistics and Commission for Scheduled Castes and Tribes are some of the Government organisations connected with studies of tribal life and culture, preparing Plans and Project Reports, monitoring and evaluation of welfare measures, studying the impact of urbanisation and industrialisation, conducting studies on untouchability and social disabilities suffered by the untouchable castes. The Registrar General and Census Commissioner also undertake socio-economic Surveys such as demographic, ethnic and linguistic studies.

Conclusion:

Indian Constitution proclaims secularism and non-interference in matters connected with practice and propagation of religion. Caste is a religious institution and the Constitution does not abolish it. The evil practices of untouchability and the concept of high and low associated with the caste system are not

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considered by the Constitution makers as concerning religious aspects. With the extension and application of protective and compensatory policies the hierarchical graduation of groups will tend to disappear, sooner or later. The policies will bring about equality of status and of opportunity assuring fraternity and unity of the Nation.

AFFIRMATIVE ACTION FOR THE DISADVANTAGED POPULATIONS: PUBLIC EMPLOYMENT IN NAMIBIA

By Bience Gawanas

As this topic relates directly to the public sector, I would wish to limit myself to that arena despite the fact that in Namibia nothing operates in tight compartments. Indeed, it would not be an exaggeration to state that there is no area of life which Apartheid has not touched be it socially, politically or economically. Books have been written about the effects of Apartheid on the lives of the Namibian people. Let it merely suffice to state here that despite 18 months of independence, those effects are still felt and will be with us into the unforeseeable future.

Without wishing to define affirmative action, which is surprisingly a very complex issue as it covers disparate situations, I would rather wish to express a gut feeling I have of what it means and what it aims to achieve. Government policies on affirmative action must be aimed at putting those people who are disadvantaged in the positions they would have been in but for Apartheid. In some fields of law we have been taught that the aim is retribution, i.e. to redress a wrong which has been committed or restitution, i.e., to place a person in a position she would have been in but for the wrong.

Amongst the disadvantaged majority, comprising of black people and women in Namibia, we find a diverse group of people. There are those who have gone abroad and have returned with high qualifications obtained in countries with diverse social systems. Others have remained and obtained qualifications against all odds albeit from an inferior educational system. And another group, who despite the lack of formal education, has gained extensive experience and skills. Many prospective job applicants with potential have experienced great frustration. Their opportunities to put their educational knowledge and skills to productive use have been limited by the implementation of discriminatory laws and job reservation practices.

Today Namibia has a huge army of unemployed which has been exacerbated by the return of a great many exiles. Secondary schoolleavers and graduates are entering a labor market marked with substantial unemployment. Although we are made to believe that there is a lack of human resources in Namibia, we are faced with a phenomenon of the underemployment or unemployment of graduates.

Since independence the Government has adopted a policy for the development of human resources in Namibia. This is necessitated by the fact that although the potential has always been there for the development of an efficient and skilled human resources,

Apartheid policies had deliberately neglected to do this. If one looks at the past educational set up, one notes the discrepancies in education provided for the different population groups.

If it is being argued that we do not have adequate skilled human resources in Namibia, it begs an essential question: are those shortages artificially created or are they real concerns. If they are real concerns why has nothing been done to redress those imbalances caused by prioritizing capital development rather than human resource development. Artificially created shortages of human resources are brought about by the fact that qualified and capable black people and women are almost always overlooked in appointments and promotions. In Zimbabwe, for example, it was assumed that only certain sectors of the population had the monopoly of skills amongst the blacks because they had been officially and deliberately excluded from acquiring skills and that expatriates would be needed to fill the gap left by the whites. A survey was conducted which revealed that there were a number of blacks with technical skills that had not been recognized by the system. The need to redress such equally held assumptions in Namibia as well as ensuring the development of a human resource which can respond to the new objectives of Namibia is not only a must but a matter of urgency.

The question which we are asking at present in Namibia is what the proper relationship should be between the users of human resources (both in the public and in the private sector) and the Ministry of Education as the provider of those resources. In other words, we have to redefine the relationship between the labor market and education system and emerging competitive labor market. It is the link between limited job opportunities and the expectations of those who have the education and the skills which the policy of affirmative action aims to address.

Another area which also calls for affirmative intervention is the civil service. A cursory look at the civil service we have inherited at independence shows a remarkable absence of black people and women from the upper echelons of power. Although changes may have occurred in the last 10 years before independence with the establishment of a South West Africa public service opening up to a few blacks, most if not all senior positions (the management cadre) were dominated by white males.

Affirmative action therefore aims at creating a balance structured civil service where the disadvantaged people will be put in a position they would have been in but for the policies of Apartheid which put them at a disadvantage educationally, socially and economically.

A key focus of the Namibian Government has been to remove not only the vestiges of Apartheid but also the obstacles to the advancement of the majority of the people. In so doing, it views

the dismantling of Apartheid as a process which attempts to make a break with the past and to create a society of equals. To that extent, the Constitution of Namibia provides a legal framework for the redressing of inequalities. In particular,

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

(1) The practice of racial discrimination and the practice and ideology of apartheid from which the majority of the people of Namibia have suffered for so long shall be prohibited and by Act of Parliament such practices, and the propagation of such practices, may be rendered criminally punishable by the ordinary courts by means of such punishment as Parliament deems necessary for the purpose of expressing the revulsion of the Namibian people at such practices.

(2) Nothing contained in Article 10 hereof shall prevent Parliament from enacting legislation providing directly or indirectly for the advancement of persons within Namibia who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices, or for the implementation of policies and programs aimed at redressing social, economic or educational imbalances in the Namibian society arising out of past discriminatory practices, or for achieving a balanced structuring of the public service, the police force, the defense force, and the prison service.

(3) In the enactment of legislation and the application of any policies and practices contemplated by Sub-Article (2) hereof, it shall be permissible to have regard to the fact that women in Namibia have traditionally suffered special discrimination and that they need to be encouraged to play a full, equal and effective role in the political, social, economic and cultural life of the nation.

Article 10 on Equality and Freedom from Discrimination

(1) All persons shall be equal before the law.

(2) No persons shall be discriminated against on the grounds of sex, race, color, ethnic origin, religion, creed or social or economic status

At first glance, these two articles may seem to be in conflict. The one speaks about equality whereas the other speaks about providing only for a certain sector of the population. It has been argued in certain quarters that as racial discrimination has been abolished, all people are equal and that there is no need to make special provisions for some. In that context, affirmative action is therefore regarded as reverse discrimination. Others,

including this writer, argue that people who have been treated unequally cannot become equal by a mere stoke of the pen and without accompanied structural changes which would make equality meaningful in practical terms. This also underlines the belief held by women who fought against racial, sexual and class oppression, that the dismantling of Apartheid, per se, will not automatically mean emancipation for them. Hence, the special mention of women in Sub-Article (3).

Article 91 on the functions of the Ombudsman entrusts the Ombudsman, inter alia, with

(a) the duty to investigate complaints concerning alleged or apparent instances of violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment of an inhabitant of Namibia by an official in the employ of any organ of Government (whether central or local), manifest injustice, or corruption or conduct by such an official which would properly be regarded as unlawful, oppressive or unfair in a democratic society.

In Namibia, affirmative action stems from two sources: the Constitution and Executive action by the Government in relation to public sector employees.

There has been established a PUBLIC SERVICE COMMISSION (PSC) as an independent and impartial body under Article 113 of the Constitution. This body has been entrusted with the task inter alia of ensuring a balanced structured civil service through affirmative action. Similarly, the Public Service Commission Act of 1990 entrusts the PSC with similar powers.

Ever since its establishment a little bit more than a year ago, the PSC was faced with the tremendous task of how to implement the provisions of Article 23 pertaining to the balance structuring of the civil service through affirmative action in the absence of legislation or clear policies as provided for in Article 23 (2).

As the civil service was predominantly white and closed to any one from outside, there was a dire need to appoint people from the disadvantaged groups into the civil service. The expansion of services to those who were previously excluded from the resources as well as to hitherto neglected rural areas as part of the overall new aims and objectives of the Government required a restructuring of the existing state machinery. New ministries were created with a civil service loyal to these new aims. Although very expensive, the expansion of the civil service was also necessary for the simple reason that the Constitution in Article 141 provided security of tenure to those employed before independence and therefore many civil servants retained their positions with the result that few vacancies existed.

The PSC therefore adopted practical measures to address the issue of balanced structuring through affirmative action:

(a) All vacant promotion posts in the Public Service were advertised sometimes with relaxed requirements. (Qualifications were generally not relaxed). This enabled disadvantaged people both in the lower levels within the public service as well as those outside of the service to apply and compete for promotion posts which were always filled from within the service in terms of the career system.

(b) Amendments as initiated by the PSC were made to the Public Service Act 1980 in particular Section 10 which sets out the procedure for the filling of vacant posts within the public service to enable the PSC to deviate from existing procedures in the filling of the post.

(c) Priority was given by the PSC to look at the candidature of the disadvantaged applicants for the filling of any post. Only when it is not possible to do that, were other applicants considered.

Staff rules and standards, recruitment, selection and placement as well as performance appraisal systems which are in conflict with the aim of balanced structuring were revised or are under continuous scrutiny by the PSC.

It should be noted that independence has created high expectations amongst the disadvantaged majority. The government or the public sector has become the refuge for a great many people as it is the single largest employer. The private sector has yet to awaken to the changes brought about by independence by absorbing the unemployed into the labor market. Thus beside the need to absorb newcomers into the civil service, the competition for jobs has led to a belief that government must provide jobs.

The absence of legislation and procedures indicating exact details about when and how affirmative action is to be applied can be attributed to the nature of affirmative action, as it also involves the private sector. However, although differences may exist between the two sectors, the principles of affirmative action remains the same. Secondly, it also has a bearing on the overall policies of the Government. Affirmative action policies do not operate in a vacuum. They are tied to overall objectives which the government of the day set for itself. What then are those objectives?

The shift from a colonized Namibia to an independent Namibia requires a fundamental and radical transformation of our society. This entails inter alia a thorough rethink of all government policies. The policies of the previous government were designed to benefit only a minority of the population and hence will of

necessity be in conflict with the declared objectives of the present Government. The problems inherent in such a transformation is quite clear. The task of the Government of removing class, race and sex discrimination and of transforming the human and material resources into a development oriented service is formidable indeed.

Strategies have been adopted by the Namibian government to ensure that the objectives are achieved and that services are not only maintained but also extended to hitherto neglected areas. These strategies are ultimately intended to have an affect on the development of human resources which are responsive to the changes. Expansion of services and the inclusion for the first time of those excluded before will also necessitate expansion of the personnel. We have witnessed those changes within the public service.

Thirdly, the existence of many role-players none of which can create legislation or policy on its own. As such the PSC cannot on its own embark on such a course but has for practical purposes adopted measures on affirmative action within the confines of the Public Service in adherence to the Constitution. At present a task force has been set up to look into affirmative action programs.

As a footnote it is worth bearing in mind that policies which emanate from Government or from the National Assembly will not solve the problem alone. The co-operation of all people is needed.

Affirmative action or positive action as it is sometimes called, has its origin in the US. It is a concept which has considerable meaning for disadvantaged people and creates unease amongst those who benefitted from past systems. However, to transplant this concept as it had been developed and promoted by law in the United States without making it relevant to the Namibian situation will create grave misgivings. In Namibia, the disadvantaged population comprises the bulk of the black people including women. Discriminatory laws and practices have greatly contributed to the inequalities which were inherited at independence.

As stated earlier, affirmative action programs must be aimed at redressing imbalances by putting disadvantaged people in the positions they would have been but for Apartheid. Thus in a society pledged to increase the employment of black people and women in the public sector, the Government, as an employer faced with two equally qualified applicants, one black person or female, one white person or male, might choose the black person or woman if they are under-represented in that particular job. Where a less well-qualified person is chosen in preference to a well qualified person, it should be sanctioned by very special

and very circumscribed circumstances. This latter course is necessary in view of the various problems which present themselves: The question of the balance between the demand of equity and those of efficiency. Equity demands restitution and meeting the expectations of the disadvantaged. Efficiency demands appointing people on the basis of merit so as not to result in economic inefficiency. Proponents of affirmative action have also cautioned for the need to have a clear government policy on affirmative action to exclude nepotism and corruption. As the government policy on affirmative action is aimed at those who were disadvantaged in the past, its focus will be mostly on black people and women. But it should not engage in mere reverse discrimination. Employment of the disadvantaged should be on the basis of merit and not only because of skin color or gender. As alluded too earlier, only in exceptional circumstances can a different approach be adopted.

It is essential to point out that the concept lends itself to various interpretations: there are those who believe that there should be competition on equal basis in the absence of discriminatory laws and practices. Others believe that even if discrimination is absent, preconceptions and attitudes still persist besides the fact that there is a need to rectify the results of discrimination i.e. the aim should be not only to end discrimination but to compensate those who had been affected by discrimination and thereby having been denied opportunities.

The effective implementation of affirmative action programs will depend to a great extent on well developed policies, the availability of statistical data on manpower and the willingness to implement the programs. The availability of data is very crucial in that there is always an excuse that human resources are not available. Similarly, the identification of posts in the civil service in which potential candidates can be employed is essential. It may be necessary to establish an independent commission dealing exclusively with affirmative action issues as well as monitoring its implementation. Equally, the problem faced by the PSC in implementing affirmative action programs is due greatly to well-developed government policies in the issue. Enforcement of such programs in the private sector also depends on well established policies. Thus for the new South Africa, you may wish to start developing broad policy guidelines on affirmative action as well as on how it will be implemented. The setting of a target date within which to achieve the objectives of affirmative action is also very important.

Affirmative action goes hand in hand with the policy of national reconciliation and reconstruction. On the economic level, reconciliation must mean acknowledging that the past has benefitted a few at the expense of the many and that without initiatives by the former to include the latter in these benefits, affirmative action programs in favor of the

disadvantaged will and must have a role to play in the redistribution of resources. Reconstruction of Namibian society and the economy will need the equal participation of the new and the old. Blending these resources together through the application of affirmative action programs must be viewed as a necessity as we all have a contribution to make in achieving an equal, just and democratic society. We know that the cornerstone of any society is equality, peace and democracy.

AFFIRMATIVE ACTION IN PUBLIC EMPLOYMENT: THE MALAYSIAN CASE

by

Mavis Puthucheary

Malaysia is perhaps the only country to include some form of affirmative action in its independence Constitution. But the bases for affirmative action in the Malaysian context are in many respects unique to the political situation of the country at the time of independence. Therefore the form of affirmative action in Malaysia is different from the form taken by other countries where affirmative action is adopted as a strategy to assist those disadvantaged by previous discrimination.

In particular it must be stressed that there are two important differences with regard to the form of affirmative action in, say, Malaysia and the United States. First, affirmative action in Malaysia is defined specifically in ethnic terms. That is, the targetted group to be assisted by affirmative action programmes belong to a particular ethnic group. A ranked social system is assumed in which ethnic and class boundaries coincide.

Second, unlike the United States, the group expected to benefit from affirmative action was also the group with a preponderance of political power. This group was therefore in a position not only to implement affirmative action according to the law, but also to give the law the widest possible interpretation.

The purpose of this paper is to indicate possible lessons that can be learned from the Malaysian experience. The paper is divided into three parts. In the first part, the historical bakground that gave rise to inclusion of a special kind of affirmative action is described. In the second part, some of the legal and constitutional issues are examined with special

reference to affirmative action in public employment. Finally, the question of affirmative action in the context of the broader objective of achieving national integration is discussed.

1. HISTORICAL AND POLITICAL BACKGROUND

Malaysia has been described as a plural society par excellence. The population is divided into three distinct ethnic groups, Malays, Chinese and Indians. At the crucial period of negotiations, no ethnic group made up a majority. The Malays, who constituted the single largest majority, made up less than 50% of the population in 1947. A large proportion of the Malay population still lived in the rural areas. The Chinese, comprised about 39% of the population in 1947. Not only were they numerically significant but they were concentrated in the urban areas where their relative wealth was demonstrated in the large houses and other signs of oppulence. Although the wealth of the country was in the hands of foreign (mainly British) economic interests, the absence of permanent British settlers masked the identity of the real owners of wealth in the Malaysian economy. The rest of the population was made up of Indians, Ceylonese, and "others".

The ethnic divisions in the society were further reinforced by religious and cultural differences and by an ehtnic division of labour. The majority of Malays were engaged in subsistence agriculture and smallholding rubber cultivation. At the apex of the Malay social structure, however, was the Malay traditional elite headed by the Malay rulers. The colonial rulers

recognised the Malay traditional system by introducing an indirect system of rule in the Malay States. The preservation of the individual identity of the separate states and the Malay traditional symbols of power served to strengthen the belief that power was shared between the colonial government and the Malay rulers. This belief was supported by the introduction of preferential policies for Malays in public employment both at the state level and at the federal level. A special school was set up to train Malays, mainly from aristocratic backgrounds for jobs in the higher civil service, in particular, the elite Malayan Civil Service (MCS). By opening the prestigious MCS to the Malays while denying entry to individuals from other ethnic groups, the British confered discriminatory status on the different groups. It seems that the Malay belief in their special rights was reinforced by the perceptions of the colonial administrators and this gave the belief some degree of legitimacy.

The other ethnic groups, while being denied employment in certain sections of the higher civil service, were employed in, large numbers in the clerical and technical brances of the civil service. In particular the English educated Indians and Ceylonese occupied these positions. The majority of Chinese were more interested in business, in particular in mining and trading activites while most of the Indians who were brought into the country as indentured labourers to work on the rubber estates had little opportunity to move out of the estates.

By creating different political and administrative structures to govern the different ethnic groups, the colonial

government succeeded in its policy of "divide and rule". It was only after the second world war when, largely as a response to constitutional changes introduced by the British, political competition was seen in ethnic terms giving rise to the saliency of ethnicity and the strengthening of ethnic consciousness.

One of the earliest political parties to mobilise support of the Malays was the United Malays National Organisation (UMNO). This organisation was successful in thwarting the colonial government's plan to introduce constitutional changes that would give equal political rights to all those born in the country irrespective of race. The leaders of UMNO insisted that the Malays had a special right to Malaysia, or Malaya as it was then called, on the grounds that they were the original people of the country. They claimed these rights by virtue of their indigeneousness which was contrasted with the immigrant status of the Chinese and Indians. Fear of being swamped by the growing immigrant population gave rise to Malay demands for exclusive political rights. Although by this time the distinction between the indigeneous and immigrant groups was largely a matter of fiction, because a large proportion of the Chinese and Indians had by then been born and had settled down in the country, the British, in the interest of political stability, withdrew the granting of equal citizenship in favour of a scheme in which Malay political supremacy vis-a-vis the Chinese and Indians was upheld.

The withdrawal of the Malayan Union and its replacement

by the Federation of Malay Agreement of 1948 turned the tide against the non-Malays in two important respects. First, a clause in the Federation of Malay Agreement gave the British High Commissioner the special responsibility for safeguarding the special position of the Malays. In the future negotiations the Malays insisted that this was a right which had to be guaranteed in the independence Constitution. Second, the withdrawal of automatic citizenship rights for non-Malays meant that future negotiations had to include the question of whether or not citizenship should be given to non-Malays and on what terms.

Malay demands for exclusive political rights became less strident as a result of several factors. First the British advisors made it clear that it would not hand over political power to only one community. As a result a British-initiated Communities Liaison Committee was set up to provide an informal structure for inter-ethnic discussion. Second, and more important, was the formation of the Alliance coalition. Initially set up only as an electoral pact between the UMNO and the Malayan Chinese Association (MCA), the arrangement was institutionalised in the establishment of the Alliance Party,a loose coalition of three ethnically-based parties, UMNO, MCA and the Malayan Indian Congress (MIC). The Alliance Party, albeit in a slightly different form, has been in power since independence. The democratic system has been maintained and the holding of relatively free and fair elections, has given legitimacy to the system and to the ruling coalition. This has contributed to political stability and to the continuation of the political system at least up to the present.

Malaysia has been relatively successful in being able to manage ethnic conflict. It has succeeded not only in creating the structures which have contributed towards promoting inter-ethnic cooperation but has also been able to work out an arrangement for inter-ethnic cooperation before the conflict took a violent form. Only in 1969 were there largescale ethnic riots which I shall discuss later in the paper.

It has been suggested by Horowitz that Malaysia has been relatively successful in avoiding ethnic conflict because its leaders "began working on inter-ethnic accomodation early in relation to independence". (Horowitz 1989:24) The timing was also crucial in facilitating inter-ethnic cooperation.

This was seen especially in the timing of the first elections. The holding of local government elections before the national elections was crucial to forging inter-ethnic cooperation because, while voting in national elections were confined to those with citizenship, this was not so for local government elections, making it possible for a large section of the non-Malay urban population to vote. This meant that in order to win the local elections, UMNO had to get the support of at least a section of the non-Malays, thus resulting in the UMNO-MCA pact. Horowitz makes this point when he states:

> The 1955 parliamentary elections preceded the granting of citizenship to most Chinese and Indians, and...Malays comprised an 84 per cent majority of the national electorate. Had these national elections preceded the town council elections, UMNO would not have found the formation of a multi-racial coalition to be in its interest; it would, instead, have responded exclusively to Malay demands, and the independence constitution of

> 1957, which consisted of an elaborate package of carefully negotiated compromises, would not have been possible. (Horowitz 1989: 27)

But it is not true to say that the constitution "consisted of an elaborate package of carefully negotiated compromises". Once the Alliance Party was able to demonstrate that it had the support of the electorate as a whole, its leaders began to nurture ambitions of becoming the future leaders of an independent Malaya. The party began to press for the early transfer of power claiming that it had the mandate from the people. In their effort to present a common front to the colonial authorities the leaders of the different groups within the Alliance did not press their ethnic claims to the point where the unity of the party would be threatened. In fact the leaders outwardly gave an impression that they had reached a settlement on all major issues, in some cases the actual content of the agreement was not known. It was assumed that once independence was attained, these issues would be settled in the spirit of give-and-take which was the basis of inter-ethnic elite cooperation.

It was in this spirit that the non-Malay leaders agreed to the inclusion of special guarantees for Malays in the Constitution. In fact the Alliance election manifesto for the 1955 elections promised the Malays that the Alliance would ensure that they would be constitionally protected.

The need for for this special clause in the Constitution was justified on the grounds that the Malays had

been disadvantaged by discrimination in the past. By allowing them to continue their subsistence economy, the colonial rulers had indirectly contributed to the creation of ethnic imbalances in wealth and income. It was claimed that the Malays were economically disadvantaged and that there was a need to correct ethnic inbalances in income and wealth through affirmative action. The special position clause in the Constitution was a form of protective discrimination in favour of the Malays.

It was, however, not necessary to include a clause in the Constitution to ensure that Malays are given some form of protection and assistance in order to improve their economic position. As in other countries, a simple act of parliament would have sufficed; and it was clear that the Alliance had the political clout necessary to ensure both the formulation and implementation of affirmative action programmes for the Malays. But it seems that for the Malays the special rights clause meant something more than affirmative action which by its very nature was limited in scope and had a definite time span; it somehow was expected to give Malays a political superiority which had nothing to do with democratic elections. The rationale for these special rights was based on the claims of Malay ownership to the land. The dichotomy of "indigeneous - immigrant" status was maintained in order to support the claim even though even at the time of independence more that 60 per cent of the non-Malay population was locally born and had no other home except Malaysia.

The clause in the Constitution with regard to special

position of the Malays is contained in Article 153 of the Constitution which is reproduced in full as Appendix A of this paper. The relevant sections relating to affirmative action in public employment states that:

> It shall be the responsiblity of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the states of Sabah and Sarawak and the legitimate interests of other communities in accordance with this article...the Yang di-Pertuan shall exercise his functions...to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service... and of scholarships, exhibitions and other similar educational and training privileges ...

LEGAL AND CONSTITUTIONAL ISSUES RELATING TO AFFIRMATIVE ACTION IN PUBLIC EMPLOYMENT

The independent Constitutional Commission set up to make recommendations for a new Constitution for independent Malaya was constrained by its own terms of reference which required it to reconcile two contradictory principles. One one hand the Commission was expected to set up the framework for a parliamentary democracy in which there was to be a "common nationality" for all. On the other hand the Commission was expected to take into account the "special position of the Malays" and make provision for in the Constitution. The framers of the Constitution acknowledged that they:

> ...found it difficult, therefore, to reconcile the terms of reference if the protection of the special position of the Malays signified the granting of special privileges, permanently to one community only and not to the others. (Constitutional Commission 1957)

The Commission was, however, in favour of some form of affirmative action because they believed that "Malays would be

at a serious and unfair disadvantage compared with the other communities if they (these preferences) were withdrawn". But they believed that there should be some time period, after which these privileges should be reviewed. It was hoped that "with the integration of the various communities into a common nationality which we trust will gradually come about, the need for these preferences will gradually disappear". This also seemed to be the view of the non-Malays. According to the Commission:

> We found little opposition in any quarter to the continuance of the present system for a time, but there was great opposition in some quarters to any increase of the present preferences and to their being continued for any prolonged period."(Constitutional Commission 1957: 72)

Accordingly the Commission recommended that the special privileges be continued "for a substantial period, but that in due course the present preferences should be reduced and should ultimately cease." The Commission suggested that existing preferences be reviewed 15 years after independence.

As to be expected, the UMNO leaders opposed putting any time limit on the special rights clause. In the euphoria of their newly attained independence, all the component parties in the Alliance. During the debate on the Consitition, the leader of the MCA informed Parliament that:

> I have no doubt in my mind whatsoever that when the time comes, the Malays themselves will ask for its abolition, but this is a matter which we must obviously leave to them to decide. (Parliamentary debates 10 July 1957)

The inclusion of the special rights clause as a permanent feature of the Constitution contradicted the provisions in the Constitution relating to the fundamental rights of the

individual. For example it contradicted Article 8 which provided that all persons are equal before the law and entitled to its equal protection. A citizen may not be discriminated against on grounds of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority (meaning generally Government, a local authority or statutory authority) or in the administration of any law relating to the acquisition, holding or disposition of property,or the establishment or carrying on of any trade, business, profession, vocation or employment (Tun Mohamed Suffian 2nd edition 1976: 205). Yet, 153 of the Constitution allows for the very discrimination which it disallowed in clause 8.

Affirmative action in favour of Malay employment in the public sector is unique. Although article 153 had its inspiration in the protective discrimination provisions of the Indian constitution (Sheridan and Groves 4th edition 1987: 411), it is fundamentally different in that it provides for Malay dominance in certain sections of the civil service. For these services, a quota is imposed which guarantees that these services will be permanently filled by Malays. The government has imposed a recruitment quota in respect of certain services, namely 4 Malays to 1 non-Malay in the Malaysian Home and Foreign Service (previously called the Malayan Civil Service); 3 to 1 in the Judicial and Legal Service; 3 to 1 in the Customs Service; and 4 to 1 in the police force. The quota in the armed forces extends to the rank and file (Suffian 1976: 295).

In evaluating the impact on the quota system in public

employment, it is important to not the two following points; first, that the quota applied only to five services and only to the higher civil service. There was no quota imposed for most of the federal public service. In particular the proffessional and technical services as well as the clerical services were filled by non-Malay officers.

Second, the quota system only applied to the recruitment of officers; once employed the Constitution provided for equal treatment of officers with regard to promotion and in-service training. The Constitution also provided for the selection of officers for the civil service according to procedures which would allow for the selection according to merit. In addition, article 136 provides that after entry all federal employees must, subject to the terms and conditions of their employment, be treated impartially. Every state constitution has a similar provision regarding state employees (Suffian 1976: 140).

The Constitution also provided certain guarantees protecting what it called "the legitimate interests of the other communities". The government, in implementing affirmative action programmes must take into account the rights of the non-Malays such as rights to keep their property and rights of those in public employment to keep their jobs. The Constitution expressly prevents a person in public office from being deprived of his job or a person already holding a government scholarship from being denied this privilege (See Article 153 in Appendix A).

During the first ten years after independence, the

Alliance government did their utmost to reconcile the contradictions in the Constitution in a fair and equitable manner. There was strict adherence to the rule of law. Although there was a quota restricting the employment of non-Malays in certain sections of the civil service, non-Malay were not denied access to the other sections where there was no quota. In the period immediately after independence as British officers were "Malayanised", both Malays and non-Malays began to fill the higher echelons of the civil service. But the existence of a quota in some services, combined with the fact that there were insufficient numbers of qualified Malays to fill the posts in the professional and technical services, resulted in Malay over-representation in the administrative and semi-professional services and in the police and armed forces, and Malay under-representation in the professional and technical and clerical services.

As the majority of Malays were in the rural areas, many of the affirmative action policies were designed to improve the socio-economic position of the rural Malays. A large number of agencies were set up to provide agricultural extension work as well as land settlement schemes, credit and marketting facilities, and other forms of assistance. A large Malay bureaucracy was set up to provide these services. In addition, vast somes of money was spent of what were called "minor works rural development" to improve the quality of life of the rural people. Most of all, the government focussed its attention on

expanding and improving the educational facilities in the rural areas.

Despite these efforts, there was considerable disatisfaction with government policies. Resentment seemed to come from both the Malays and non-Malays, Malay claiming that not enough was being done for them, while non-Malays claiming that they were being discriminated against. Resentment appeared to manifest itself especially during election campaigns, when "political entrepreneurs" seeking electoral victory resorted to making anti-racial statements (Rabushka and Shelpse (1971 465). As competition politics became synonymous with ethnic politics, there was a tendency for leaders to outbid each other in their claims to protect the interests of their own ethnic group against threats of deprivation in a zero-sum political environment.

Ethnic competition of this nature seemed to have an inbuilt mechanism for political instability as was manifested in the period immediately following the 1969 elections. According to the official report on the causes of the ethnic riots in Kuala Lumpur, ethnic conflict broke out as a result of the irresponsible statements made by "opportunists" and "extremists" who questioned "the historic right of the Malays to regard themselves as the indigeneous people of Malaya" and who falsely claimed that "Malays were given privileges in government jobs to the exclusion of non-Malays" (May 13 Tragedy 1969 21).

The breakdown of law and order and the declaration of a national emergency gave an opportunity to the UMNO leaders to renegotiate the terms of the bargain. The emergency had given in

effect transferred all power to the UMNO and the new bargain was clearly one in which the Malays would "share" political power without in fact losing it.

It was made clear form the beginning that parliamentary democracy would be restored only after certain conditions were met. In particular the Malay leadership wanted the special rights clause to be extended in scope to cover a wide range of economic activities including employment in the private sector It wanted ethnic quotas to be extended to institutions of higher learning as well.

There were also demands for changes in the Constitution to ensure that the special rights clause could not be removed even with a two-third majority. This particular clause in the Constitution required the consent of the rulers in council in addition to the normal two-thirds majority required for amending the Constitution. Given the fact that the Malay rulers would be unlikely to do anything which was not in their own vested interets, this amendment meant that the special rights clause would be there as long as the Constitution was in force.

Furthermore, restrictions on the freedom of the individual were made with regard to public discussion of the special rights clause. Constitutional amendments were passed preventing public discussion on what were termed, "sensitive issues" which included discussion of the special rights clause.

As the role of government increased both in magnitude and scope, the size of the public sector also grew considerably.

Government expenditure as a percentage of the GDP rose from 14% in 1960 to 41.7% in 1986. Public sector employment also grew from about 250,000 in 1965 to 850,ooo or about 12.8% of the labour force (Second Outline Perspective Plan 1991-2000:116).

As to be expected, a large proportion of those recruited after 1970 were Malays. As many of the new agencies were established to implement various aspects of preferential policies which were incorporated under what was called, the New Economic Policy, it was obvious that there would be a preference for Malay officers as their values and self-interest would be in tangent with the government's policies. The ethnic breakdown of public sector employment shows that by 1990 out of the 850,000 people employed nearly 66% are Malays. (Second Outline Perspective Plan 1991-2000:116)

AFFIRMATIVE ACTION IN PUBLIC EMPLOYMENT IN THE CONTEXT OF NATIONAL INTEGRATION

Since 1970 several factors have contributed towards a gradual but clearly discernable shift in the balance of power between the ethnic groups. Although the structure of consociational politics remains, the extent of Malay political dominance has increased. Through various changes brought about mainly by government strategies, Malay political dominance has become both "overwhelming and unassailable" (Means 1991: 316). What implications does this have for national integration?

First, the ethnic emphasis given to affirmative action has meant that as the group which is in power is also the group targetted to benefit from the policies, there is a tendency for

the government to give the widest possible interpretaion to the special rights clause. This was clearly seen in 1970 when the previous interpretation giving Malay preference in certain limited areas like public employment was replaced by another interpretation in which preferential policies were extended to almost every aspect of social and economic activity. The official interpretation of the special rights clause in 1970 was stated as follows:

> The purpose of this article is to provide leverage to the Malays to advance and progress more rapidly since it is generally recognised that the Malays and the non-Malays have not advanced at the same rate of progress. (White Paper entitled "Towards National Harmony" 1971)

According to this interpretation the socio-economic position of the Malays as a group is compared with the socio-economic position of the non-Malays as a group. Such a comparison showed that, despite the large government expenditures on rural development programmes designed primarily to benefit the rural Malays, ethnic imbalances had increased rather than decreased. To overcome this problem the government introduced the New Economic Policy and increased Malay participation in the expanding public sector. The redistributive objectives of national development was emphasised, with special attention being given to strategies to increase Malay participation in the modern sectors of the economy.

But, as in the case of affirmative action in public employment, the government assured the non-Malays that they would not be deprived of what they already had. It was assumed that the

redistributive objectives of the NEP would be implemented within the framework of an expanding economy. This meant a bloated public bureaucracy and heavy public debt. The strategy of increasing Malay participation in business through the establishment of a large number of public enterprises, while very costly in financial terms, was effective in reducing the potential for ethnic conflict. Fortunately the country's expanding economy was able to bear the cost of the government's huge expenditure and to carry the burden of financial losses incurred by some of the enterprises. Nevertheless, by using these strategies the government managed to achieve its objective of increasing Malay participation in business activities without being seen as depriving the other communities with what they already had. Thus although there are individual instances of deprivation, in general the policies have been implemented without undue hardship for non-Malays. Most of all the distributive objectives have been achieved within the framework of a expanding economy so that everyone has benefitted. The rapid rate of economic development has provided job opportunities for both Malays and non-Malays in the public and private sectors. This increase in private sector employment has meant that there has been less pressure on the government to increase the size of the public bureaucracy in order to accomodate the increasing number of Malay graduates who enter the labour market every year. The government has recently embarked on a privatisation programme to reduce the size of the public bureaucracy. This is possible because of the low unemployment rate which, at about

6%, must be one of the lowest in the world. Even more significant from the point of view of ethnic relations, the rates of unemployment are roughly the same for all ethnic groups, thus supporting the government's claim that it has implemented affirmative action policies in a fair and just way.

But even with this high rate of economic growth, national integration is still very far from becoming a reality. All that seems to have happened is that economic development has tended to mute, for the time being at least, open conflict. The reason for this is that basically the sources of conflict have not been removed; political competition is still fought on ethnic lines, with leaders mobilising support by promises of patronage and individual rewards to members of their own community. The continuation of the special rights clause and its extension to other areas has been a source of considerable resentment among the non-Malays who have tended to have shifted their support to the opposition parties. Thus slowly a pattern of majoritarian rule is being established, in which there is Malay dominant rule and non-Malay minority opposition. The defining of affirmative action in ethnic terms has contributed to the strengthening of ethnic institutions and to the gradual move away from consociationalism to a position of Malay political hegemony.

A political system in which politics is defined in ethnic terms and in which the majority ethnic group remains permanently in power while minority groups are locked out of power does not augur well for national integration. As pointed

out by Horowitz, the kind of majority rule which is based on ascriptive factors such as ethnicity, tends to create a situation which results in majority domination and the exclusion of minorities from power because:

> The election is tantamount to a census, and it locks out the minority from any significant political power, save what it can pry loose by violence or disruption... ascriptive majority rule...kills democracy by turning elections into census and locking minorities out. (Horowitz 1991:98)

In Malaysia the continuation of the consociational system, in name if not in fact, has been a major factor contributing to the legitimacy of government as a multi- racial government. But the credibilty of the system is slowing being eroded as non-Malays begin to realise that they have lost real political power. All they have is the right to vote, but as their votes make no difference to the outcome of the elections, this means very little. For the time being, however, they non-Malays have not become conscious of their powerlessness mainly because the government continues to maintain the semblance of a power-sharing arrangement by keeping the Alliance structure and by the willingness of the leaders to work with the non-Malay leaders. But it is becoming clear that whatever to the non-Malays have obtained, they have received not because of their leaders in the Alliance have been able to negotiate and influence policies, but because the Malay leaders themselves have decided to make these concessions. The leaders of the non-Malay parties in the Alliance are dependent on "hand-outs" from the the Malay leaders. Thus a new kind of patron-client network is established in which Malay

leaders promise rewards in exchange for some degree of non-Malay support. It is clear, however, that as the non-Malay support for the Alliance falls, the need for the coalition government becomes less. It seems that it has reached a point where the coalition is allowed to exist merely to maintain the facade of a multi-racial government. Almost all the non-Malay candidates in the Alliance depend on Malay rather than non-Malay votes for their success at the polls.

The shift in emphasis from consociationalism to Malay majority rule has had certain adverse implications for maintaining the balance between affirmative action for Malays and protecting the "legitimate rights of the other communities. This is seen in the changes with regard to the public employment. For example, although in theory Malay special rights apply only to recruitment, and not to promotion, in practice, there is a tendency for Malays to be promoted in order to make sure that the highest policy-making positions are filled by Malays regardless of objective performance standards (Means 1972:47-48). This, according to Means has "contributed in no small measure to an erosion of public confidence in the public service, particularly among non-Malays.

In addition, there is a tendency to apply ethnic preference policies in those services which do not have ethnic quotas, thus confirming the earlier point that there is no need for ethnic quotas to ensure ethnic representation; in fact affirmative action that is incorporated in ordinary laws which have a sunset clause are usually better monitored as they have to

be reviewed from time to time.

Affirmative action policies which do not define the disadvantaged in ethnic terms are more likely to gain wider acceptance from the public than those which are designed to benefit particular groups defined in ethnic, religious or regional terms. When the disadvantaged are defined in ethnic terms, as in the case of Malaysia, it is likely that those benefitting from ethnic preferences will be the richer members of that community, thus discrediting the policy as a whole. When this happens it is difficult for the society as a whole to support affirmative action. To some it has been equated with a form of legalised corruption.

What seems to have happened in the way affirmative action is practised in Malaysia is that while inter-ethnic inequalities still exist and are likely to continue, inequalities within each community have widened as wealth has trickled down to the poorer sections of the society. The danger of concentrating on eradicating inter-ethnic inequalities is that in the efforts to correct aggregate ethnic imbalances, the really poor members of all communities have been neglected thus defeating the very purpose of introducing affirmative action for the disadvantaged.

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APPENDIX A

FEDERAL CONSTITUTION
MALAYSIA

153. (1) It shall be the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and the legitimate interests of other communities in accordance with the provisions of this Article.

(2) Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities give or accorded by the Federal Government and, when any permit or licence for the operation of any trade orbusiness is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences.

(3) The Yang di-Pertuan Agong may, in order to ensure in accordance with Clause (2) the reservation to Malays and natives of any of the States of Sabah and Sarawak of positions in the public service and of scholarships, exhibitions and other educational or training privileges or special facilities, give such general directions as may be required for that purpose to any Commission to which Part X applies or to any authority charged with responsibility for the grant of such scholarships, exhibitions or other educational or training privileges or special facilities; and the Commission or authority shall duly comply with the directions.

(4) In exercising his functions under this Constitution and federal law in accordance with Clauses (1) to (3) the Yang di-Pertuan Agong shall not deprive any person of any public office held by him or of the continuance of any scholarship, exhibition or other educational or training privileges or special facilities enjoyed by him.

(5) This Article does not derogate from the provisions of Article 136.

Affirmative Action in Education, Health, Welfare and Employment

by R.K.W. Goonesekere

"In South Africa, it is not just a question of dealing with poverty such as you might find in any country, but with responding to the social indignities and inequalities created as a direct result of State policies under apartheid."

A Bill of Rights for a New South Africa

(Working Document by the ANC Constitutional Committee)

The situation in Sri Lanka or Ceylon as it was then known at the time of independence in 1948 was quite different from the situation in South Africa today. The British who had ruled Ceylon as a colony had succeeded in making Ceylon one of the show-pieces of the Empire. In the political sphere, there had been a gradual transfer of power by constitutional reforms and without violent agitation. Leaders representing the people had impressed the colonial masters of their ability to govern themselves in an orderly fashion and in the best British tradition of parliamentary democracy. Many factors stood out to inspire this confidence - political maturity and experience in self-rule displayed by the leaders, an excellent educational system, a legal system that combined the best elements of the English common law and the Roman-Dutch law, a judiciary accustomed to asserting its independence and impartiality, a stable economy based on the plantation industry, and a cohesiveness among the people, despite differences.

A notable factor was that there were hardly any white settlers, whether British or Dutch, at any given time. There were British residents who were managing the estates and agency houses, others who were engaged in banking and commercial activities or serving in the higher echelons of the administrative service. The superiority of the British manifested itself in the private sector in their dealings with subordinate staff or with minor officials, and less in the administration where educated Ceylonese were more than able to hold their own. There were other insidious forms of superior status such as exclusive clubs and social gatherings, but no one seriously minded this. The people may have looked at the British with deference on ocasions but never put themselves down as inferior beings. Generally speaking the ordinary man had more to deal with his own kind and there would have been more indignities that he suffered at their hands than from the white masters.

When independence came, there was no score to settle with the British people who chose to remain and who, in any event, did not enjoy any special advantages.

Even before independence great strides had been taken to justify Ceylon's claim as a model society. Representative government based on universal adult suffrage had been established with success. The schools system giving a good English education meant that the medical, legal, engineering, scientific, educational, administrative and other services

were easily filled by qualified Ceylonese and in sufficient numbers so as to make unnecessary dependence on outsiders. It is worth mentioning that education had been made free in government schools for everyone from the lowest grade and including the University opening the doors of learning to all segments of the population. Equality of educational opportunity existed for everyone irrespective of sex, race, religion or social background. There were no laws or administrative decisions restricting the benefits of education to some and denying it to others. Indeed, the policy was the other way round - encouraging the school-going habit.

The educational system was matched by the medical services which operated a free health scheme. Government hospitals established in all the districts provided indoor and out-door facilities of every conceivable kind to all patients alike who did not pay anything as consultation fee or fees for surgery, medicine, laboratory tests, nursing, food etc.

One can sum up by saying that on the eve of independence, the professions and the administrative service (which was the most sought after employment) were open to all persons on the basis of merit and merit alone. We can also add that there existed religious freedom, freedom of the press, freedom of association, freedom to form political parties even of a Communist kind, and other freedoms associated with a liberal democracy.

No country is entirely homogeneous and Ceylon was no exception. There was a majority community (Sinhala) and several minority communities (Tamil, Indian Tamil, Moors, Malays and Burghers). This is a division based on race or ethnicity, as well as language. Another division would be according to religion with Buddhists constituting the majority and the others being Roman Catholics, Protestants, Hindus and Muslims. A third division was based on caste or a social stratification among the Sinhala and Tamils coming from ancient times. It could be said that the developments that were noted above cut across all these divisions, and that even if there were at times private prejudices, officially and as a matter of law, no favour or disfavour was shown to any person by virtue of his being a member of any particular group for whatever purpose.

This is not to say that differences did not exist or that resentments were not felt from what was perceived as differential treatment. If we take the case of Indian Tamils who were recent migrants brought by the British from South India to provide cheap labour on their estates (and for that reason not identified with the Ceylon Tamils) they were concentrated in the remote inaccessible areas of the interior. They were not considered permanent residents. The facilities available to them were less advantageous and they lacked the opportunity for advancement available to other communities. They constituted a large minority group. There were no special laws discriminating against them but in educational and employment opportunities, they were outside the main stream.

A similar group was constituted by the depressed castes, both Sinhala and Tamils. This is more difficult to explain because it was a prejudice, sometimes an ostracism, manifesting itself in social behaviour against persons belonging to what were considered inferior or low castes. Caste distinctions have been officially condemned but certain practices and prejudices in dealings with so-called low-caste people have persisted and have had the effect of not affording to them the same opportunities for advancement as for the higher castes.

A third group consisted of a very large section of the population - 90 per cent or more who lacked an education in English. Power, position and privilege lay with the small minority of English speaking, English educated families. University and professional education was in English and English was also the language of administration and of the Courts. For the vast majority of the youth in the rural areas where thre were no or few facilities for teaching of English in their schools, this meant a denial of the opportunity for higher education and they were out of the race for white-collar employment.

The fourth and last group was the entire Ceylon Tamil community which in numbers was almost as large as the Indian Tamils and shared with them a common language. But in all other respects they were different. They were very much in public life, in the professions, in the administration and all other walks of life. This was not a disadvantaged group in

any sense of the term. Equality of opportunity and equality of treatment had enabled them on merit and industry to achieve the highest positions available. They are mentioned as a group not because of historic injustices but because of the fear that the future may not be as rosy as before. In achievement, they were seen as having attained results more their numbers justified. On the basis of territorial representation and one man/woman one vote, they saw the transfer of political power to the Sinhala and future domination by the Sinhala majority to their detriment.

II

In this state of affairs and in the confidence that the existing laws guaranteed basic human rights, there was no agitation for a Bill of Rights to be incorporated in the Independence Constitution. What was seen to be necessary was to allay the fears of the Tamil minority that their rights to equal treatment would not be in jeopardy. For this purpose, it was considered sufficient that the Constitution should place appointments outside political control and in the hands of an independent Public Service Commission, endorse the principle of merit and ensure an independent judiciary. Additionally, the Constitution prohibited the passing of any law which would confer on persons of any community or religion any privilege or advantage which is not conferred on persons of other communities or religions.

Subsequent developments have shown that the country would have benefited immensely in having a Bill of Rights and that the optimism in the political leaders with the best will in the world being able to control hidden forces was misplaced.

But first to deal with the positive side. For almost 10 years, nothing happened to raise apprehensions that that Tamils would be denied education, health, employment, public office, equality of opportunity in any sphere. There was also a positive step taken to eradicate social practices which were discriminatory and offensive. In 1957 the Prevention of Social Disabilities Act was passed making it an offence to impose a social disability on any person by reason of such other person's caste. Covered by this law were acts of discrimination in employment, in education, in shops, in public eating houses and lodging houses, in availing of public facilities such as water, hairdressing saloons, laundry, cemetery, transport, in clothing and in places of religious worship. It was also made an offence for a public officer not to perform any duty he was bound to perform if his decision had been influenced by the caste of the person for whose benefit he should have acted. Caste differences at this time were only shame-facedly admitted at higher social level and in a more hurtful manner at times in the lower strata. The Act struck at the perpetration of indignities of a public nature based on caste and did not include religious and communal discrimination. There were a few prosecutions arising from Hindu priests refusing to permit minority Tamil worshippers to

enter a Temple for worship, a Tamil barber refusing to cut the hair of another Tamil. It cannot be said that the Act has been seriously invoked because the cruder manifestation of caste prejudices have almost disappeared.

Turning to the other groups referred to in the earlier section, the picture after independence is less clear. The Citizenship Laws enacted in 1948 and 1949, and the amendment to the Parliamentary Elections Law had the effect of disfranchising the vast majority of Indian Tamils who had up to that time possessed the right to vote. When challenged on grounds of discrimination, both the Supreme Court and Privy Council upheld the constitutional validity of the laws. This group became virtually Stateless with India disclaiming responsibility for them. Those who benefited, and were probably intended to benefit, were underprivileged Kandyan Sinhala villagers who had suddenly found themselves a minority in their own traditional homeland. Indian Tamils were not deprived the benefits of the welfare State but their status was affected and a lack of interest shown in their advancement. It took many years and negotiated settlements between the Indian and Ceylon Governments to solve this problem and there are today no Stateless persons of Indian origin.

In the field of education major changes have taken place which are of a controversial nature because different interpretations could be placed on them depending on from whose point of view they are seen.

(1) Private schools which provided a better education and were also run by Christian denominations were taken over by the State (except for a few) in an attempt to eliminate the superior status enjoyed by such schools and its products.

(2) English as the medium of instruction was denied to all Sinhala and Tamil students and segregation in schools according to language media took place.

(3) Since private schools had used English as the medium of instruction and these schools and other schools also using English were concentrated in the urban areas, the changes in (1) and (2) above were identified as an effort to remove the disparities existing between the rural and urban child. As long as private schools and English remained, real equality of opportunity was denied to children from rural areas. In point of numbers, it was the majority community that felt discriminated against by the continuation of pre-Independence policies. The changes had the effect of improving facilities in non-big city areas and also increasing the number of schools overall.

(4) Ultimately, in the crucial area of University education, the predominance of the urban student gradually disappeared as large numbers of rural students succeeded in gaining admission through a common Entrance Examination held in Sinhala and Tamil. Existing Universities were

expanded and new Universities opened to meet the large numbers who qualified for admission. Admissions continued to be purely on merit but English could not be easily dislodged in the Universities and the student with knowledge of English had a distinct advantage over the others.

(5) While equal opportunity was spread over a larger area, in one important respect the differences continued to exist. In the highly competitive disciplines of medicine, dentistry, engineering, physical and biological sciences, veterinary sciences, proper facilities existed only in a few established urban schools and the extension of similar facilities even to selected schools in the provinces and to rural schools was a slow process. It so happened then that the rural students crowded into the humanities and social sciences, and could not compete on equal terms in the professional schools, which from the point of view of advancement, afforded the best opportunities. This frustration was vented against Tamil students who were seen to fill the medicine and science Faculties in disproportionately large numbers. Inevitably, allegations of bias in the marking of Entrance Examination papers by Tamil Examiners followed.

(ϕ) The remedial action taken in this situation was to damage communal relations permanently. It was decided in the key Faculties to standardise marks media-wise. The result was that the intake of Tamil students to these Faculties dropped drastically raising the cry of a policy of deliberate discrimination.

Changes in educational policy alone could indicate how disturbed the Tamils felt over what they saw as planned discrimination. Even before these changes, the Official Languages Act had been passed in 1956 making Sinhala the only Official Language and replacing English as the language of administration. Although concessions were made to provide a measure of recognition to the Tamil language, the Tamil community was convinced that the system was changing to their disadvantage. They could not be made to see that hostility was to the English-educated elites of whatever community or that what was being asserted was on behalf of a language and culture that had been deliberately neglected by the British. What they saw was a parading of majoritarian rights in an overtly racial manner.

III

In 1972 the Independence Constitution was replaced by an autochthonous Constitution declaring Sri Lanka to be a Free Sovereign and Independent Republic. It contained a Bill of

Rights which incorporated the Fundamental Rights and Freedoms recognised in International Law. It declared that "all persons are equal before the law and are entitled to equal protection of the Law". Another provision stated that -

> "No citizen otherwise qualified for appointment in the central government, local government, public corporation services and the like, shall be discriminated against in any such appointment on the ground of race, religion, caste or sex;
>
> Provided that in the intrests of such services, specified posts or classes of posts may be reserved for members of either sex."

Parliamentary sovereignity was made absolute and restricted only by the provision that a Bill inconsistent with the Constitution (this would include a discriminatory law) could not be validly passed except by a two-third majority. The Constitution did not however expressly deal with State Action in violation of fundamental rights with the result that complaints of discrimination by executive action never came up before the Courts. The fact that University Entrance Examination marks were standardised media-wise without any challenge may be explained on this footing.

The Constitution also had a Chapter on Principles of State Policy which were not justiciable. Of special interest are the following:-

> "The State shall endeavour to eliminate economic and social privilege, disparity and exploitation and ensure equality of opportunity to all citizens."

> "The State shall strengthen and broaden the democratic structure of Government and democratic rights of the people by affording all possible opportunities to the people to participate at every level in national life and in Government, including the civil administration and the administration of justice."

IV

The Constitution of 1972 was replaced by the Second Republican Constitution of 1978. The Chapter on Fundamental Rights was expanded. The equality rule was stated thus -

> Art.12(1) All persons are equal before the law and are entitled to equal protection of the law.
>
> (2) No citizens shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds .....

(3) No person shall, on grounds of race, religion, language, caste, sex or any one of such grounds be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

(4) Nothing in this Article shall prevent special provisions being made by law, subordinate legislation or executive action for the advancement of women, children or disabled persons.

The apex Court, the Supreme Court, was vested with jurisdiction to hear complaints of violation or imminent violation of fundamental rights by executive or administrative action and to grant such relief or make such directions as it may deem just and equitable in the circumstance.

In the Directive Principles of State Policy it is stated, inter alia –

"The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the grounds of race, religion, language, caste, sex, political opinion or occupation."

The prohibition against discrimination and the affirmation of the equality rule are clearly stated. The empahsis is also on the individual's right to equal treatment. There is also a reference to affirmative legislative or executive action in Art.12(4) but only in relation to women, childrn and disabled persons on the assumption that they have been subject to unequal treatment in the past. Is there no further scope for affirmative action? In the 1972 Constitution, one Principle of State policy was the "full realisation of all rights and freedoms of citizens <u>including group rights.</u>"

In the 1978 Constitution, the last three words have been omitted. Two decisions of the Supreme Court having a bearing on the question posed will now be considered.

Reference was made in an earlier section to the Government having adopted the principle of standardisation of marks media-wise for the purpose of determining admissions to Medical and Science Faculties. Standardisation is a negation of the merit principle. It enables an unseen quota system to operate and this was the cause of frustration and resentment among the Tamil youth. The Government that came into power in 1977 did away with standardisation and established once again equality of opportunity for University admission irrespective of ethnicity.

There was however another development in University admissions with the proposal to modify the merit principle by the adoption of district quotas in the selection of students. It was sought to spread the opportunity for education evenly among the districts in respect of 65% of the available places and an additional 5% for chosen disadvantaged districts, leaving an intake of only 30% on merit. The proposal was challenged in the Supreme Court as violating the guarantee of equality in Saneviratne's case (1980). Ethnicity was not involved except perhaps indirectly and the Petitioner was in fact a Sinhala candidate who alleged that students from the outstation schools who came low down on the merit list would be preferred for admission to those with higher marks. This result was not in dispute but the Court gave its approval to the scheme "as a solution to existing inequalities of which the State must take cognisance". The Court acted on material placed before it on the existence of imbalances in the system of education. In these circumstances, the Court had no doubt that affirmative action was called for and invoked the Directive Principles of State Policy contained in Art.27(2)(h) -

> "the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels."

The Court said this was not to be a permanent arrangement but subject to review.

Notwithstanding the good motive and the existence of material to show disparities in education facilities in big-city schools and other schools, there was still an element of arbitrariness in the selection of the population in the district to determine the quota for each district. It is also important to note that the criterion adopted was not that the student belonged to a particular district by reason of birth but because he was educated in a school in that district during the relevant period. The affirmation of the scheme was not popular and is now under review.

The second case was recently decided by a Bench of 7 Judges of the Supreme Court. What was in issue in this case was the implementation of a public Administration Circular. According to this Circular which was based on a Cabinet decision, appointments and promotions at all levels in the public service, national, provincial and district, inclusive of public corporations etc. should be made strictly in accordance with the respective national, provincial and district ethnic ratios. These ethnic ratios had been ascertained and made part of the Circular. The national ethnic ratios were given as Sinhalese 75%, Tamils 12.75%, Indian Tamils 5.5% and Muslims 8%. Previously, in the case of recruitment, applicants had to satisfy the eligibility requirements and the

selection was made on merit. In the case of promotions, appointments were based on merit and seniority. The undoubted affect of the Circular in both cases was to retain the merit principle but at a certain point to subordinate or displace it with the ethnicity principle.

In Ramuppillai's case (1991), it was proposed to implement the Circular to promotions within the Customs Department. Appointments were to be made to several promotional posts and the applicants consisted of a number of Sinhalese and Tamil officers who had a long period of service in the Customs. Their names appeared in an official seniority list. The normal practice was unless there was a good reason to deny a promotion, vacancies were filled in order of seniority. The Circular however when worked out gave only 3 posts in all to Tamil Officers. The Petitioner was a Tamil officer who was fairly high up in the seniority list but his name appeared after 3 other Tamil officers and if they were promoted, there was no way in which he could also be promoted. His complaint was that the operation of ethnic quotas was to deny him a deserved promotion. He challenged the Circular as violating his right to equal treatment.

Although the application of quotas to a promotional situation was what arose directly, much of the argument was necessarily on the constitutionality of the entire Circular including ethnic quotas in recruitment. The Attorney-General's main

argument for the validity of the Circular was that the ethnic problem had deteriorated so badly that its solution involved, among other things, assuring to members of all communities equality of opportunity with regard to the public service or quotas based on ethnicity. To show that this was not to abandon the merit principle, he argued that if all citizens had equal access to education and training required to gain the necessary qualifications and experience for recruitment or promotion, then statistically it was possible that when the public service or public sector was considered as a whole, it would reflect national ethnic proportions. In other words, if an ethnic group was represented in proportion to its national, provincial or district ratio, the constitutional right to equality was not violated. This argument was unanimously rejected and the respondents were directed to determine promotions without taking race into account.

All the Judges agreed that Art.12(2) did not permit differentiation on ethnic grounds and that race was quite unrelated to the maintenance of efficiency in the service. Even if race could afford a permissible basis of classification, the existence of special circumstances, such as evidence of past discrimination or an imbalance existing within the service which called for rectification, must be specifically averred and proved. As Just Mark Fernando said -

> "Racial preferences or quotas, for their own sake, are not permissible, because in a free, republican democracy one citizen is as good as another, and is entitled to equal treatment, regardless of the group to which he belongs. Likewise, racial quotas cannot be imposed simply for the purpose of 'correcting' an existing racial imbalance: except perhaps where there is serious, chronic, pervasive under-representation (or over-representation) sufficient to raise a presumption of past discrimination."

The Supreme Court reserved the right to decide on the validity of ethnic quotas in recruitment when the matter comes up before them. So far no application has been made challenging the Circular in its application to recruitment and entry into the public service is being decided on ethnic quotas seemingly without protest.

R.K.W. Goonesekere

AFFIRMATIVE ACTION AND THE REGIME'S CONSTITUTIONAL PROPOSALS

Kader Asmal

INTRODUCTION

This paper is not concerned with making the case for affirmative action in a post-apartheid South Africa, but attempts to relate proposals for corrective action to the context of the National Party's proposals for a new constitution published in September 1991. The paper draws on earlier ANC suggestions for affirmative action and analyses the extent to which the regime's new constitutional order would impede, forbid or enhance the possibility of affirmative action in a free South Africa.

THE BACKGROUND

Remedial action to overcome the legacy of structured discrimination based on race was part of the policy of the African National Congress long before the current constitutional debate began.

The constitutional guidelines

In the Constitutional Guidelines published in 1988, but prepared over the previous two years, the ANC identified the need for affirmative action as part of the orderly and systematic method of creating a democratic society which would 'sweep away the centuries-old legacy of colonial conquest and white domination.' In order to assist in the process, the Guidelines referred to the urgent need to overcome '... centuries of racial domination and inequality' by developing '... constitutional provisions for corrective action which guarantees rapid and irreversible redistribution of wealth and the opening up of facilities for all.' As a result, reference to affirmative action was firmly placed within the Bill of Rights section where a constitutional duty was imposed on the State to eradicate inequalities produced by apartheid.

It must be emphasised that the ANC never envisaged affirmative action as being limited to education and public and private employment, but covered the totality of social relations embraced by apartheid. This meant that investment policies, economic opportunities, housing and general job creation all had to be addressed in this way so as to buttress the formal equality provisions. Specifically in relation to land, the Guidelines referred to the need for a land reform programme '... in conformity with the principle of affirmative action, taking into account the status of victims of forced removals.'

Affirmative action as part of remedial justice drew on national and international experience and its validation by the two major anti-discriminatory conventions enabling states to take such action. These are the United Nations International Convention on the Elimination of All Forms of Racial Discrimination in 1966 and the Convention on the Elimination of All Forms of Discrimination against Women in 1979.

The Law Commission

Such has been the impact of the principle of affirmative action that the South African Law Commission, in its first report on group and individual rights, included a reference to the principle in its Bill of Rights clauses. Although the Law Commission's Bill of Rights has rightly been criticised for its somewhat eccentric inclusion of rights not generally recognised and its invention of the extraordinary provision of the right of disassociation which would enable groups to create enclaves of racial privilege, sufficient attention has not been focused on Article 2 of the proposed Bill of Rights.

The Law Commission recognises that affirmative action cannot be left to the whims, fancy, vagaries or waywardness of a court of law whose function it is, as in the United States, to interpret a written constitution and a bill of rights as part of the constitution. The right to take affirmative action has to be protected by being inserted in the constitution. There is, therefore in Section 2, which deals with equality before the law and non-discrimination on the now accepted grounds, a proviso which permits:

> '... such legislation or executive or administrative acts as may reasonably be necessary for the improvement, on a temporary basis, of a position in which, for historical reasons, persons or groups find themselves to be disadvantaged ...'

However limited or unsatisfactory this 'over-ride' clause may be, it marks an important acceptance of the principle of affirmative action. No such acknowledgement can be found in the proposals of the National Party.

The ANC's Bill of Rights

In preparing its draft Bill of Rights in November 1990, the Constitutional Committee of the ANC was conscious of the need not only for the 'over-ride' clause, but of the necessity of covering the area of gender as part of the positive programme of remedial action. The adoption of a policy is a matter of political choice by the State, regional and local authorities, under the general framework of policy guidelines adopted by the government of the day. To buttress this approach, the draft Bill of Rights proposes the establishment of a Human Rights Commission which would be entitled to vindicate a collective and individual human rights programme. More specifically, Articles 13 and 14 of the draft Bill of Rights deal with affirmative and positive action respectively.

> Article 13 is broadly drafted and enables the '...enactment and legislation, or the adoption by any public or private body, of special measures of a positive kind designed to procure the advancement and the opening up of opportunities, including access to education, skills, employment and land, and the general advancement in social, economic and cultural spheres, of men and women who in the past have been disadvantaged by discrimination.'

The Constitution will not be able to stand in the way of such measures and nothing in the Bill of Rights could be construed '...as derogating from and or limiting in any way the general provisions of ...' Article 13.

This comprehensive 'over-ride' provision is supplemented by Article 14 which obliges all organs of government at the national, regional and local levels to '...pursue policies and programmes aimed at redressing the consequences of past discriminatory laws and practices, and at the creation of a genuine non-racial democracy in South Africa (para 5).

More specifically, there are provisions dealing with the public services, defence, police force and the prison service (para 6), the judiciary (para 7), women (para 8) and non-governmental organisations and private bodies (para 9).

The Constitutional Principles

A few months later, in April 1991, the ANC published its discussion document on Constitutional Principles and Structures for a Democratic South Africa. In this extensive and major document, the ANC placed affirmative action in a non-racial constitution which

'...can be adopted rapidly but a non-racial South Africa would take many years to evolve. Yet, although the massive discrepancies in education, health and living conditions imposed by decades of racial discrimination cannot be eliminated by constitutional declaration, the Constitution must provide the positive means to reduce progressively the imbalances and inequalities and to ensure that everybody has an equal chance in life.'

THE CONSTITUTION AND THE BILL OF RIGHTS

In its widest sense, affirmative action involves the adoption, by the appropriate authorities, of a programme whose implementation may involve legislative, executive or administrative initiatives. In other words, the constitutional provisions in the context of a bill of rights permitting affirmative action are not self-executing, but require a conscious and deliberate effort by the appropriate organ of government to act in pursuit of a socially desirable policy aimed at (in the words of Albie Sachs) levelling the playing field. The question which arises is the extent to which a permissive provision such as that found in the Law Commission's Report or in the draft Bill of Rights of the ANC could be satisfactorily implemented in post-apartheid south Africa.

The answer to this turns ineluctably on the way the wider constitutional arrangements are posited. In a normal democratic state, the organs of government, elected on a universal suffrage, would be able to adopt and implement policies for which a mandate had been obtained. Hence, the ANC's historic commitment to a non-racial, democratic and non-sexist state is a cardinal policy principle. Most recently, the Constitutional Principles document of April 1991 supports governmental structures and institutions which are based on 'democratic principles, popular participation, accountability and accessibility.'

The fundamental ANC demand has been for the acceptance of the majority principle whereby a government is formed - at the central, regional or local level - by the party which obtains a majority of the seats. The formation of a coalition is a matter of political choice, not constitutional prescription. The power of the majority party which forms the executive at any level would, of course, be restricted by the constitution, especially by a bill of rights, by the application of the separation of powers and by the right of a constitutional court to judge the legality or constitutionality of legislation or executive action. Minorities of various kinds would find an appropriate level of representation at all structures through proportional representation.

On the basis that the authority of government would be limited by institutional guarantees, the Constitutional Principles document adheres to the majority principle as a democratic right in order to ensure that there is 'strong and effective central government to handle national tasks, strong and effective regional government to deal with the tasks of the region and strong and effective local government to ensure local government in handling local issues.'

Such an approach would ensure that there could not be any constitutional or legal obstacle to the implementation of an affirmative action programme at any level of government. The only factor would be the presence or absence of political will.

THE NATIONAL PARTY PROPOSALS

The National Party proposals of September 1991 adopt a totally different tack and are based on two fundamental principles. The first provides for the diffusion of power among the three levels of government - central, regional and local - with constitutionally entrenched powers for each level of government. The second proposes 'power-sharing' of a unique nature. Both approaches impinge dramatically on the capacity of the state at any level to implement affirmative action policies. In addition, the limited reference to what is described as a 'Charter of Fundamental Rights' makes no provision for affirmative action in any guise or at any stage.

'Participatory democracy' is defined by the National Party as the development of a system of government in which a number of political parties effectively participate and in which 'power sharing therefore takes place. This is in contrast to the Westminster system in which one party exclusively enjoys power' (emphasis in original).

Now, in a normal democracy, participatory democracy does not mean multi-party governance. The concept, elusive though it may be, refers to the political right of individual citizens to influence policy formulation, for governmental structures to be receptive to the demands of the citizen, and to enable citizens to be consulted adequately and to complain about infringements of their rights. In other words, it ensures a greater voice to individuals and to organs of civil society in order to mitigate the impersonality and perceived lack of receptiveness of representative democracy.

In the language of the present government, the concept undergoes changes. Its view is that the majority party must not govern alone, but that all parties with a certain degree of minimum support must be enabled to govern at every level of government. This form of compulsory coalition is closely associated with distributing power among the different 'tiers of government'. Thus the constitution would confer autonomous authority on every tier which is described as 'original and entrenched authority with which the other tiers of government may not interfere'. Effectively, this approach pre-supposes a federal, rather than a unitary form of government as, in the latter case, the central legislature has all the authority of government which it may delegate if it so desires.

Parliament

The 'participatory model' is based on two houses of parliament. Whereas the lower house will be directly elected on the basis of proportional representation with one-person-one-vote, its powers to pass legislation will be severely limited by the upper house which will have the right to veto legislation.

The composition of the upper house is again unusual. Each region will have an equal number of seats. In each region, a party which has obtained a minimum of support in the region's legislative body will be allocated an equal number of seats for that region in the upper house. In other words, a party with 70% of the votes in a regional election will be allocated the same number of seats as a party with, say 15% of the votes. This stands on its head the idea of equal regional representation in the upper house. In the United States it is possible for a party with majority vote in each state to win both Senate seats for their state.

The effect of composing the upper house in such a way is effectively to negate the right of a directly-elected lower house to pass legislation, especially of the kind required in South Africa to reconstruct a shattered society. As no provision is made for the resolution of a conflict between the two houses, instead of a theory of reconstruction, there will thus be a triumph of the status quo. On the contrary, any legislation which 'relates to the interests of minorities' requires 'weighted' majority to become law. Neither the 'interests' nor the minorities nor the weighting is defined in the proposals which means that 25% of the upper house could frustrate the clear wish of the majority of the electorate.

The Executive Authority

The document describes as the 'core of the National Party's proposal' the proposition that the executive should not be constituted from one party alone, but from members of a number of the major parties.

A sudden and dramatic opposition to the excessive concentration on 'functions and authority in a single person' results in a remarkable proposal that the office of head of state and of government should be vested in a collective body known as the Presidency, which may consist of from three to five people, the leaders of the largest parties in the lower house. The chairmanship may rotate annually among the members of the Presidency and a State President may also be elected on a rotating basis from their ranks.

For the purposes of this paper, the most significant aspect of this 'troika'-type approach is the method of decision-making. The Presidency appoints ministers who form a multi-party cabinet. The cabinet is obliged to carry out the policy of the Presidency. However, the Presidency decides on all policy matters, including the appointment of the ministers, by consensus. This means that the smallest, or the smaller parties, regardless of the size of the majority party, will exercise a veto.

The implications for affirmative action are enormous under this model of participatory democracy. Since nearly all legislation nowadays emerges from and is controlled by the executive, with the legislative playing a more or less formal and deliberative role (except where there is a total separation of powers as in the United States), the Presidency will be the fountain-head of legislation. The conferring of a veto on minority party representatives means that a programme of affirmative action which, by its very nature, interferes with the <u>status quo</u> would be impossible to initiate, especially as the National Party has made it quite clear that it opposes land reform by way of land redistribution. It is not conceivable, either, that such a Presidency would support any modest programme of changing the nature and composition of the armed forces or the civil service.

The Cabinet, which acts on the instructions of the Presidency (providing the Presidency is able to come to a decision) is a compulsory coalition of parties. Although the proposals do not make this quite clear, the underlying assumption is that is will not act by consensus.

The Regions

The locking of power and authority within the consensual approach to government is again reflected in the model of governance for the nine proposed regions. The legislative council for a region is not to be wholly elected as it may be partly directly elected on the basis of proportional representation from electoral districts within the region and partly nominated by third level authorities or possibly by sub-regions. There is a Delphic reference to decision-making procedures which may provide '...for the protection of minority or minority interests and certain circumscribed matters' as far as the legislature is concerned. Presumably this means that there may be weighted majorities on 'community sensitive' matters.

It is the Executive Authority which reflects the unique value set on 'power-sharing' by the National Party. This body will be made up of the three to five leaders of political parties who have a minimum representation on the legislative Council, will function as a 'unit' and must act by consensus.

As affirmative action programmes have to be implemented at regional and local level, an enforced coalition acting by consensus is a recipe for immobilism and inaction.

Local Government

The National Party proposals recognise that it is at the level of local government '...where people live, work and take their recreation from day to day' that the '...large gap between developed and underdeveloped areas becomes most evident.' Instead, however, of attempting to challenge the large gap by proposing ameliorative measures and challenging head-on the most obvious manifestations of the apartheid legacy in housing, schools, hospitals and welfare, the Party's proposals attempt to subvert democracy in a most evident fashion.

Local authority powers and authority in the legislative executive and fiscal areas will be laid down in the Constitution and entrenched. Secondly, 'participatory democracy' may be put into effect by:

(i) electing the City Council on the basis of representation by wards (surely a recognition of group areas) and the delimitation of wards may be determined by reference to property valuations and voter numbers in a fair proportion to one another;

(ii) determining the franchise in accordance with both the interests of all lawful residents (sic, influx control has been abolished in South Africa since 1986) and the particular interests of owners, lessees and rate payers;

(iii) considering a 'combination model in which half of the city councillors are elected on a common voters' roll in which the names of all 'residents' appear and the other half by a voters' roll containing only the names of owners, lessees and ratepayers.

(iv) providing for special decision-making procedures, such as increased majority votes in the city council, in respect of certain 'circumscribed sensitive matters'.

It now becomes clear that the real battle for democracy will be fought at the level of local government. The rejection of one-person-one-vote-one-value at this level and the vesting of important powers, constitutionally entrenched, will ensure that formal constitutional change will not have any effect on the lives of ordinary South Africans.

Even more remarkable are the Party's proposals for the establishment of Neighbourhood Councils, the only level of government where decisions will be taken by ordinary majority vote. The majority here will therefore be able to play an effective and meaningful role, but it does not need an acute intelligence to determine who will constitute the majority.

Such councils may be set up in a municipal area on a voluntary basis as the expression of 'self-determination over community interests'. The council could be elected by the residents of the neighbourhood and it would have 'autonomous' power over a whole range of important issues including the regulation of 'norms and standards' for the residential environment, the granting of licences or permits in regard to the use of property, security matters and civil protection and such matters as education and welfare may be allocated in terms of other legislation.

Depending on the size of the neighbourhood and the jurisdiction of the Council, these proposals bear an uncanny resemblance to the concept of 'own affairs', reduced to local level. There can be little question of affirmative action where power is transferred (or retained) at a level which could only be controlled by those who have the power today.

FEDERALISM

It is of course possible to implement policies of affirmative action in a federation, providing that powers of policy formulation are retained by the central legislature and the central government and the regions act in good faith in carrying out centrally determined policies. But the concept of 'power-sharing' as identified by the National Party would make decision-making of a decisive nature impossible at all levels except at the Community Council one.

Apart from this consideration, there are basic objections to the grafting, if not the imposition, of the federal option for south Africa, which would affect affirmative action programmes. Firstly, a federation will perpetuate the existing, artificially created, fragmentation caused by the bantustan system. We need to recognise the political and economic unity of South Africa. Such a unified approach is not a matter of sentiment: it is crucial for the social and economic management of our society and for the redistribution of resources in favour of the less prosperous parts of South Africa. We need also to have a uniformity of approach to issues such as taxation and the allocation of resources. In addition, successful federations have worked well under conditions of reasonable parity of economic resources and an agreement or consensus about the goals to be achieved. Federations have usually been formed by the coming together of previously independent or autonomous states. Federalism, therefore, was designed and is appropriate for states coming together to form a single unit, and not for a state breaking up into smaller units.

In the South African context, federal form of government is an attempt to denude the central authorities of the power to initiate programmes of reconstruction and development and control over tax and other fiscal resources by diffusing power between central and regional authorities. Less government from the centre does not, in this context, mean good government if the result is to frustrate the legitimate needs and demands of the majority for decisive action to combat the consequences of apartheid.

CONCLUSION

The central proposals of the National Party, with their emphasis on 'power-sharing' and 'participatory democracy' will entrench privilege, status and domination at every level of government. They are inconsistent with democracy and majority rule. They will create constitutional fetters of a kind which would seriously impede the capacity of a government to govern, let alone embark on a policy of affirmative action. Affirmative action is a method of meeting the legitimate expectations of the majority for development and change. These proposals are meant to frustrate any attempt to meet these expectations.

Cape Town, October 1991

Kader Asmal is Professor of Human Rights Law at the University of the Western Cape, Member of the ANC Constitutional Committee and Member of the National Executive of the African National Congress.

PROFILE: JOHN ERNSTZEN

TRADE UNION INVOLVEMENT: PAST 33 YEARS

ELECTED TO FIRST COSATU NEC: AT FORMATION IN 1985

CURRENTLY STILL A COSATU NEC MEMBER

GENERAL SECRETARY OF SOUTH AFRICAN MUNICIPAL WORKERS' UNION (SAMWU):

SINCE INCEPTION IN 1987

PAPER ON AFFIRMATIVE ACTION IN PUBLIC SECTOR EMPLOYMENT

BY JOHN ERNSTZEN

It is difficult to accurately define the public sector in South Africa but, broadly speaking, it includes those State operations which are administrative and regulatory and which essentially provides social services. Having regard to the current situation in the country this would include both white and blue collar workers in health services, education, railways and harbours, posts and telecommunications and local government.

In dealing with the question of affirmative action, this paper will encompass all the above areas but specifically identify the position in local authorities which is peculiar to the introducer.

To the best of one's own knowledge and experience it would be safe to say that the public sector is one area in which successive governments have applied affirmative action since 1910 but in favour of Whites. In fact the Public Sector has been a bastion of Apartheid since Union was formed in 1910. To illustrate this point let us look at any area within the public sector whether it be the civil service generally, railways, posts and telecommunications or local authorities. In every one these areas, Apartheid has been vigorously applied. Blacks were not allowed to occupy skilled posts. Only Whites. These were really the areas into which poor Whites were pushed in large numbers and from which they could ascend, through promotion, to supervisory positions. The political significance of this process on the part of the State is deserving of comment. This movement took

place particularly during the 1930's, 1940's and 1950's and created a huge bureacracy of petty clerks and petty supervisors who were to play an important role in bringing the Nationalist Party into power in 1948.

At the same time it would be useful to examine the attitudes of these petty bureaucrats. For example if one was to go to a ticket box on the station or to the Receiver of Revenue, one would always be received by some kind of "dumb pumpkin" stare. Even the most elementary enquiry would be met with a frown and uncertainty. The "civil servant" would most times be uncivil and arrogant. To this individual, time would not be of the essence. The picture portrayed would either be one of stupidity, unconcern and even hostility or a combination of them all. These characters were arrogant because of their political security under segregation (pre-1948) and Apartheid. At the same time, the "swart gevaar" remained the cause of their nightmares carefully endorsed by successive White governments. Their position (the poor whites) was always ambiguous in that they were secure and yet insecure - politically entrenched and yet politically threatened. This latter factor was due to the formation of the Industrial and Commercial Union around the 1930's, the Great Miners Strike of the 1940's and the formation of the ANC in the 1950's. Affirmative action therefore had to constantly be reaffirmed to ensure the continuation of White

privilege (and profits) by legal measures and policies which increased in repressiveness with the growth of organisation among Black workers.

Affirmative action in South Africa has existed in the public service in particular and in this way Apartheid has been maintained not only by law but also by policy. Whites were getting everything. They were being favoured and protected. Poor whites coming from farms in the 1930's, 1940's and 1950's were given jobs in the Public Sector. They were given every opportunity to improve and acquire skills.

Over the years Whites have been favoured in every way, for example:-

- in allocation of jobs
- in promotions
- in pay
- in benefits

What the above means is that Blacks have always been relegated to performing menial jobs and wage discrimination has been the order of the day. The same applies to benefits whether in relation to pensions, medical aid, housing allowances etc. In fact the vast majority of Blacks in the Public Sector have no pension or medical cover at all.

Today we have a situation where very few Blacks are trained or have skills necessary to occupy top positions. After nearly 100 years of racist public service policy, we have a situation

where Blacks are not only deprived of benefits but also of the training and skills necessary to occupy top positions.

This has to be looked at historically. Soon after the formation of Union in 1910 and as part of the general assault on the rights of Blacks, laws were passed to keep blacks in menial positions and to prevent Black workers from unionizing. Black workers were stripped of all rights and forced to carry passes. Hence after Union, which made Blacks subservient, a number of laws were passed. For example,

(a) The Mines and Works Act which enforced White superiority in jobs and prohibited Blacks from aspiring to these positions;

(b) The Apprenticeship Act which excluded Blacks from becoming apprentices and thereby artisans;

(c) The Urban Areas Act which controlled their movement in and out of cities;

(d) The Wage Act which pegged their salaries ;

(e) The Industrial Conciliation Act which denied blacks the right to unionize themselves through the definition of "employee "; and a host of other laws.

The effect of all these laws was to render Blacks without power and reduce them to cheap labour.

In addition to laws, Whites only local authorities and public administrations applied a similar policy.

The situation was made worse by the Bantu Education Act and similar laws for Coloured and Indian as well as the separate Universities Law.

This deliberate policy of retardation meant that Blacks were debarred from educating themselves. Bantu Education has had a devastating effect. It has left millions without skills or qualifications.

I am now going to turn my attention to the area I know best namely the field of Local Authorities. Starting with the formation of Union in 1910, Local Authorities has always been devised on an Apartheid basis. Initially all Local Authorities were totally white controlled but a qualified franchise existed in certain areas. For example, a qualified franchise existed in the Cape and could be said to be a heritage of British Colonial policy. Hence the Cape Town City Council had Coloured Councillors elected on the basis of ownership of property but they were eventually removed by statute and replaced with Management Committees. This was divide and rule in the classical sense. The oppressed and exploited were kept apart from one another through the Group Areas Act, separate education and the creation of an elitist "Coloured" and "Indian" middle class. They had no political rights whatsoever but these dummy bodies were rejected by the people and ultimately led to their demise.

At the same time Black workers were being moved from pillar to post and regarded as nothing more than pawns in the hands of the chess master. They were transferred from White controlled Councils to Bantu Administration Boards and thereafter to Provincial Administrations and finally to Black Local Authorities. Significantly the whole process has gone the full cycle particulary with the collapse of Black Local Auithorities

through the emphatic rejection of these puppet institutions on the part of the people coupled with corruption and inadequate services which have been a feature of their existence.

The continual transferrance of Black workers from one employer body to another has however left a legacy of discrimination in pay on the basis of colour and sex.

For example, the State Health Department had always subsidised Local Authorities but on the express condition that different pay scales would be applicable for different races notwithstanding the fact that nurses and those in allied professions were equally qualified.

A further aspect of discrimination and exploitation that requires comment relates to Privatisation. After securing the wealth, skills, facilities and land, the State has embarked upon a massive Privatisation program. Linked to their Constitutional Proposals and their Bill of Rights in which the Nationalist Party speaks of freedom of association and freedom of dissociation, is Privatisation. The result of successfully persuing these goals will mean that a Democratic State will not be able to interfere. Through Privatisation the status quo will be maintained under different lables. The Nationalist Party through its Constitutional Proposals, Privatisation and Bill of Rights wishes to entrench the wealth and privilege currently being enjoyed by the minority.

On the part of progressive organisations, however, including the Union movement in the country, what we want is a non-racial

South Africa. This is what workers are demanding and what unions are demanding. We want deracialisation. We want non-racial municipalities which will provide equality in opportunity, equality in pay, equality in conditions of service, equality in training, equality in promotional opportunities etc. We do not want what the government is projecting. The government's proposals is a facade of non-racial cities and under the facade of the maintenance of group areas.

It is in this context that affirmative action in public sector employment will have to be considered as essential. I do not pretend to know all the answers as to the mechanics of it all and look forward to hearing the views of others on this process. However what is certain is that unless there is a positive programme to ensure real equality, political change may come but that in itself will not change anything on the ground. The Black workers will still do the menial work while Whites will still occupy the top positions.

In my view, to understand the need for positive affirmative action it is necessary to understand the legacy of apartheid in the public sector sphere. Broadly speaking in the local government service Blacks are pegged in their jobs. This relates to the educational system, the lack of training, the non-imparting of skills, no managerial training and the stifling of promotion. I wish to remind Conference that while I have not touched on other areas within the public sector, the position

outlined above is exactly the same in the other areas. In short the same factors which make for White domination in the municipal service apply to other sectors in the Public Service as well.

As a representative of COSATU, it is necessary for me to relate COSATU's policy in the context of division of the Public Sector. At its fourth National Congress held during July 1991, COSATU resolved that the CEC should:

"Develop together with the affected unions, a programmatic approach towards strengthening, consolidating and expanding organisation in this sector. Our organisational programme must involve public sector unions and associations inside and outside COSATU, including SADTU and the Nurses Forum.
Lead public sector campaigns such as the campaigns against privatisation and for the attainment of stop order facilities.
Monitor the progress in establishing one Public sector union."

The need to unite all Public Sector workers into one strong National Union is the main thrust of the resolution. Allied to this is the need for appropriate development of Human Resources with adult basic education and literacy being high on the priority list. In addition COSATU demands to be involved in the whole process of restructuring of the economy because it is emphatic that no solution can be found without the active participation of the Trade Unions.

It is said that we in South Africa are to be the last to attain independence. From our observation of other countries, we are not satisfied that the real status of the majority of people

have altered significantly since they gained independence. In fact it is clear to us that the poor have remained poor, the unskilled have remained unskilled and that life has gone on very much the same as before. The only difference is that there appears to be a new elite which assists in maintaining the neo-colonial status of the countries concerned.

We in South Africa are in a unique position. We may be the last country which will achieve freedom in Africa but let us make sure that it is not a bogus freedom. We have a golden opportunity to be the first country in Africa to make equality, freedom and democracy real and meaningful for the majority of the oppressed and exploited people of this country. It is our hope that this conference will be able to work out a way to ensure that affirmative action becomes a powerful weapon to achieve true liberation and equality.

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

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June 3, 1991

Mr. Bulelani Ngcuka
Community Law Centre
University of the Western Cape
SOUTH AFRICA

Re: Conference on Affirmative Action

Dear Bulelani:

As I told you during our telephone conversation, I will definitely be able to spend $30,000 on the affirmative action conference. That is more than we have been able to contribute to prior conferences. I am also looking for additional funds so I may be able to contribute even more.

I have attached several documents that I hope will be helpful to you with regard to the upcoming conference on affirmative action. Since the primary mission the Lawyers' Committee for Civil Rights Under Law is to promote affirmative action in the United States through litigation and legislative initiatives, we have tried to put a lot of thought into our suggestions about your upcoming conference.

Below, I list and comment briefly on the documents that I have attached to this letter.

1. Statement on the scope of the conference. For the last two conferences, Fink and Pius prepared a two page statement that described the topic to be covered by the conference. That statement was extremely useful to include in the letters inviting the foreign experts to clarify the issues for them. I have included a copy of the statement Fink drafted for the February conference. I have also included a suggested draft for the affirmative action conference.

06. 04. 91 08:07AM *LAWYERS' COMMITTEE P02

2. Proposed Conference Programme. After doing some research and thinking through the issues relating to affirmative action, we have taken the liberty of drafting a proposed conference programme with suggested speakers. Following the program you will find a memo that I prepared simply to explain our thinking in organizing the proposed programme as we did. I offer the draft programme only as a discussion document for you and the Constitutional Affairs Committee to alter, accept or reject as you wish.

3. Biographical Data on proposed speakers. In certain places we have suggested a speaker and then an alternate in case the preferred speaker cannot participate for some reason. In working on the previous two conferences we noted that a lot of valuable time was lost looking for an alternate speaker when the original choice declined the invitation. It would be an important time-saver if when you consider our list of suggested speakers you make not only a first choice but also a second and third for the same paper.

4. Draft Letters of Invitation For Foreign Experts. For the first two conferences we sent to foreign invitees a letter signed by Zola and the conference coordinator (Fink or Pius) and one signed by me. I've included for your convenience copies of the letters of invitation sent out for the February conference and drafts that, with your approval, could be used for the affirmative action conference.

Having attended the last three ANC Constitutional Affairs Committee conferences, I have been extremely impressed with their substance and organization. I think they all have been important milestones in the development of the constitution - making process in South Africa. In reviewing the conferences I can think of only three areas in which minor improvements could be made:

1. At times there have been too many papers presented leaving too little time for group discussions in commissions.

2. At times the foreign speakers have talked in terms too general to be helpful. It would be better to have tightly focused papers that discuss specific issues of relevance to South Africa.

3. Papers should be duplicated and ready for distribution at the beginning of the conference so that participants can read them prior to the panel presentations.

In the draft programme I have tried to allocate substantial time to discussion in commissions. However, each additional person added to the list of conference speakers will decrease discussion time. In order to address the second problem I would suggest sending each foreign expert who is invited a list of specific questions to which they should respond in their remarks. Once you have made a final choice of foreign invitees I will be happy, with your consultation and approval, to draft questions for that purpose. That might also help them to finish their papers and get them to you early so that they can be ready for distribution at the start of the conference.

I await your comments on all of this. Best wishes.

Sincerely,

Gay

Gay J. McDougall
Director
Southern Africa Project

attachments

Document 1A

CONFERENCE ON A CONSTITUTIONAL COURT FOR A NEW SOUTH AFRICA

1-3 February 1991

The Conference

The conference will be organized by the Legal and Constitutional Committee of the ANC in collaboration with the Centre for Applied Legal Studies. The Legal and Constitutional Committee is of the view that there is an urgent need to address the problems facing a future judicial system and to discuss models of legal justice which would be appropriate for a democratic non-racist and non-racial South Africa. It was also felt that these issues should be aired in a forum which would enable the participation and contribution by a broad range of South Africans currently involved in our legal system. Although South Africans have a rich pool of legal talents to draw on in confronting these issues, the conference will also benefit from the attendance of jurists from Africa, Europe, Asia and the Americas. Their participation will enable South Africans to learn from the legal and constitutional experiences of countries in other parts of the Continent and the world.

The Issues

The conference will address the adequacy of the current legal and judicial system in dealing with the legal issues, and in meeting the requirements of legitimacy in a new non-racial democratic South Africa.

All the major parties in the negotiating process have committed themselves to a constitutionally entrenched Bill of Rights, and to an independent judiciary. The judiciary will have significant role in testing legislation, executive action and interpreting the Bill of Rights.

The interpretation of fundamental rights and liberties, and the exercise of judicial review is more than an exercise in literal interpretation. Notwithstanding notable exceptions the judiciary in South Africa has not shown whether it can meet the challenge of this new role.

The present judiciary is unrepresentative of the racial, ethnic, and class composition of our society. Accordingly it may lack legitimacy as an agency entrusted with protection or enforcement of the legal interests of all South Africans and it may lack an understanding of the social reality experienced by many South Africans.

The composition of the branches of the legal system, academics, attorneys (solicitors), advocates (barristers) and judges, is problematic because of its lack of black membership. The composition of the profession and the judiciary, as presently

structured, into a more representative institution will take decades.

While the constitutional court offers some solutions to many of these issues, it is foreign to the existing legal culture. In view of the stated desire by all parties for an 'independent' judiciary - particularly to deal with politically charged issues - method of appointment to any constitutional court, will have to be manifestly fair so as to enjoy the confidence of all South Africans.

06. 04. 91 08:07AM *LAWYERS' COMMITTEE P04

Document 1A

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Document 1B

CONFERENCE ON AFFIRMATIVE ACTION IN A NEW SOUTH AFRICA

August 1991

The Conference

The Affirmative Action Conference is being organized by the Legal and Constitutional Affairs Committee of the African National Congress together with the Centre for Development Studies at the University of Western Cape. Following the decades of apartheid rule, the Legal and Constitutional Committee points to the grossly unequal access to employment, housing, education and other resources faced by millions of black South Africans.

It was felt that possible models for affirmative action to address this situation should be discussed by a broad range of South Africans involved in both our legal system and our social services arena. Many countries have faced legacies of oppression and inequality, and have devised their own particular means of redress. We want to learn from the lessons drawn elsewhere as we strategize our own programs. The Conference will draw on the rich experiences of jurists, activists, and government officials from around the world.

The Issues

The Conference will first look at the situation facing black South Africans in the fields of employment (including access to government positions), housing, education and economic resources.

The importance and contours of a constitutional framework for affirmative action to overcome race and gender discrimination will be considered in detail.

Participants will seek to draw relevant and useful lessons from the experiences with affirmative action programs in India, Malaysia, the United States, Zimbabwe and Namibia. Affirmative action programs in other countries have tended to be race-based. However, participants may consider other criteria to be used in identifying target groups in post-apartheid South Africa, such as the homeless, the under-educated the landless etc.

Document 2B

EXPLANATORY NOTE TO PROPOSED DRAFT CONFERENCE PROGRAMME

September 1991

In drafting the conference programme, we have attempted to create a structure conducive to comparative analysis. We have sought to avoid mere recitations of individual countries' policies. Rather, in choosing panel topics, we have tried to distill essential issues relating to affirmative action.

We suggest that the Conference begin with a detailed study of the needs posed by post-apartheid South Africa. This discussion will set the stage by instructing the overseas panelists on the social and economic context for South African affirmative action.

After a general survey of affirmative action programs, the conference could perhaps focus on specific issues. South Africa will be introducing affirmative action programs in support of the economically disadvantaged numerical majority. In most countries, affirmative action tends to be applied to numerical minorities. As this will be a decisive factor in terms of the scale of implementation, the first comparative panel could perhaps deal with questions raised by numerical majority affirmative action in the public sector. The Conference could look at three countries that have acted or will act in favor of their majorities: Malaysia, Namibia, and Zimbabwe. Panelists could discuss the respective experiences of these three countries.

The second comparative panel could deal with affirmative action in the private sector. Private sector action can have particular impact on property and contract rights. Moreover, enforcement may be more difficult within the private sector. Private sector programs have two foci: 1) increasing employment in private businesses, i.e. hiring and promotion; and 2) increasing the economic viability of businesses owned by members of the oppressed group. Private sector affirmative action has been generated by government contracts and licensing, targetting

certain populations. Government structures are usually the largest contracting agents in most economies. For example, some government structures in the United States have a requirement that a certain percentage of all government contracts must be given to African American businesses. Kenya is also an example of this experience. The Malaysian government has targetted the issue of disproportionate business ownership by creating a government-run mutual fund (unit trust fund) that purchases stock on behalf of its Malay subscribers.

The third comparative panel could perhaps focus on the design of affirmative action programs. In many countries, goals have been stated in terms of general timetables and guidelines; in other countries, legislation has reserved a specific number of places in employment and educational institutions for the target populations. Canada and the United States represent examples of the former, whereas India is an example of the latter.

The fourth panel could deal with affirmative action in the realm of education. In Sri Lanka, a preferential treatment policy was instituted in favor of the majority rural Sinhalese population. In the United States, affirmative action has for many years been targetted at public schools and universities.

Finally, we suggest that the Conference close with a panel discussing standards, implementation, and enforcement. There are particular questions which participants should tackle. For example, how should target groups be identified? Should there be separate recruitment and education entrance standards for different groups, and what should these standards be? What enforcement problems may be envisioned?

Document 3

CONFERENCE ON AFFIRMATIVE ACTION
IN A NEW SOUTH AFRICA

September 1991

List of overseas experts

This is a list of preferred suggestions for speakers as well as one or two alternates in case the preferred speaker is unable to attend. Please confirm all names, so that we can proceed in contacting alternates whenever this proves necessary.

I. An Introduction to Affirmative Action

Preferred Speaker:

Doctor Neelan Tiruchelvam (Sri Lanka). Doctor Tiruchelvam is head of the International Center for Ethnic Studies which has been doing on-going comparative research on ethnic conflict and government policy. He assisted in drafting the constitution of Sri Lanka. He has taught at Harvard University and devised a conference at Oxford on international norms and government policy regarding ethnic issues.

Alternates

Asbjorn Eide (Norway). Mr. Eide is the leading United Nations expert on the treatment of minorities. He is former Chair of the U.N. Working Group on indigenous peoples and is currently a Commissioner of the Sub-Commission on the Prevention of Discrimination against Minorities. He is leading the United Nations effort for the Second Race Decade. Mr. Eide heads the Norwegian Institute for Human Rights in Oslo.

06. 04. 91 08:07AM *LAWYERS' COMMITTEE P12

15:30-17:00 Commissions

17:00-18:00 Plenary: Report-back

19:00-21:30 Dinner
Address

****

Sunday, September 8, 1991

9:00-10:30 Affirmative Action in Education

A panel considering affirmative action programs for both majority and minority populations in education. Suggested Panelists: R.K.W. Goonesekere (Sri Lanka), Ms. Donna Shalala (United States).

10:30-11:00 Tea

11:00-12:30 Commissions

12:30-13:30 Lunch

13:30-15:30 Implementation and Enforcement

A round-table discussion of problems encountered in other countries and issues which may arise in South Africa. Particular attention will be paid to the pro's & con's of: reporting and inspection; enforcement through administrative agencies; and enforcement through litigation initiated by aggrieved persons. Suggested Panelists: Ms. Rosalie Abella (Canada), L.G. Havanur (India), Ms. Mavis Puthechery (Malaysia), Drew Days (United States).

Discussion

15:30-16:30 Closeure

05. 04. 91 08:07AM *LAWYERS' COMMITTEE P09

15:30-17:00 **Affirmative Action for Majority Populations: Public Employment**

A panel on the particular issues raised by affirmative action in the public sector benefitting numerical majorities. Suggested Panelists: Ms. Mavis Puthechery (Malaysia), Ms. B.P. Gawanas (Namibia), Head of the Public Service Commission (Zimbabwe).

17:00-18:30 **Commissions**

19:00-21:30 **Dinner Address**

****

Saturday, September 7, 1991

9:00-10:30 **Affirmative Action in the Private Sector**

A panel on affirmative action employment programs in the private sector. Suggested Panelists: Professor Yash P. Ghai (Kenya), Doctor Abdul Khalid bin Ibrahim (Malaysia), Anthony Robinson (United States).

10:30-11:00 **Tea**

11:00-12:30 **Commissions**

12:30-13:30 **Lunch**

13:30-15:00 **Affirmative Action: Quotas, Guidelines and the Standards Debate**

A panel on affirmative action standards and the use of reservations, quotas or more general guidelines. Suggested Panelists: Ms. Rosalie Abella (Canada), L.G. Havanur (India), Ms. Mary Berry (United States).

15:00-15:30 **Tea**

Document 2A

PROPOSED CONFERENCE PROGRAM

CONFERENCE ON AFFIRMATIVE ACTION
IN A NEW SOUTH AFRICA

September 6-9, 1991

Friday, September 6, 1991

9:00 Arrival and Registration

10:00-12:00 Opening Session

Welcome Address: Doctor Zola Skweyiya

A Study of Needs

South African specialists present an overview of the domestic situation in the fields of housing, education, employment, and women's issues.

12:00-13:00 Lunch

13:00-15:00 An Introduction to Affirmative Action

A survey of affirmative action programs in other countries.
Suggested Speaker: Neelan Tiruchelvam (Sri Lanka).

Discussion

15:00-15:30 Tea

06. 04. 91 08:07AM *LAWYERS' COMMITTEE P07

Some countries use numerical reservations on the basis of identified underprivileged communities, i.e. reserved numbers of places in schools, universities and in employment. Other countries forbid the use of so-called quotas. In some countries, the debate has focused on the question of qualifications and standards.

Clearly, affirmative action in the South African context must have unique characteristics which make it appropriate to both the national history of oppression and the national goals for the future society. As stated by a member of the ANC Constitutional Affairs Committee:

> "Considerable attention will have to be paid to the question of harmonizing affirmative action with non-racial democracy. Non-racism presupposes a colour-blind constitution; affirmative action requires a conscious look at the realities of the gaps between the life chances of blacks and whites. The right to be the same takes on an additional meaning - it is the right to have the same opportunities, and if these are blocked because of the heritage of past discrimination, then it includes the right to special intervention to remove the disadvantages.
>
> In fact it is difficult to see how a truly non-racial society can be built in South Africa without at least one generation of accelerated progress being achieved under the principles of affirmative action."

06. 04. 91 08:07AM *LAWYERS' COMMITTEE

Gudmunder Alfredsson (Iceland). Mr. Alfredsson currently holds the Rapporteurship on Minorities both for the European Community and the United Nations. He has done considerable work on indigenous peoples and minorities.

Ms. (Doctor) Claire Palley (England). Ms. Palley is a Professor and the Principal of Saint Anne's College of Oxford. She is the British delegate to the United Nations Sub-Commission on the Prevention of Discrimination against Minorities. She has done extensive constitutional work on Africa-related issues and is an adviser to the independent Minority Rights Group.

II. Affirmative Action for Majority Populations: Public Employment

Malaysia: Preferred Speaker:

Ms. (Professor) Mavis Puthechery. Ms. Puthechery holds a chair in the Department of Economics and Administration at the University of Malaya. She has been monitoring government affirmative action policies for over twenty years, and is widely regarded as a leading expert on this issue.

Alternates

Chandran Moosafa. Mr. Chandran is head of the Malaysian ethnic rights organization, Aliran. The organization is actively involved in monitoring ethnic issues through research and publication. Mr. Chandran has also been involved in working with the Malaysian government on religious conflict.

Doctor Zakaria Haj. Ahmad. Doctor Zakaria is a professor at the University of Kebangsaan. He holds a PhD. from M.I.T. in politics. He has focussed his studies on the Malaysian government's economic reform programs.

Namibia: Preferred Speaker:

Ms. (Advocate) B.P. Gawanas. Ms. Gawanas is a member of the Namibian Public Service Commission. She has been suggested because of the similar problems faced by the newly independent government of Namibia regarding affirmative action in the public sector. Thus, it is important to include a Namibian

representative.

Zimbabwe: Preferred Speaker:

Head of the Public Service Commission of Zimbabwe. As with Namibia, it will be important to include a Zimbabwean representative on the issue of affirmative action in the public sector.

III. Affirmative Action in the Private Sector

Kenya: Preferred Speaker:

Professor Yash Ghai. Professor Ghai is currently at the Law Faculty of the University of Hong Kong. He is widely reknowned for his constitutional experience, and has been recommended by many people. Professor Ghai has worked on various Asian constitution-making processes. Originally from Kenya, he has studied the affirmative action policies of that government in support of urban African businessmen.

Malaysia: Preferred Speaker:

Doctor Abdul Khalid bin Ibrahim. Doctor Khalid is the head of P.N.B. (Permodalan Nasional Berhad), a unique government-run mutual fund (unit trust fund) specifically designed to increase Malay participation in business ownership. Malays have access to the fund shares at a discount and are guaranteed a minimum dividend. The fund then purchases stock in businesses which have tended historically to be dominated by the ethnic Chinese community. Doctor Khalid has written and spoken extensively about his work at P.N.B.

United States: Preferred Speaker:

Anthony Robinson. Mr. Robinson is President of the Minority Business Enterprise Legal Defense and Education Fund (MBELDEF). He has successfully handled important class action litigation regarding affirmative action issues. MBELDEF is the leading minority advocacy group regarding affirmative action targetting entrepreneurial activity and contract "set-asides."

IV. Affirmative Action: Quotas, Guidelines and the Standards Debate

Canada: Preferred Speaker:

Ms. (Judge) Rosalie Abella, Chairperson of the Ontario Law Reform Commission. Judge Abella headed the Royal Commission of Inquiry into affirmative action and is perhaps one of the most knowledgeable on the issue in Canada. She is regarded as an intelligent and thoughtful spokesperson on the issue. She even coined the term "employment equity" which is name for Canadian affirmative action.

Alternate

Jules Oliver, Director General of Program Development, Employment Equity, Staffing Programs Branch of the Public Service Commission. Mr. Oliver heads the Canadian federal public service "employment equity" program and is well versed in the technical side of it. He regularly meets with foreign dignitaries, introducing them to the Canadian system.

India: Preferred Speaker:

L.G. Havanur. Mr. Havanur is the former Minister of Law for the state of Karnataka. He chaired a commission of inquiry into lower caste affirmative action; he designed and implemented a state reservation policy.

Alternates

Andre Beteille. Mr. Beteille is considered the foremost scholar on the "untouchables." He is a sociologist at the Delhi School of Economics, and has specialized in the effects of government policies on the "untouchable" community. He has been invited to teach and lecture at a variety of universities, including Cambridge University, England.

Gahanshyan Shah, Centre for Social Studies, University of Surat. A political scientist, Mr. Shah has specialized in studying at the local level the effects of affirmative action on untouchables in Gujarat. He was recommended as a person with a sound grasp on grass-roots issues.

B. Sivaramayya. Mr. Sivaramayya is a reader at the University of Delhi Law Faculty. He is known for a scholarly approach to affirmative action issues. A respected lawyer,

Sivaramayya took part in the Rockefeller Foundation "Bellagio" Conference on affirmative action.

United States: Preferred Speaker:

Ms. Mary Berry. Ms. Berry served as a Commissioner on the United States Commission on Civil Rights under both Presidents Carter (who appointed her) and Reagan (who unsuccessfully attempted to fire her). She has also served as Assistant Secretary for Education. Professor Berry has held various faculty posts, has been Chancellor of two universities, and is currently Professor of American Social Thought and History at the University of Pennsylvania. She is widely respected as an expert on the American civil rights movement.

V. Affirmative Action in Education

Sri Lanka: Preferred Speaker:

R.K. Goonesekere. Mr. Goonesekere has long been active in Sri Lankan human rights. He is a past professor of law, and has taught in other countries including Nigeria. He is currently senior counsel and has been involved in seminal litigation regarding the affirmative action programs in his country.

Alternate

H.L. de Silva. One of Sri Lanka's leading constitutional attorneys, he has argued several cases before the Supreme Court on affirmative action issues. Mr. de Silva currently holds the position of President's Council. He participated in the drafting of the Sri Lanka constitution.

United States: Preferred Speaker:

Ms. Donna E. Shalala. Ms. Shalala is the first female Chancellor of the University of Wisconsin, one of the largest universities in the United States. When she took the position she made a commitment to instituting a comprehensive affirmative action program to significantly increase the number of women and African Americans on the faculty and in the student body. In only a few years, she has been tremendously effective. Formerly the President of Hunter College in New York, she is one of the United States' leading educators.

VI. Implementation and Enforcement

United States: Preferred Speaker:

Professor Drew Days. Drew Days is currently professor of law at Yale Law School. He was Assistant Attorney General for Civil Rights in the administration of former President Jimmy Carter. In that capacity, he represented the United States government before the Supreme Court in defense of an array of government affirmative action programs. Prior to that he practiced at the preeminent U.S. civil rights law firm, the NAACP Legal Defense Fund, as a litigator suing private employers and public education boards to force them to implement affirmative action programs.

Alternate

Peter Sherwood. Mr. Sherwood is currently Solicitor General for the State of New York. Prior to that post, he worked as counsel at the NAACP Legal Defense Fund, litigating some of the most important affirmative action cases. He has written and lectured extensively on affirmative action issues.

(All the other panelists for this discussion have been named in the panels above.)

Document 4A

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.
TELEX: 205662 SAP UR
FACSIMILE: (202) 842-3211

January 9, 1991

The Honorable Jose Manuel Cardoso da Costa
President
Tribunal Constitutional
Rua do Seculo 111
Lisboa, Portugal

Dear Judge Cardoso da Costa:

As the accompanying letter states, you are cordially invited to participate in what may be an historic event, a consultation on the future organization of the judiciary in South Africa. Specifically, the conference will consider the efficacy of establishing a constitutional court for South Africa.

As South Africa prepares to engage in the debate necessary to transform the country from an apartheid to a democratic society, several substantive, but thorny, legal/constitutional issues will need to be addressed as a matter of urgency. Clearly, a significant amount of work has already been done on constitutional options for South Africa. All would agree, however, that there is more that must be done quickly.

Because of your distinguished career as President of the Constitutional Court of Portugal, your participation in the upcoming conference in South Africa would make an invaluable contribution.

*The conference will be conducted in English. Unfortunately, there will be no translation services. We hope that you will be able to make an oral presentation in English and otherwise participate without interpreters.

06. 04. 91 08:07AM *LAWYERS' COMMITTEE P18

As facilitator for the conference, we at the Lawyers' Committee for Civil Rights Under Law in Washington will be making the necessary arrangements for your participation. As time is of the essence, we would appreciate an early response by cable, telex or fax. When we receive your positive response, we will forward to you the conference agenda and background documents. I look forward to hearing from you at your earliest convenience.

Sincerely,

Gay McDougall

Gay J. McDougall
Director
Southern Africa Project

Document 4B

Centre for Applied Legal Studies

UNIVERSITY OF THE WITWATERSRAND, JOHANNESBURG

1 Jan Smuts Avenue, Johannesburg

P O WITS
2050, SOUTH AFRICA

'Uniwits'
(011) 716-1111
Fax: (011) 403-2341

January 9, 1991

Reference:

Enquiries:

(011) 716-5672

The Honorable Jose Manuel Cardoso da Costa
President
Tribunal Constitutional
Rua do Seculo 111
Lisboa, Portugal

Re: CONFERENCE ON A CONSTITUTIONAL COURT FOR SOUTH AFRICA

Dear Judge da Cardoso Costa:

The Legal and Constitutional Committee of the African National Congress in conjunction with the Centre for Applied Legal Studies, University of the Witwatersrand will be hosting a conference on "A Constitutional Court for South Africa?" on 1, 2, 3 February 1991. Attached please find a brief statement setting out the objectives of the conference. You are cordially invited to participate. We have requested the kind assistance of Gay McDougall of the Lawyers' Committee for Civil Rights Under Law in making the necessary arrangements for your attendance.

The conference will take place at the Magaliesburg near Johannesburg. It will last three days and will deal with the problems facing the legal system, more specifically the Courts, in a post-apartheid democratic South Africa. Eminent judges and jurists from Africa, Europe, Asia and the Americas will give the conference the benefit of their experiences and perspectives. In addition, the ANC's legal and constitutional Committee has invited a range of South Africans involved in all aspects of the legal system to participate. In this way, we hope, the concerns of a broad range of South Africans interested in the most appropriate legal structure for a democratic South Africa will be canvassed and aired. It is our belief that a new legal system must enjoy the confidence of all South Africans.

We believe that South Africa may be on the brink of a post-apartheid democracy. It is most appropriate that we learn from the successes and failures of other countries as we construct our own future constitution. Your participation in the conference will enhance our capacity to do that. Should you be able to attend we would request that you sit on a panel to comment on the merits of a Constitutional Court in the light of your own experiences.

08. 04. 91 08:07AM *LAWYERS' COMMITTEE P20

As facilitator for the conference, we at the Lawyers' Committee for Civil Rights Under Law in Washington will be making the necessary arrangements for your participation. As time is of the essence, we would appreciate an early response by cable, telex or fax. When we receive your positive response, we will forward to you the conference agenda and background documents. I look forward to hearing from you at your earliest convenience.

Sincerely,

Gay McDougall

Gay J. McDougall
Director
Southern Africa Project

Document 4c

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.
TELEX: 205662 SAP UR
FACSIMILE: (202) 842-3211

Dear _____:

As the accompanying letter states, you are cordially invited to participate in what may be an historic event, a conference on future affirmative action programs in South Africa to redress the inequities produced by the implementation of apartheid policies.

As South Africa prepares to engage in the debate necessary to transform the country from an apartheid to a democratic society, several substantive, but thorny, legal/constitutional issues will need to be examined as a matter of urgency. Clearly, a significant amount of work has already been done on constitutional options for South Africa. All would agree, however, that there is more that must be done quickly.

Because of your distinguished career as _____, your participation in the upcoming conference in South Africa would make an invaluable contribution.

The conference will be conducted in English. Unfortunately, there will be no translation services. We hope that you will be able to make an oral presentation in English and otherwise participate without interpreters.

As facilitator for the conference, we at the Lawyers' Committee for Civil Rights Under Law in Washington will be making the necessary arrangements for your participation. As time is of the essence, we would appreciate an early response by cable, telex or fax. When we receive your positive response, we will forward to you the conference agenda and background documents. I look forward to hearing from you at your earliest convenience.

Sincerely,

Gay J. McDougall
Director
Southern Africa Project

06. 04. 91 08:07AM *LAWYERS' COMMITTEE P22

In order to facilitate arrangements, kindly reply to Gay McDougall by 15 January 1991.

Sincerely,

Zola Skweyiya
Chairman, ANC Legal &
Constitutional Committee

Nicholas Haysom
Professor of Law
Centre For Applied Legal Studies

Document 4D

Re: CONFERENCE ON AFFIRMATIVE ACTION IN A NEW SOUTH AFRICA

Dear _____:

The Legal and Constitutional Affairs Committee of the African National Congress in conjunction with the Centre For Development Studies, will be hosting a conference on "Affirmative Action In A New South Africa" on 6, 7, 8 September 1991. Attached is a brief statement setting out the objective of the conference. You are cordially invited to participate. We have requested the kind assistance of Gay McDougall of the Lawyers' Committee for Civil Rights Under Law in making the necessary arrangements for your attendance.

The conference will take place at Port Elizabeth, South Africa. It will last three days and will focus on a constitutional framework for affirmative action to overcome race and gender discrimination and programs to restructure governmental and other institutions to redress inequities that have been produced by apartheid in access to employment, education on other resources. Eminent lawyers, jurists and governmental officials from Africa, Europe, Asia and the Americas will give the conference the benefit of their experiences and perspectives. In addition, the ANC's Legal and Constitutional Committee has invited a range of South Africans involved in all aspects of the legal system to participate. In this way, we hope, the concerns of a broad range of South Africans interested in the most appropriate constitution and policies for a post - apartheid democratic South Africa will be canvassed and aired.

We believe that South Africa may be on the brink of a post-apartheid democracy. It is most appropriate that we learn from the successes and failures of other countries as we construct our own future constitution. Your participation in the conference will enhance our capacity to do that. Should you be able to attend we would request that you sit on a panel to comment on the merits of an affirmative action program in the light of your own experiences.

06. 04. 91 08:07AM *LAWYERS' COMMITTEE P23

In order to facilitate arrangements, kindly reply to Gay McDougall by 25 June 1991.

Sincerely,

Zola Skweyiya
Chairman, ANC Legal & Constitutional Affairs Committee

Bulelani Ngcuka
ANC Legal & Constitutional Affairs Committee

attachments