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AFFIRMATIVE ACTION—A SOUTH AFRICAN PERSPECTIVE

T. H. Madala*

DEAN Attanasio, members of the staff of SMU, ladies and gentlemen. I wish to start by thanking the Dean, the organizers of this conference and the sponsors thereof, for having invited me and my colleagues to participate in this series of Alfred P. Murrah Lectures, and for making it possible for us to attend. It is for us a great honor and privilege to have been invited to be with you, and I must put on record that we have enjoyed every moment of our stay in Texas, and being at SMU in particular.

Today's topic—Affirmative Action—is a topic of great magnitude, one that would be difficult, if not impossible, to discuss in the abstract without reference to a particular legal system. Therefore, I have chosen to address the topic in the light of the South African experience.

Niccoló Machiavelli observed: “[t]here is nothing more difficult to handle, more doubtful of success, and more dangerous to carry through than initiating changes in a state's constitution.”¹

Ladies and gentlemen, I want to suggest to you that that goes for any new order—be it a new labor dispensation, a new legal order, the empowerment of a people previously disadvantaged, or the enforcement of Acts of Parliament that seek to redress, remedy and promote fairness and equity where previously there was none. The list is endless. But in South Africa, all of these things must be accomplished, so to speak, *yesterday*. Our dynamic and ambitious Constitution reigns supreme over our rainbow nation. Its implementation is undoubtedly the most important event in our country's legal and political history. It ends an era of Parliamentary sovereignty and ushers in an era of constitutionalism; an era where sovereignty is vested in the Constitution.

Apart from its far-reaching political and social consequences, the Constitution of South Africa brings a new dimension to the practice of law and its attendant procedures.

The Preamble to our Constitution states, among other things, that the Constitution as the supreme law of the Republic has been adopted by the

* Justice of the Constitutional Court of South Africa. Justice Madala delivered this paper as part of the Alfred P. Murrah lecture series at Southern Methodist University School of Law, Dallas, Texas, on October 22, 1998.

1. NICCOLÓ MACHIAVELLI, *THE PRINCE* (G. Bull trans., Harmondsworth: Penguin 1999).

people so as to “. . . heal the divisions of the past and establish a society based on democratic values, social justice, and fundamental human rights; . . . improve the quality of life of all citizens and free the potential of each person”²

The achievement of this ideal, in my view, must be predicated on an acceptance and appreciation on the part of all South Africans that the black community has had decades and decades of injustice, disadvantage, inequality, and marginalisation—politically, economically, educationally and otherwise—and that it is the correction of this imbalance that will set us on the road to attaining true justice, equality and democracy. Given the fact that inequality in all spheres of life was at the root of the wrongs of the past, it is not surprising that the new Constitution structures itself so that it seeks to achieve political, civil, as well as socio-economic equality. After all, that is what the struggle was all about. The majority sought to enter into South Africa’s institutionalized life as equal citizens. They sought equality before the law, they sought equality and protection under the law, they sought to participate equally in South Africa’s free enterprise system. They sought to be able to enjoy equally with other citizens rights such as freedom of movement and the freedom of association. They sought equality of opportunity.

In the face of glaring socio-economic and political inequalities, it was inevitable that special measures of redress would become a central concern of Government. This is reflected, for example, in the African National Congress’s (“ANC”) Reconstruction and Development Programme of 1994, which I shall refer to as the RDP. The opening paragraph states that the RDP “. . . seeks to mobilize all our people and our country’s resources toward the final eradication of apartheid, and the building of a democratic, non-racial and non-sexist future.”³

The RDP document adds that apartheid has been a bitter experience which has left deep scars, and that the systematically enforced racial divisions engendered by apartheid must, just as systematically, be reversed. In the preamble to the Constitution, we commit ourselves to healing the divisions of the past, to establishing a society based on democratic values, to the restoration of human dignity and social justice, and to the advancement of fundamental human rights.⁴

Apartheid’s legacy of poverty and deprivation must be dealt with through realistic and sustained programs aimed at achieving an improved standard of life in a peaceful society. These programs must be implemented by all levels of government, by other groups, including big and small businesses, and by individuals.

Throughout the RDP document, there is an emphasis on the use of affirmative action as a means to achieve equality by countering the effects

2. S. AFR. CONST., Preamble (Act 108, 1996).

3. THE RECONSTRUCTION AND DEVELOPMENT PROGRAMME: A POLICY FRAMEWORK ¶ 1.1.

4. See S. AFR. CONST., Preamble

of discrimination. The Constitution demands no less in section 9(2).⁵ The principles put forward by the RDP are now being implemented by the Government. For example, the White Paper on Education states: "No person shall be unfairly discriminated against, directly or indirectly, on any grounds whatsoever. However, affirmative action measures to counter the disadvantages of previous unfair discrimination are specifically protected."⁶

The discourse on affirmative action is sometimes dominated by emotional engagement with the issues. It would be wrong, for instance, to interpret a policy of affirmative action as being in its nature anti-white, which is how people have understood it to be. The beneficiaries of affirmative action are supposed to be those who suffered most under the apartheid regime, without being, on the other hand, a punitive measure against those who benefited from apartheid. It is not a matter of doing a favor to the less-deserving. It is a matter of positive and co-operative action on an issue of concern to us all. It requires a coordination of effort among the different sectors of our society. There must be established institutional processes to create the pathways toward a shared vision of equality and long-term prosperity.

The issue of developing a detailed and clear policy and implementation plan for affirmative action is now more firmly on the agenda of government and other stakeholders than ever before. Even more important will be the task of dismantling the structures of racial and gender oppression. And in this exercise we would like to show the world that we mean business.

The conditions that sustained white economic privilege have not, unfortunately, qualitatively changed with the end of minority rule. The change of government has not necessarily changed the nature of South African society. A change in government (representing control over state apparatuses), although necessary, is insufficient for the transformation of the state in its role as the political embodiment and expression of wider relations in society. The period in which South Africa has recently entered can rightly be characterized as the beginning of a transition towards a democracy based on majority rule. It offers both opportunities and constraints for advancing the project of transformation and redress.

We need to recognize that the apartheid state remains largely intact, and while we have in theory achieved a non-racial, non-sexist democracy, we must now aim to implement the Constitutional directives which envision this ideal.

5. Section 9(2) of the South African Constitution states: "Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination may be taken." S. AFR. CONST., § 9(2).

6. GN 2188 in GG 19281 of 25 September 1998.

I. AFFIRMATIVE ACTION IN THE BILL OF RIGHTS

The structure of the South African Bill of Rights follows closely that of the Canadian model. All the civil rights and liberties entrenched in Chapter Two of the South African Constitution, subject to both the internal and external constitutional limitations, must pass muster under the limitations clause.⁷

The equality provision⁸ of the Bill of Rights makes a specific provision for the implementation of affirmative action programs. It asserts that: [e]very one is equal before the law and has the right to equal protection and benefit of the law.

Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken⁹

The framers of the Constitution did not envisage affirmative action as a derogation from the right to equality, or as a 'negative' right. Affirmative action should properly be viewed as being interpretive of equality, and as part and parcel of the right to equality.

In giving effect to this, the Legislature has proposed a number of bills targeting various public sectors of society with the specific intention of implementing affirmative action policies.¹⁰ The final Constitution appears to favor limited horizontal application of the Bill of Rights,¹¹ which would allow for an application of affirmative action policies at the level of the private sector. The Constitutional Court itself has, however, pronounced neither on affirmative action nor on horizontality, and the observations that I make are therefore of a personal and general nature.

II. TOWARDS A DEFINITION OF AFFIRMATIVE ACTION IN SOUTH AFRICA

At the outset I intend to distance myself from any hard and fast definition of the concept of affirmative action. I do this in recognition of the fact that democratic institutions implement and enforce affirmative action under the guise of different instruments and names. I am especially aware that signatories to the Covenant Against Discrimination can only in an honest way eradicate discrimination by implementing affirmative action in one form or another. In formulating a definition, I shall therefore limit myself to a definition of affirmative action that is uniquely tailored to the South African context.

7. See S. AFR. CONST., ch. II, § 36.

8. See S. AFR. CONST., ch. II (Bill of Rights), § 9.

9. *Id.* at § 39(1)-(2).

10. For example, the White Paper on Education, *supra* note 2, the Employment Equity Act 55 of 1998; and the Transformation of the Public Service and Administration Bill (General Notice 564/98, March 1998).

11. S. AFR. CONST., § 8(2).

There is little doubt that a realistic view of South Africa is not one that portrays a picture of equity and harmony. The legacy of apartheid is still tangibly visible in that it permeates all sectors of South African society. By way of example, recent statistics released by the Department of Public Service and Administration are indicative of this legacy: only 38% of the management positions in the Public Service are held by black South Africans, only 11% by women, and only 0.02% by disabled persons.

An attempt to define the meaning of affirmative action in the South African context must start by understanding the rationale behind the implementation of such a policy.

A number of factors have contributed to the present social and economic inequalities in South African society. Amongst these factors are:

- the imposition of racist socio-economic policies by previous governments under colonialism and apartheid;
- the success of these policies in deliberately stunting and retarding the development of blacks;
- the simultaneous success of these racist policies in engineering the over-development and over-utilization of the minority in South Africa as the sole source of leadership and management in commerce, industry, the professions and other walks of life; and
- the resultant racial distortion in these leadership positions in favor of whites, who fill a quantity of such positions totally out of proportion to their demographic representation in the South African population.

The effect of these policies has been to create a situation in which:

- there is a paucity of black people in leadership positions in the public sector, commerce, industry and other key socio-economic institutions;
- heavy reliance is placed on a diminishing and limited pool of white people for skills and leadership to sustain an ailing economy;
- in comparison with other newly industrialized countries, South Africa's commitment to human resource development rates poorly;
- negative attitudes and racist stereotyping still influence and dominate the employment sector because of unfair labor and human resource policies; and
- the tremendous potential for creative social contributions among the black majority have been sidelined or ignored by industry and commerce for decades to the detriment of South African society.

A deliberate and concerted effort has to be made to ensure that the central spheres in South African society are demographically representative; this would include political leadership, business management, public administration, and the industrial sector. It is considered a matter of national importance that this effort should be embarked upon urgently and with serious commitment. The situation prevailing currently is not one that can be only pro-active; it has to justifiably and necessarily reverse the effects of decades of discrimination, dismantle the processes which have sustained the social, economic and political privilege of the minority, and restore a balance to socially engineered imbalances.

Affirmative action needs to be defined in a way that has meaning for South African society, and a meaning that reflects the particular historical origins of inequality in the country. The definition must also give clear directions as to how a commitment to affirmative action can be translated into practical and realistic strategies. Ideally, such a policy in the South African context would have the following characteristics:

- perhaps, most importantly, it must target the creation of opportunities for education, training, and development;
- it must help to reverse the prevailing situation of disadvantage of the majority. It must also represent an affirmation of all the human rights which were historically violated by institutionalized discrimination;
- it must take apart the structures and processes that have maintained the social, economic and political privilege of the minority; and
- a positive organizational ethos should be key in all sectors. It should aim at the complete eradication of racist and sexist attitudes, tendencies, and practices which have been at the core of society in the past. Affirmative action should be an on-going process that should affect all aspects of society.

South Africa is faced with a fundamental transformation from apartheid colonialism to a non-racial, non-sexist and democratic society. This task is much broader than the scope of affirmative action is generally conceived to be (i.e., as promoting proportionate representation of previously marginalized groups in public and private institutions). I emphasize that one must avoid the danger of over-simplifying the task of affirmative action in this manner. Affirmative action strategies must be located within broader strategies of redress as part of a necessary transformation away from the edifice of apartheid. This means that at a macro level, affirmative action policies should be pursued within the broader strategy of transformation and developmental policies. At the institutional level, affirmative action must be pursued as part of a broader strategy for organizational restructuring and development.

Affirmative action therefore implies the total eradication of all obstacles, whether subtle or overt, formal or informal, which hinder the meritorious empowerment of individuals through opportunity and development. I would, therefore, propose a definition along the following lines:

Affirmative action is a planned and positive process and strategy aimed at transforming socio-economic environments which have excluded individuals from disadvantaged groups, in order for such disadvantaged individuals to gain access to opportunities, including developmental opportunities, based on the individual's suitability and merit.

I offer by way of illustration a discussion of the recent Employment Equity Act,¹² which was passed in early 1999. In so doing, I draw atten-

12. See Employment Equity Act 55 of 1998.

tion to South Africa's current socio-economic climate, and the nature of the affirmative action measures which the South African Legislature has taken.

III. THE EMPLOYMENT EQUITY ACT

Four years after our transition to a democratic state, the economy of our country remains largely in the hands of those privileged by apartheid. The marketplace has barely begun to be deracialised. Management is, with a few exceptions, largely white-dominated, and where companies claim to have made progress in correcting the historic imbalances amongst management, this apparent progress often consists of token appointments, with black managers appointed to symbolic positions, without real decision-making power. Of top managerial positions, 96.4% of jobs in South Africa are still held by whites.¹³ In the last three years there has only been a 2.3% increase in the appointments of blacks to senior management levels, mainly in administrative areas, not in policy making positions.¹⁴ In the almost invisible middle management level, the increase has only been 1.6%.¹⁵

South Africa has the most unequal distribution of income in the world. The bottom 20% of income earners receive 1.5% of national income, while the wealthiest 10% earn 50% of the national income. Poverty is overwhelmingly concentrated in the African and so-called Coloured population. Ninety-five percent of Africans are poor, and 33% of the Coloured population live in poverty.¹⁶

It is in this context that the Employment Equity Act was drafted, after the Green Paper, *Employment and Occupational Equity: Policy Proposals of July 1996*, allowing for extensive consultation with all interested parties.

The Legislature saw the need to take some action to ensure that the workplace becomes more representative at all levels of the South African population. It saw the need for a culture of non-discrimination and diversity to exist in every workplace.

The stated purpose of the Act is:

to promote the constitutional right of equality and the exercise of true democracy; [to] eliminate unfair discrimination in employment; [to] ensure the implementation of employment equity to redress the effects of discrimination; [to] achieve a diverse workforce broadly representative of our people; [to] promote economic development and efficiency in the workforce; and [to] give effect to the obligations of the Republic as a member of the International Labor

13. See *infra* note 16.

14. See *infra* note 16.

15. See *infra* note 16.

16. *Breakwater Monitor* (University of Cape Town's Graduate School of Business), quoted by UCT Vice-Chancellor Dr Mamphela Ramphela in an article published in the *Sunday Times* on March 15, 1998.

Organization.¹⁷

The preamble to the Act and the explanatory memorandum state that it seeks to undo the huge disparities in employment, occupation and income within the labor market that have resulted from apartheid laws and other discriminatory practices.¹⁸ The mere repealing of discriminatory laws and outlawing of discrimination are not in themselves sufficient to redress these imbalances, and, accordingly, the Act requires employers to enter into the process of transformation, to eliminate unfair discrimination, and to implement employment equity.

IV. KEY PROVISIONS OF THE ACT

- The Act can be divided into two main areas. The first portion prohibits discrimination in employment, while the second part introduces affirmative action programs to deal with apartheid-linked discrimination.
- All employers are required to promote “equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.”¹⁹
- “No person may unfairly discriminate, directly or indirectly, against an employee . . . on . . . grounds . . . (of) race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language (or) birth.”²⁰
- Racial and sexual harassment also constitute unfair discrimination.²¹
- Medical testing is prohibited except in specific circumstances.²²
- All these protections also apply to applicants for employment.²³
- The burden of proof is placed on the employer, requiring the employer to justify any action that might be considered unfair discrimination.²⁴

There has been Parliamentary opposition to the affirmative action aspects of the Act. There have been claims that the Act will re-racialize South Africa, that it will lower standards, that it introduces quotas, that it encourages rigidity in the work place and will place an unsound economic burden on business.

However, an examination of the Act discloses that:

- it does not require fixed quota of employees for each of the different races.²⁵ The Act limits the scope of affirmative action to what it calls “designated groups”—Black people, women, and people with disabilities; people who have been most marginalized during

17. Employment Equity Act, Preamble.

18. *See id.*

19. Employment Equity Act, § 5.

20. *Id.* § 6(1).

21. *See id.* § 6(3).

22. *See id.*

23. *See id.* § 9.

24. *See* Employment Equity Act, § 11.

25. *See id.* § 15(3).

the apartheid regime. The Act does not distinguish between the people that apartheid defined as not white. It simply defines "black people" as meaning Africans, so-called Coloureds, and Indians;²⁶

- it does not seem, from a closer reading of the Act, that standards will be lowered. Throughout the Act, the term "suitably qualified people" is used. It states quite clearly that no employer is required to appoint anyone who is not suitably qualified;²⁷
- the Act does not impose fixed targets. In fact, in Section 15(3) of the Employment Equity Act, it explicitly rejects fixed quotas. Rather, it requires each workplace to set its own targets. These are agreed upon after consultation with workers and trade unions, and must take into account the particular circumstances of each workplace; and
- each workplace does not have to reflect national demographics. The Act allows for maximum flexibility. Employers and workers, when setting targets, must take into account:
 - "[the] pool of suitably qualified people from and amongst the different designated groups from which the employer may reasonably be expected to promote or appoint employees;"²⁸
 - "demographic profile of the national and regional economically active population;"²⁹
 - "economic and financial factors relevant to the sector in which the employer operates;"³⁰
 - "present and anticipated economic and financial circumstances of the employer;"³¹ and
 - "the number of present and planned vacancies that exist in the various categories and levels, and the employer's labor turnover."³²

With the enactment of the Employment Equity Act, the Legislature has shown its commitment to redressing the imbalances of the past without compromising the ability of business to function efficiently and profitably. The Act ensures that unqualified people will not be employed to fill racial quotas, but ensures that suitably qualified people from all sectors of society are given the opportunity to contribute to the economic development of our nation, and to enjoy the fruits of our growing economy.

I should like to analyze a feature of the Act which I believe to be a useful tool in understanding the nature of the affirmative action policy implemented by the South African Legislature.

The inclusion of the notion of "unfair discrimination" in the Act leads to a two stage approach to discrimination cases. The first stage requires the applicant to prove that he or she has been discriminated against

26. *See id.* § 1.

27. *See id.* § 2 (defining "suitably qualified").

28. *Id.* § 42(a)(ii).

29. Employment Equity Act, § 42(a)(i).

30. *Id.* § 42(a)(iii).

31. *Id.* § 42(a)(iv).

32. *Id.* § 42(a)(v).

either directly or indirectly on one or more of the nineteen grounds listed in the Act. If the applicant successfully proves discrimination, the second stage requires the respondent to prove that the discrimination was, in fact, fair.

The Act allows two defenses which satisfy the paradoxical notion of "fair discrimination." The first is that the employer took affirmative action measures consistent with the purpose of the Act. The second defense is that the applicant was discriminated against on the basis of an inherent requirement of a job.

By including affirmative action as a fair defense to discrimination, the Legislature indicates that the law does not view affirmative action measures as a form of reverse discrimination, but rather as a form of fair discrimination. Through the inclusion of affirmative action as a recognized defense to discrimination, the framers of the Act avoided the debate in the United States as to whether affirmative action constituted reverse discrimination. The United States Supreme Court finally held that affirmative action does not infringe the right to equality, because the purposes of affirmative action plans mirror those of the statute enshrining equality. It is unlikely that this debate will occur in South Africa, as the Constitution, the Labor Relations Act, and the Employment Equity Act all explicitly include affirmative action measures as a legitimate defense to allegations of discrimination or inequality, and hence as congruent with the Constitutional commitment to equality.

It is imperative for the transformation process that employers should not comply with the Act simply in response to the possible sanctions that may result from failure to comply. In order for the employment equity plan, policies and procedures adopted to have a real impact, the motives behind such implementation must have the honest, real intention of achieving the goal of an enhanced representation of currently unrepresented categories of people within the workforce. Unless employers recognize and embrace the purpose of employment equity, the fears of tokenism, entrenched prejudice and regulatory strong-arming may well become a reality.

V. CONCLUSION

Every human being has the potential to acquire and develop skills. When that potential is arbitrarily and unjustifiably impeded, action needs to be taken to redress the monumental harm caused. In my view, in the South African context, such action can only be affirmative. "Affirmative action" for me refers to the affirmation of every person's worth, dignity, and equality. A South Africa that can affirm these values is one that can hold its head up high in the world community. The Constitution, in my view, promises us a future in which equality will not merely be an empty and formalistic shell, but a living reality.